

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
‘D’BENCH, AHMEDABAD

BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

| Sr.No. | ITA No. | Asstt. Year | Name of Appellant | Name of Respondent |
|--------|---|-------------|--|---|
| 1-2 | No.285/Ahd/2020 & C.O. No.81/Ahd/2020 | 2013-14 | D.C.I.T, Circle-1(1)(1), Ahmedabad | M/s Adani Enterprises Ltd., Adani House, Nr. Mithakhali Six Roads, Navrangpura, Ahmedabad. PAN :AABCA2804L |
| 3-4 | No.336/Ahd/2020 With C.O. No.80/Ahd/2020 | 2014-15 | D.C.I.T, Circle-1(1)(1), Ahmedabad | M/s Adani Enterprises Ltd., Adani House, Nr. Mithakhali Six Roads, Navrangpura, Ahmedabad. PAN :AABCA2804L |
| 5-6 | No.472/Ahd/2020 With C.O No.02/Ahd/2021 | 2015-16 | D.C.I.T, Circle-1(1)(1), Ahmedabad | M/s Adani Enterprises Ltd., Adani House, Nr. Mithakhali Six Roads, Navrangpura, Ahmedabad. PAN :AABCA2804L |
| 7 | No.523/Ahd/2020 | 2016-17 | D.C.I.T, Circle-1(1)(1), Ahmedabad | M/s Adani Enterprises Ltd., Adani House, Nr. Mithakhali Six Roads, Navrangpura, Ahmedabad. PAN :AABCA2804L |

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| (Applicant) | | (Responent) |
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|---------------|---------------------------|
| Revenue by : | Shri Alok Kumar, C.I.T.DR |
| Assessee by : | Shri Vartik Choksi, A.R. |

सुनवाई की तारीख/Date of Hearing : 05/08/2022
घोषणा की तारीख /Date of Pronouncement: 17/08/2022

आदेश/O R D E R

PER WASEEM AHMED ACCOUTANT MEMBER:

1. The above appeals and CO's have been filed by the Revenue and the assessee against the orders of the Ld. Commissioner of Income-Tax (Appeals)-1, Ahmedabad, arising in the matter of the Assessment Order passed u/s143(3) of the Act Income Tax Act 1961 (here-in-after referred to as "the Act") relevant to the Assessment Years 2013-2014 to 2016-17. Since, issues involved in all these appeals are identical, we proceed to dispose of all the appeals by this common order for the sake of convenience and brevity

First, we take ITA No. 285/Ahd/2020 an appeal by the Revenue for A.Y. 2013-14

2. The Revenue has raised the following grounds of appeal:

(1) The CIT(A) has erred in law and in facts in deleting the adjustment on account of corporate guarantee of Rs.84,690/-by ignoring that corporate guarantee constitutes an international transaction.

(2) The CIT(A) has erred in law and in facts in deleting the transfer pricing adjustment of Rs.19,61,02,194/- for benchmarking of purchase of coal.

(3) The CIT(A) has erred in law and in facts in deleting the Section MA disallowance of Rs. 16,17,71, 216/- under both general and MAT provisions.

(4) The CIT(A) has erred in law and in facts in deleting the disallowance of depreciation of Rs.4,77,009/- claimed on shares despite the fact that shares are not depreciable assets.

(5) The CIT(A) has erred in law and in facts in deleting the depreciation disallowance of Rs.68,00,471/-.

(6) The CIT(A)has erred in law and in facts in deleting he addition of Rs.1,72,59,614/- made on account of unutilized CENVAT credits.

(7) The CIT(A) has erred in law and in facts in adjustment of Rs. 1,15, 15,902/- u/s 1 15JB of the Act on account of provision for leave encashment.

(8) It is, therefore, prayed that the order of Id. CIT(A) may be set aside and that of the Assessing Officer be restored.

3

3. The first issue raised by the Revenue is that the learned CIT (A) erred in erred in deleting the upward adjustment of Rs. 84,690/- made on account of corporate guarantee to AE.

4. The assessee is a public limited company and engaged in the business of Export & Import/ Domestic Trading & Manufacturing of various commodities. The assessee had extended corporate guarantees in respect of borrowings made by its associated enterprises namely Adani Global FZE Dubai for Rs. 5.12 crores only. The assessee did not charge any consideration from its AE for the issuance of corporate guarantees. During the course of ascertaining the Arm Length Price of impugned guarantee transaction, the TPO was of the view that a reasonable guarantee commission ought to have been charged in respect of issuance of such guarantee. The argument of the assessee to this effect that it does not constitute an international transaction was rejected by the TPO. As such the TPO computed the Arm's Length Price of the guarantee commission @ 0.17% of the guarantee value and accordingly made upward adjustment of Rs. 84,690/- only by adding to the total income of the assessee.

5. Aggrieved assessee preferred an appeal before the learned CIT (A) who following the order this Tribunal in own case of the assessee for A.Y. 2008-09, 2009-10 and 2010-11 deleted the upward adjustment made by the AO.

6. Being aggrieved by the order of the learned CIT (A) the Revenue is in appeal before us.

7. Both the learned DR and the AR before us vehemently supported the order of the authorities below to the extent favourable to them.

8. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that the facts of the issue on hand has been elaborated in previous paragraph which are not in dispute,

4

therefore we are not inclined to repeat the same for the sake of brevity and convenience. Hence, we proceed to adjudicate the issue on hand directly. The provisions of section 92B of the Act defines the parameters of what constitutes an international transaction. Although the ambit of international transaction was wide enough, yet due to judicial interpretation, certain classes of transactions were being left out of the transfer pricing net. To tackle the same, by the Finance Act of 2012 an Explanation to Section 92B[2] of the Act was brought on the statute with retrospective effect from 1st April 2002. The explanation is clarificatory in nature and added certain categories of transactions, inter alia, the transaction as specified under clause (c) of explanation (i) to section 92B of the Act within the ambit of international transactions which is reproduced as under:

[Explanation.—For the removal of doubts, it is hereby clarified that—

(i) the expression "international transaction" shall include—

*(a) ******

*(b) ******

(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;

8.1 It can be seen that the guarantee was included within the ambit of international transaction by the Finance Act 2012 with retrospective effect. Thus there remains no ambiguity to the fact that corporate guarantee extended by the assessee to its AE is an international transaction and therefore the same has to be benchmarked at the arm length price. However, we note that the different benches of the ITAT have taken different view. Some of them held that the transaction of corporate guarantee is an international transaction whereas some of them held that the transaction of corporate guarantee is outside the purview of the international transaction including the Ahmedabad tribunal in the case of Micro Ink Ltd. vs. Addl. CIT reported in [2015] 63 taxmann.com 353, wherein it was held that the corporate guarantee is not international transaction. The precedent laid out in the case of Micro Ink Ltd (Supra) was also followed in the own case of the assessee for A.Y. 2009-10 in ITA No. 3321 & 3480/Ahd/2014 by the

coordinate bench of this tribunal. At the time of hearing, the learned AR heavily relied on this order of the tribunal.

8.2 However, we find that the Hon'ble Madras High Court in the case of PCIT vs. Redington (India) Ltd. reported in 122 taxmann.com 136 has held that corporate guarantee is covered under the limb of international transaction and having bearing on profit and loss account. The relevant finding of the Hon'ble court reads as under:

The concept of bank Guarantees and Corporate Guarantees was explained in the decision of the Hyderabad Tribunal in the case of Prolifics Corpn. Ltd v. Dy. CIT [2015] 55 taxmann.com 226/68 SOT 104 (URO). In the said case, the revenue contended that the transaction of providing Corporate Guarantee is covered by the definition of international transaction after retrospective amendment made by Finance Act, 2012. The assessee argued that the Corporate Guarantee is an additional guarantee, provided by the Parent company. It does not involve any cost or risk to the shareholders. Further, the retrospective amendment of section 92B does not enlarge the scope of the term 'international transaction' to include the Corporate Guarantee in the nature provided by the assessee therein. The Tribunal held that in case of default, Guarantor has to fulfil the liability and therefore, there is always an inherent risk in providing guarantees and that may be a reason that Finance provider insists on non-charging any commission from Associated Enterprise as a commercial principle. Further, it has been observed that his position indicates that provision of guarantee always involves risk and there is a service provided to the Associate enterprise in increasing its creditworthiness in obtaining loans in the market, be from Financial institutions or from others. There may not be immediate charge on profit & loss account, but inherent risk cannot be ruled out in providing guarantees. U1 and adjustment are to be made on guarantee commissions on such guarantees provided by the Bank directly and also on the guarantee provided to the erstwhile shareholders for assuring the payment of Associate Enterprise.

In the light of the above decisions, the Tribunal committed an error in deleting the additions made against Corporate and Bank Guarantee and the order passed by the DRP is to be restored. [Para 76]

8.3 Thus, in view of the above, we hold that the bank/corporate guarantee is an international transaction. Therefore, the same has to be bench marked for determining the ALP. Thus the issue involved on hand is no longer covered as alleged by the learned AR for the assessee in view of the judgment of Hon'ble Madras High Court as discussed above.

8.4 The next aspect arises to determine the benchmarking for working out the ALP of the impugned international transaction. The TPO/AO in the case on hand has worked out the ALP at 0.17% and basis of the same has already been

elaborated in his (TPO) order. In this regard, we find that the Hon'ble Bombay High Court in case of CIT vs. Everest Kento Cylinders Ltd reported in 58 taxmann.com 254 held that while determining the ALP the rate charged by the bank or financial institution cannot be taken as comparable. The relevant finding of the Hon'ble Court reads as under:

In the present case, it is assessee-company that is issuing corporate guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which apply for issuance of a corporate guarantee are distinct and separate from that of bank guarantee and, accordingly, commission charged cannot be called in question, in the manner TPO has done. The comparison is not as between like transactions but the comparisons are between guarantees issued by the commercial banks as against a corporate Guarantee issued by holding company for the benefit of its AE, a subsidiary company. In view of the above discussion, appeal does not raise any substantial question of law and it is dismissed

8.5 Now, the question arises what should be the ALP rate of the commission on corporate guarantee? In this regard we find that The Tribunal in several cases has considered 0.50% (of corporate guarantee given) as ALP rate of Corporate Guarantee commission. Some of these cases are as under:

- (i) *Videocon Industries Ltd. v. Dy. CIT [2017] 79 taxmann.com 216 (Mumbai - Trib.), Parent company charged commission at 0.25 %. The ALP was determined by the Tribunal at 0.50%.*
- (ii) *Hindalco Industries Ltd. v. Addl. CIT [2015] 62 taxmann.com 181 (Mum.), Parent company charged commission at 0.50% which was considered as at ALP.*
- (iii) *Manugraph India Ltd. v. Dy. CIT [2015] 62 taxmann.com 347 (Mum. - Trib.), The corporate guarantee was not treated as international transaction by the parent company but the Tribunal treated it as international transaction u/s 92B and upheld the ALP of 0.50%, following the order in the case of the assessee for the earlier year. The Tribunal followed Everest Kento Cylinder Ltd. v. Asstt. CIT [2015] 56 taxmann.com 361 (Mum-Trib). It seems that the decision in Bharti Airtel Ltd. (supra) was not referred to in this case.*
- (iv) *Aditya Birla Mincas Worldwide Ltd. v. Dy. CIT [2015] 56 taxmann.com 317/69 SOT 18 (URO) (Mum - ITAT). The assessee had not classified this transaction as international transaction. However, guarantee commission was fixed at 0.50%.*
- (v) *Mylan Laboratories Ltd. v. Asstt. CIT [2015] 155 ITD 1123/63 taxmann.com 179 (Hyd. - Trib.). The assessee admitted corporate guarantee as international transaction, then as against 2% fixed by TPO the Tribunal upheld the claim of the assessee at 0.53% following the decision in ProlificsCorpn. Ltd. v. Dy. CIT [2015] 68 SOT 104 (URO)/55*

[taxmann.com 226 \(HYD - Trib.\)](#).

- (vi) *Everest Kanto Cylinder Ltd. (supra) - Assessee paid guarantee commission at rate of 0.5 per cent for obtaining guarantee. This was accepted as ALP for all corporate guarantees given by the assessee.*
- (vii) *Godrej Consumer Products Ltd. v. Asstt. CIT [2016] 69 taxmann.com 436 (Mumbai - Trib.)- The assessee suomotu benchmarked the commission chargeable on bank guarantee @ 0.25%. It was determined at 0.50%.*

8.6 Whereas we find that in case on hand the AO/TPO has computed ALP at 0.17% of value of corporate guarantee. Thus, in view of the above we are also of the opinion that 0.17% of commission on the value of corporate/ bank guarantee will serve the justice to both the assessee and the Revenue. Hence, the ground of appeal raised by the Revenue is hereby allowed.

9. The next issue raised by the Revenue is that the learned CIT-A erred in deleting downward adjustment made with respect to purchase of the coal from the associated enterprises under the provisions of transfer pricing by the TPO for Rs. 19,61,02,194/- only.

10. The assessee in the year under consideration has purchased coal from its associated enterprises which was benchmarked on CIF value in pursuance to the CUP Method. According to the assessee, the impugned transaction for the purchase of the coal from the associated enterprises was at the arm length price as the same was within the tolerance bandlimit of 3% in pursuance to the notification issued by the CBDT bearing No. SO 962(E) dated 15 April 2013.

11. However, the TPO was not satisfied the contention of the assessee and rejected the same by observing as under:

"7, The main international transaction this year like past years is of import of coal from Singapore and Dubai based AEs. This coal has been mainly sourced from Indonesia with few transactions having being sourced from South Africa. The coal purchased from AF, on CIF basis was partly sold on High Sea Sales basis and was partly traded in India. These transactions have been benchmarked for past many years using CUP i.e. FOB rates on the basis of Argus and Platts database with adjustment for freight incurred to get the GIF rates. In (he CUP tabulation, prepared on these lines, submitted vide 26.08.2016 it was observed that few transactions were outside the tolerance band of 1 %. In this regard the assessee company^ vide order sheet entry dated 2/9/2016 was asked as under:

8

"It was pointed out to the Authorised Representative that as per the tabulation of CUP submitted few transactions are beyond 1% tolerance band prescribed for AY 2013-14 for whole sale traders. Authorised Representative asked to reply why ALP adjustment should not be made/"

8. Till AY 2012-13 the prescribed tolerance band was 5%. w.e.f. AY 2013-14 amendments were made to section 92C as under:

"(2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:

Provided further that if the variation between the arm's length price so determined and price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed such percentage not exceeding three per cent of the latter, as may be notified by the Central Government in the Official Gazette in this behalf, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price".

9. For AY 2013-14 Notification No. SO 962(E), dated 15-4-2013 was issued as under: "In exercise of the powers conferred by the second proviso to sub-section (2) of section 92C, the Central Government hereby notifies that where the variation between the arm's length price determined under section 92C and the price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed one per cent of the latter for wholesale traders and three per cent of the latter in all other cases, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price for assessment year 2013-14."

10. Though differential rates were prescribed for wholesale traders and others for AY 2013-14 no definition of wholesale traders was prescribed in the notification. For the first time the definition of wholesale trader as under was prescribed in the Notification No. SO 2478(E), dated 23-9-2014 issued for AY 2014-15:

In exercise of the powers conferred by the second proviso to sub-section (2) of section 92C, the Central Government hereby notifies that where the variation between the arm's length price determined under section 92C and the price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed one per cent of the latter in respect of wholesale trading and three per cent of the latter in all other cases, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price for assessment year 2014-15.

Explanation.—For the purposes of this notification, "wholesale trading" means an

international transaction or specified domestic transaction of trading in goods, which fulfils the following conditions, namely : —

(i) purchase cost of finished goods is eighty per cent or more of the total cost pertaining

to such trading activities; and

(ii) average monthly closing inventory of such goods is ten per cent or less of sales pertaining to such trading activities".

II. In the case of Assessee Company the contentions regarding the applicable tolerance

band focused on the second condition above. In this regard the relevant details as under were filed vide submission dated 09.09.2016:

| Month | Qty. in MT | Sale per month | Closing Stock |
|---|------------|----------------|----------------|
| Apr-12 | 998530 | 5984270994 | 8554389459 |
| May- 12 | 1424441 | 8535003916 | 9392054780 |
| Jun-12 | 1 707006 | 10525391642 | 7678207437 |
| Jul-12 | 1534175 | 8458079439 | 4242012982 |
| Aug-12 | 939880 | 5132898771 | 4592850985 |
| Sep-12 | 1091822 | 5483199867 | 5652046789 |
| Oct- 12 | 1 529608 | 7778409861 | 7667989885 |
| Nov-12 | 2028975 | 10013867444 | 9357943749 |
| Dec-12 | 1674867 | 8165823888 | 11476933054 |
| Jan- 13 | 2419671 | 11402285785 | 9432703934 |
| Feb 13 | 2597640 | 12344685826 | rHI^^62576972_ |
| Mar-13 | 9007391 | 438496757T1 | 73203ll696~ |
| | TOTAL | 9820888500T | 9223004 1 722 |
| Avg. of Monthly Closing Stock i.e. 92230041722/12 | | | 7655836810 |

12. For want of any prescribed definition for AY 2013-14 the definition notified for AY 2014-15 has to be relied upon. This proposed use of the definition prescribed for AY 2014-15 in AY 2013-14 was not objected to by the assessee company. From the above tabulation it is seen that total sales in FY 2012-13 were Rs.9820.88,85.00/ and the average closing stock was Rs. 768,58,36,810. Thus on the basis of the definition prescribed for A.Y. 15 the assessee company satisfies both the above conditions applicable to a wholesale trader. In view of this 1% tolerance band was correctly being applied as per show cause issued vide order sheet entry dated 2/9/2016.

13. On this issue to supplementary contentions were filed by Assessee Company. Firstly a supplementary CUP tabulation was furnished vide submission dated 17.10.2016. This tabulation was prepared on the basis of FOB rates in the Argus and Platts database with freight adjustment as per Baltic Freight Index. Taking the average of the two GUI' tabulations it was contended that all transactions, except two, fall within the tolerance band of 1%. Secondly it was contended that to properly apply the definition prescribed for wholesale trader its business model needs to be understood wherein the transactions in import of coal are of two different categories i.e. High Sea Sales (HSS) basis and coal landed and traded in India. It was contended that as coal from the first category v/as

10

never brought to India it never formed part of the inventory hence for the purposes of definition of whole of HSS should be excluded from the sales figure.

Detailed tabulation on this basis was filed vide submission dated In this as per certificate issued by Chartered Accountant the average monthly closing inventory came out to be 10.35% of the Sales excluding HSS.

14. Both these contentions of the assessee company have been considered and not found acceptable. Baltic Indexation for Freight being derived working cannot be substitute or supplement for more direct CUP tabulation initially submitted. Similarly the segmental working submitted on 18.10.2016 is not borne from the audited accounts of the assessee company wherein all these Iran suctions of import of coal are treated in the same manner. In view of this ALP benchmarking of coal is done as per initial submission dated 26.08.2016 as corrected and filed vide submission dated As per this 37 transactions as detailed in Annexure - 2 of this order are priced beyond the tolerance band of 1%. The total adjustment on account of these transactions comes to Rs. 19,61,02,194/-.

12. Aggrieved assessee preferred an appeal to the learned CIT-A, who has deleted the addition made by the TPO/AO by observing as under:

*6.5 On perusal of relevant facts on record, it is **observed** that **only dispute of** is for adjustment only when purchases made by appellant are higher than prescribed band of 1%. In the **case** of the appellant the international transaction in question pertains to import of coal by the appellant from its AEs. Therefore, the TPO is to consider the transactions of import of coal by the appellant from its AEs in its entirety. In the present case, as factually demonstrated by the appellant more specifically vide Annexure-D, the **TPO has ignored certain transactions or import of materials wherein the prices charged by the AEs were substantially lower than the ALP.** In other words, the TPO has **cherry-picked** only those transactions where the prices charged by the AEs were higher in comparison with the ALP while ignoring **other** transactions where the appellant had imported coal at a price lower than the market value. By doing this exercise, AO has made addition of **Rs.19.16** crores when net gain effect of transactions of coal imported is Rs.17.16 crores (Rs. 36.77 crores - Rs.19.61 crores). When appellant has made transactions with AEs which are of similar nature, TP adjustment cannot be made only for transactions which are for the benefit of Revenue and more particularly in present case, overall net impact is that appellant has gained by Rs.17.16 crores which is not disputed by TPO. The ratio of decision of Hon'ble Pune ITAT in the case of Henkel Adhesives Technologies India Pvt. Limited referred supra is squarely applicable to present case. On these facts, TP adjustment made by TPO for Rs.19.16 crores **cannot** be sustained. **This ground of appeal is, thus, allowed.***

13. Being aggrieved by the order of the learned CIT-A, the revenue is in appeal before us.

14. The learned DR before us submitted that the transaction of purchase of coal carried out by the assessee is not within the tolerance band limit and thus the learned DR supported the order of the AO.

11

15. On the other hand, the learned AR contended that there were certain transactions for the purchase of the coal at a price lesser than ALP and if such price is considered then the assessee has gained by a sum of ₹17.16 crores which has not been disputed by the AO. Accordingly, the learned AR contended that there cannot be any addition qua the difference between the purchase price of the coal viz a viz the ALP as discussed above. The learned AR in support of his contention has vehemently relied on the order of the learned CIT-A.

16. The learned DR in rejoinder, without prejudice to the contention stated above, submitted that the matter can be set aside to the file of the TPO for fresh verification whether the assessee has gained the sum of ₹17.16 crores in the manner as discussed above.

17. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that all the necessary details were available before the AO with respect to the actual price towards the purchase of coal shown by the assessee viz a viz the ALP determined based on CUP method after considering the necessary comparables. The TPO has made the addition with respect to transactions wherein the price paid by the assessee was more than the ALP after excluding the transactions where the assessee has paid less than amount against the purchases of the coal than the ALP. Thus, there is no ambiguity to the fact that the revenue has taken contradictory stand by picking up only those invoices which were containing the excessive value of the purchases of coal than the ALP. In such facts and circumstances we note that the Pune tribunal in the case of Henkel Adhesives Technology India (P.) Ltd reported in 45 taxmann.com 197 has held as under:

26. We have carefully considered the rival submissions. In our considered opinion, the entire purpose of the transfer pricing analysis is to compute the income arising from an international transaction, having regard to its arm's length price. The 'international transaction' in question, relates to import of raw materials by the assessee from its associated enterprises. Therefore, what is expected of the TPO is to consider the transactions of import of raw materials by the assessee from its associated enterprises in its entirety. In the present case, as factually demonstrated by the assessee, TPO has

12

ignored certain transactions of import of raw materials from the associated enterprises where the prices charged by the associated enterprises were lower than the prices charged by the non- associated enterprises. In other words, TPO has picked up only those transactions where the prices charged by the associated enterprises are higher in comparison to prices charged by the third parties, without considering the reasons for the same. In our considered opinion, the said approach of the TPO is quite flawed and is not justified. Moreover, in the tabulation noted above, assessee has explained reasons which prevailed with it to make imports from the associated enterprises of the 5 products, though the prices charged by associated enterprises were higher than the prices charged by the non-associated enterprises. The circumstances canvassed by the assessee have not been found to be lacking in bonafides by the TPO. He has merely brushed aside the same. In our considered opinion, it would meet the ends of justice, if the aforesaid action of the TPO is set-aside and the matter is remanded back for re-computation of the arm's length price by taking into consideration the international transaction of import of raw materials from the associated enterprises in its entirety and not merely in relation to 5 products and leaving out the other 5 products which are also imported from the associated enterprises. Thus, the TPO/Assessing Officer shall re-visit the controversy on this aspect after allowing the assessee a reasonable opportunity of being heard and thereafter decide as per law.

17.1 The ratio of the impugned order is directly applicable to the present set of facts the case. Thus, respectfully following the order of ITAT Pune bench, we do not find any reason to interfere in the finding of the learned CIT(A).

17.2 As regards contention of the learned DR that the matter can be aside set aside to the file of the TPO for fresh adjudication, we note that admittedly the ITAT Pune bench has set aside the issue for fresh adjudication as per the provisions of law with the direction that the assessee will furnish the necessary details to quantify the exact amount in dispute. However, in the case on hand, we note that all the details were already available before the AO which has not been disputed therefore, we do not find any reason to set aside the order of the learned CIT(A) to the file of the TPO for necessary verification and quantification of the amount as per the provisions of law. Accordingly, we uphold the finding of the learned CIT (A) and direct the AO to delete the addition made by him. Hence, the ground of appeal of the Revenue is hereby dismissed.

18. The next issue raised by the Revenue is that the learned CIT (A) erred in deleting the addition of Rs. 16,17,71,216/- made under section 14A of the Act read with rule 8D of Income Tax Rule and under computation of MAT under section 115JB of the Act.

13

19. The assessee during the year earned exempted income of Rs. 108,91,53,148/- and accordingly made suo-moto disallowance of Rs. 2,19,43,404/- being expenditure incurred by the treasury department which is looking after the investing activity of the assessee company. The assessee further submitted that it is having sufficient interest free fund and also earned interest income which is more than the interest cost incurred. However, the AO being dissatisfied with the suo-moto disallowance made by the assessee invoked the provision of Rule 8D of Income Tax Rule and worked out the disallowance under section 14A r.w.r. 8D at Rs. 18,37,14,620/- being direct expenses of Rs. 1,09,21,702/- under rule 8D(i), interest expenses of Rs. 7,05,00,668/- under rule 8D(ii) and administrative expenses of Rs. 10,22,42,250/- under rule 8D(ii) of Income Tax Rule. The AO finally and made addition of Rs. 16,17,71,216/- after adjusting suo-moto disallowance made by the assessee. The AO also made similar addition under MAT by the amount of disallowance under section 14A r.w.r. 8D of Income Tax Rules.

20. Aggrieved assessee preferred an appeal before learned CIT(A), who by following the order of his predecessor in own case of assessee for AY 2012-13 deleted the addition made under section 14A of the Act and consequently under section 115JB of the Act.

21. Being aggrieved by the order of the learned CIT (A), the Revenue is in appeal before us.

22. The learned DR before us vehemently supported the stand of the AO by reiterating the findings contained in the assessment order which we have already adverted to in the preceding paragraph. Therefore we are not repeating the same for the sake of brevity and convenience.

22.1 On the other hand, the learned AR vehemently supported the order of the ld. CIT-A.

23. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we find that identical issue was before us in the own case of the assessee for A.Y. 2011-12 in ITA No. 2030/Ahd/2016 where we have decided the issue in favour of the assessee by observing as under:

47. *We have heard the rival contention and perused the material available on record. Admittedly the assessee earned exempted income against which suo-moto disallowance of Rs. 3,26,91,096/- under section 14A of the Act was made. However, the AO invoked the provisions of Rule 8D of Income tax rule read with section 14A of the Act and enhanced the disallowances under section 14A by Rs. 12,28,46,340/- only. However, the same was deleted by the learned CIT(A).*

47.1 *The provisions of sub-section (2) and (3) to Section14A, which empower the AO to compute disallowance as per the provisions of Rule 8D of the Income-tax Rules, 1962 ('Rules') with effect from Assessment Year ('AY') 2008-09, provides that the disallowance under Rule 8D can be computed, only if the AO, having regard to the accounts of the assessee, is not satisfied with the claim of the assessee regarding the expenditure claimed to have been incurred/not incurred in relation to the exempt income. In this context, it is important to make reference to the provisions of Section14A of the Act. The provisions read as under:*

"14A. (1) For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.

(2) 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.

(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act:

Provided that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001."

47.2 *As per the provisions of sub-section (1) of Section14A of the Act, the AO is empowered, not to allow the assessee any deduction with regard to any such expenditure which has been incurred by the assessee in relation to income which does not form part of its total income, i.e. the income which is exempt. The provisions of sub-section (2), which was inserted by the Finance Act, 2006 with effect from 01 April, 2007 further provides that if the AO is not satisfied with the correctness of claim of assessee in respect of expenditure in relation to exempt income, the AO is to determine the amount of such expenditure incurred in accordance with the method as prescribed. At this point in time, it will be appropriate to allude to Rule 8D, which was introduced in the Rules with effect from 24 March, 2008. The Rule provides for a mechanism of computing the expenditure to be disallowed by the AO under Section14A. Sub-section (3) of Section14A further states that the provisions of sub-section (2) are also applicable in a scenario where the assessee claims that no expenditure has been incurred in relation to earning of exempt income. This*

means that even after the introduction of the computation mechanism provided for in Rule 8D from AY 2008-09 and onwards, it is only if the AO, having regard to the accounts of the assessee, reaches to a finding/satisfaction that the claim of assessee regarding expenditure incurred in relation to exempt income is incorrect, that he can compute the disallowance under Section 14A as per the provisions of Rule 8D.

47.3 The Supreme Court of India in the case of Maxopp Investment Ltd. v. CIT [2018] 402 ITR 640/254 Taxman 325/91 taxmann.com 154 has also come to a conclusion that the language of Section 14A(2) makes it clear that before applying the theory of apportionment, the AO needs to record its satisfaction that having regard to the accounts of the assessee, the suo motu disallowance made by assessee under Section 14A was not correct. The Apex Court has further stated that if the assessee in its return of income has himself apportioned certain expenditure or claims to have incurred no expenditure in relation to exempt income, in that eventuality, the AO will have to record its satisfaction to this effect, after examining the nature of loan taken by assessee for purchasing shares/making investments and the nexus thereof with the actual investments made from which the income derived will not be included in the total income.

47.4 Coming to the facts of the case, there is no ambiguity to the fact that the assessee has suo-moto made the disallowance under the provisions of section 14A of the Act amounting to Rs. 3,26,91,096/-. Now the onus has been shifted upon the AO to reject the suo-moto disallowance made by the assessee based on the cogent reasons before invoking the provisions of rule 8 the. In this regard we note that, the AO has given a finding in the assessment order as reproduced below:

4.10 As has been discussed above in this case, there exists a proximate relationship between the expenses claimed and the exempt income. As the assessee has actually incurred expenditure and not disallowed any expenditure under section 14 A as per the method laid down in Rule 8D, the undersigned is not satisfied with the correctness of the claim of the assessee, disallowance under section 14A needs to be made. Regarding the interest expense, assessee could not fully explain the source of all investments in the shares and Mutual funds which either give rise to exempt income or having potential of yielding exempt income, have not been fully explained. Thus, it is apparent that certain amount of interest expenditure claimed by the assessee as deduction against the taxable income is actually incurred which is required to be worked out as per Rule 8D. Details of specific purpose borrowings and the interest on general borrowings have been worked out. It is seen that there is interest income after taking in to account the specific borrowings for the year. As regards, the administrative expenditure, the claim that the Treasury Dept. has identifiable expenses has no relevance here. The expense of Treasury Department has been ultimately claimed as expenditure in P & L account of the company and not disallowed in the computation of income statement.

47.5 However, the finding of the AO is contrary to the facts available on record. It is for the reason that the AO on one hand saying that the assessee has not made suo-moto disallowance with respect to the Treasury Department expenses and on the other hand the AO while computing the income of the assessee has given benefit to the assessee for the expenses which were disallowed by it. All these facts can be verified from the order of the AO. Thus it appears that the AO has not derived correct satisfaction before making the disallowance under the provisions of section 14A of the Act r.w. rule 8D of Income Tax Rule.

47.6 In addition to the above, we note that the own fund of the assessee exceeds the investment made by it. We find that own fund of the assessee stands at Rs. 9768.17/-

crores whereas total investment of the assessee stands 1529.80 crores. Thus it can be safely concluded that the assessee was having sufficient own fund to make investment. It is settled position of law by several competent court that if there are mixed funds then the power of presumption would be that the investments have been made out of interest free funds. In holding so we draw support and guidance from the judgment of Hon'ble jurisdictional High court in the case of CIT vs. Torrent Power Ltd reported in 363 ITR 474 where it was held as under:

It was noted from records that the assessee was having share holding funds to the extent of 2607.18 crores and the investment made by it was to the extent of Rs.195.10 crores. In other words, the assessee had sufficient funds for making the investments and it had not used the borrowed funds for such purpose. This aspect of huge surplus funds is not disputed by the revenue which earned it the interest on bonds and dividend income. [Para 7]

47.7 Likewise the interest expenses incurred by the assessee were less than the income by way of interest shown by the assessee in the financial statements. The total interest expenses were claimed by the assessee in profit loss account stand at Rs. 66.39/- crores and AO worked out the interest expenses which are not related to specific borrowing at Rs. 39.34 crores where the assessee offered taxable interest income at Rs. 226.84 crore which far more than expenses. This tribunal in several cases held that for calculating the disallowances of interest expenses under the provision of section 14A of the Act only net interest expenses after adjusting with interest income should be considered. In the given case, the interest income exceeds expenses. Therefore, the AO was not justified in making disallowances on account of interest expenses.

47.8 In view of the above, we do not find any infirmity in the order of the learned CIT-A and accordingly we decline to disturb the finding of the learned CIT-A. Hence the ground of appeal of the revenue is hereby dismissed.

23.1 In view of the above we are of the opinion that no additional disallowance is required under section 14A read with rule 8D of Income Tax Rules while calculating the income under normal computation of income.

23.2 Coming to next controversy where the AO while computing the book profit under section 115JB of the Act made addition by the amount of disallowances made under section 14A of the Act.

23.3 The AO in the instant case has made the disallowance u/s 14A r.w.r. 8D of the Income Tax Rules for Rs. 16,17,71,216/-while determining the income under normal computation of income. Further, the AO while determining the income under Minimum Alternate Tax (MAT) as per the provisions of section 115JB of the Act, has added the disallowance made under the normal computation of Income

under section 14A r.w.r. 8D of Income Tax Rule for Rs. 16,17,71,216/- in pursuance to the clause (f) of explanation 1 to section 115JB of the Act.

23.4 However, we note that in the recent judgment of Special Bench of Hon'ble Delhi Tribunal in the case of ACIT vs. Vireet Investment Pvt. Ltd. reported in 82 Taxmann.com 415 has held that the disallowances made u/s 14A r.w.r. 8D cannot be the subject matter of disallowances while determining the net profit u/s 115JB of the Act. The relevant portion of the said order is reproduced below:

"In view of above discussion, the computation under clause (f) of Explanation 1 to section 115JB(2), is to be made without resorting to the computation as contemplated under section 14A, read with rule 8D of the Income-tax Rules, 1962."

23.5 The ratio laid down by the Hon'ble Tribunal is squarely applicable to the facts of the case on hand. Thus it can be concluded that the disallowance made under section 14A r.w.r. 8D cannot be resorted while determining the expenses as mentioned under clause (f) to explanation 1 to section 115JB of the Act.

23.6 However, it is also clear that the disallowance needs to be made with respect to the exempted income in terms of the provisions of clause (f) to section 115JB of the Act while determining the book profit. In holding so, we draw support from the judgment of Hon'ble Calcutta High Court in the case of *CIT Vs. Jayshree Tea Industries Ltd.* in GO No.1501 of 2014 (ITAT No.47 of 2014) dated 19.11.14 wherein it was held that the disallowance regarding the exempted income needs to be made as per the clause (f) to Explanation-1 of Sec. 115JB of the Act independently. The relevant extract of the judgment is reproduced below:-

"We find computation of the amount of expenditure relatable to exempted income of the assessee must be made since the assessee has not claimed such expenditure to be Nil. Such computation must be made by applying clause (f) of Explanation 1 under section 115JB of the Act. We remand the matter for such computation to be made by the learned Tribunal.

We accept the submission of Mr. Khaitan, learned Senior Advocate that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act."

23.7 Given above, we hold that the disallowances made under the provisions of Sec. 14A r.w.r. 8D of the IT Rules, cannot be applied to the provision of Sec. 115JB of the Act as per the direction of the Hon'ble Calcutta High Court in the case of *CIT Vs. Jayshree Tea Industries Ltd.* (Supra).

23.8 Now the question arises to determine the disallowance as per the clause (f) to Explanation-1 of Sec. 115JB of the Act independently. In this regard, we note that there is no mechanism/ manner given under the clause (f) to Explanation-1 of Sec. 115JB of the Act to workout/ determine the expenses with respect to the exempted income. However, the assessee admittedly has made the suo-moto disallowance while calculating the book profit amounting to Rs. 2,19,43,404/- as evident from the working of the profit made by the AO in the assessment order. As such the AO has calculated the amount of disallowance under the normal provisions of the Act amounting to ₹ 18,37,14,620/- which was reduced by the amount of suo-moto disallowance made by the assessee amounting to Rs. 2,19,43,404/-. Thus the AO made the effective disallowance at ₹ 16,17,71,216/- and the same amount was also added to the book profit. The act of the AO suggests that the assessee has also made the suo-moto disallowance in the computation of the profit. However, in our considered view the AO was under the obligation to reject the disallowance made by the assessee before substituting the amount of disallowance. Thus we find no reason to interfere in the finding of the learned CIT-A. Hence the ground of appeal of the revenue is hereby dismissed.

24. The Next issue raised by the Revenue is that the learned CIT (A) erred in deleting the disallowance of depreciation on office premises for Rs. 4,77,009/- only.

25. The assessee in the year 1998 entered into an agreement with M/s Ruparelia Theaters Pvt Ltd. for allotment of parking space and use of terrace. As per the agreement, the assessee, to acquire the right to use the parking space and terrace, has to acquire equity shares of the company. Accordingly, the

19

assessee acquired 640 equity share of type A and 1280 share of type B for an amount of Rs. 2,31,68,000/- only. The assessee also paid an amount of Rs. 27,57,000/- and Rs. 1,16,00,000/- for the use of terrace and for construction on terrace. The assessee treated the amount of acquisition of shares and amount paid aggregating to Rs. 3,75,25,000/- (Rs. 2,31,68,000/- + Rs. 1,16,00,000/-) as cost towards building and claimed depreciation on the same for the entire year. The AO disallowed the claim of the depreciation in earlier years by holding that having right to use property by virtue of acquiring share does not mean assessee becomes the owner of the building. Thus the AO by following the order of his predecessor disallowed the claim of depreciation on building for Rs. 4,77,009/- claimed in the current year.

25.1 Aggrieved assessee preferred an appeal before the learned CIT (A), who deleted the addition by following the order of his predecessor for the AY 2010-11 and order of this tribunal in the own case of the assessee for AY 2006-07 and 2007-08 in ITA No. 2078/Ahd/2011 and 558/Ahd/2012.

26. Being aggrieved by the order of the learned CIT (A), the Revenue is in appeal before us.

27. The learned DR before us vehemently supported the stand of the AO by reiterating the findings contained in the assessment order which we have already adverted to in the preceding paragraph. Therefore, we are not repeating the same for the sake of brevity.

28. On the other hand, the learned AR submitted that the issue is covered in its favor. The Id. AR vehemently supported the order of the Id. CIT-A.

29. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we note that the identical issue was

there before this tribunal in the own case of the assessee for AY 2007-08 bearing ITA No. 558/Ahd/2012 where it was observed as under:

17. Heard rival contentions. There is no dispute about the fact that the assessee has claimed depreciation in question on shares of the above stated assets. The Revenue fails in rebutting the crucial appellate finding that the same already forms part of the relevant bloc of assets since 1998 treated eligible for depreciation. We further find that a co-ordinate bench decision of the tribunal in Deepak Fertilizer case (supra) already allows identical depreciation claim on shares of the relevant assets. There is no distinction on facts or law pointed out in the courses of hearing. We affirm the CIT(A)'s finding thereby declining with Revenue's instant substantive ground. Its appeal ITA 558/Ahd/2012 fails

29.1 Before us, no material has been placed on record by the Revenue to demonstrate that the decision of Tribunal as discussed above has been set aside / stayed or overruled by the Higher Judicial Authorities. Before us, Revenue has not placed any material on record to point out any distinguishing feature in the facts of the case for the year under consideration and that of earlier years nor has placed any contrary binding decision in its support. Thus, respectfully following the order this tribunal in own case of assessee the ground of appeal raised by the revenue is hereby dismissed.

30. The next issue raised by the Revenue is that the learned CIT (A) erred in deleting the disallowance of depreciation on motor car and office equipment and UPS for Rs. 68,00,471/- only.

31. The assessee during the financial year 2009-10 purchased BMW car for an amount of Rs. 1,13,27,637/- only. The assessee treated the same as commercial vehicle and claimed depreciation @ 50%. However the AO restricted the depreciation on BMW car to the extent of 15% only and added the excess depreciation of Rs. 4,95,583/-.

32. Likewise the assessee claimed depreciation on office equipment such as electrical fittings, exhaust fan, electrical fan, electronic machine, electrical wires, cables, switches, plugs etc. @ 15% by treating the same as plant and machinery. The assessee submitted that these items are integral part of plant and machinery

21

and cannot function independently. Therefore, the same is eligible for depreciation at the rate available to plant and machinery i.e. 15%. However, the AO restricted the depreciation to the extent of 10% by treating the same as furniture and fixture. Thus, the AO added back the excess depreciation of Rs. 45,38,344/- on office equipment to the total income of the assessee.

33. Likewise, the AO found that assessee was claiming depreciation on UPS @ 60% under the block computer. However, the AO restricted the depreciation @ 15% by holding that the UPS is not the integral part of computer. Thus the AO added back the excess depreciation of Rs. 17,66,544/- only.

33.1 In aggregate, the AO disallowed the excess depreciation of Rs. 68,00,471/- claimed on car, office equipment and UPS and added to the total income of the assessee.

34. Aggrieved assessee preferred an appeal before the learned CIT(A) who deleted the disallowances/addition made by the AO by following the order of his predecessor in the own case of the assessee for AY 2012-13.

35. Being aggrieved by the order of the learned CIT (A) the Revenue is in appeal before us.

36. The learned DR before us vehemently supported the stand of the AO by reiterating the findings contained in the assessment order which we have already adverted to in the preceding paragraph. Therefore we are not repeating the same for the sake of brevity.

37. On the other hand, the learned AR before us reiterated the contentions as made before the authorities below. The Id. AR vehemently supported the order of the Id. CIT-A.

38. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we find that identical issue was there before us in the own case of the assessee for A.Y. 2011-12 in ITA No. 2030/Ahd/2016 where we have decided the issue is favour of the assessee by observing as under:

64. We have heard the rival contention of both the parties and perused the materials available of record. Admittedly the assessee claimed depreciation on BMW car @ 50%, on office equipment @ 15% and on UPS @ 60% which was restricted by the AO to the extent of 15%, 10% and 15% respectively. We proceed to adjudicate the each item separately.

64.1 The first controversy before us is whether the BMW car purchased by the assessee is a commercial vehicle eligible for depreciation @ 50%? In this regard we note that the car was purchased in the F.Y. 2009-10 corresponding to the A.Y. 2010-11, hence it is second year of claim. In the first year, the controversy reached to the ITAT level where the coordinate bench of this tribunal in ITA NO. 2305/Ahd/2015 observed as under:

138. On a perusal of the impugned order passed by the CIT(A), we find that the CIT(A) has simply followed the decision dated 22nd March 2013 passed by a coordinate bench of this Tribunal in the case of Voltemp Transformers Limited (ITA No. 1676/Ahd/12) and extensively reproduced from the same. Neither the learned Departmental Representative has demonstrated any distinguishing features in the said case vis-à-vis the case before us, but has vehemently relied upon the stand of the Assessing Officer. We see no reasons to take a different view of the matter in this case and must, therefore, follow the coordinate bench. Respectfully following the same, we confirm the action of the CIT(A) and decline to interfere in the matter.

64.2 Before us, no material has been placed on record by the Revenue to demonstrate that the decision of Tribunal as discussed above has been set aside / stayed or overruled by the higher Judicial Authorities. Therefore, in our considered view when in very first year of the acquisition of vehicle being BMW Car, depreciation was allowed @ 50% then in subsequent year depreciation claimed on WDV cannot be disturbed unless there is change in law. Hence the addition made by the AO on account of excess depreciation on car directed to be deleted.

64.3 Coming to next controversy whether the office equipment being electrical fittings, exhaust fan, electrical fan, electronic machine, electrical wires, cables, switches, plugs etc. are part & Parcel of the plant and machinery or same should be treated as furniture and fixture? We find this controversy also arises in earlier year in the own case of the assessee and the coordinate bench of this tribunal in ITA No 2305 & 2531/Ahd/2015 has decided the issue in favour of the assessee by observing as under:

141. So far as this grievance is concerned, we find that the assessee had granted depreciation on office equipment as furniture and fittings, and thus declining the claim of the assessee for 15% depreciation. In appeal, it was pointed out by the assessee that the equipment were in the nature of electric fan, electric machine, LCD, TV, projector, water purifiers etc which must be included in the definition of plant. The judicial precedents in support of this proposition were also cited. It was in this backdrop, and following the judgment of Hon'ble Bombay High Court in the case of CIT Vs Park Davis India Ltd (214 ITR 587), learned CIT(A) held the office equipment to be eligible for 15% depreciation. Accordingly, depreciation disallowance of Rs 13,84,895 was deleted. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

23

142. Having heard the rival contentions, and having perused the material on record, we find that this issue is also covered, in favour of the assessee, by a decision of the coordinate bench in the case of CeraSanitaryware Ltd Vs DCIT [42 ITR (Trib) 334 (Ahd)]. Respectfully following the same, we confirm the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

64.4 Before us, no material has been placed on record by the Revenue to demonstrate that the decision of Tribunal as discussed above has been set aside / stayed or overruled by the higher Judicial Authorities. Before us, Revenue has not placed any material on record to point out any distinguishing feature in the facts of the case for the year under consideration and that of earlier years nor has placed any contrary binding decision in its support. Thus, respectfully following the order this tribunal in own case of assessee the addition made by the AO on account of excess depreciation on office equipment directed to be deleted.

64.5 Coming to next controversy whether the UPS is integral part of the computer and eligible for depreciation @ 60%? We find this controversy also arises in earlier year in the own case of the assessee and the coordinate bench of this tribunal in ITA No 2305 & 2531/Ahd/2015 held the issue in favour of the assessee by observing as under:

145. Learned representatives fairly agree that this issue is also covered, in favour of the assessee, by Hon'ble Delhi High Court's judgment in the case of CIT Vs BSES Yamuna Power Ltd (358 ITR 47), even as learned Departmental Representative vehemently relied upon the stand of the Assessing Officer. There is non contrary judicial precedent pointed out to us. In this view of the matter, and respectfully following the esteemed views of Hon'ble Delhi High Court in the case of BSES Yamuna Power (supra), we confirm the order of the CIT(A) on this point as well, and decline to interfere in the matter.

64.6 Before us, no material has been placed on record by the Revenue to demonstrate that the decision of Tribunal as discussed above has been set aside / stayed or overruled by the higher Judicial Authorities. Before us, Revenue has not placed any material on record to point out any distinguishing feature in the facts of the case for the year under consideration and that of earlier years nor has placed any contrary binding decision in its support. Thus, respectfully following the order this tribunal in own case of assessee the addition made by the AO on account of excess depreciation on office equipment directed to be deleted.

64.7 In view of the above discussion and respectfully following the order this tribunal in own case of assessee the ground of appeal raised by the Revenue is hereby dismissed.

38.1 In view of the above finding in the own case of the assessee for A.Y. 2011-12 we do not find any infirmity in the order of the learned CIT(A). Hence, the ground of appeal raised by the Revenue is hereby dismissed.

39. The next issue raised by the Revenue is that the learned CIT(A) erred in deleting the addition of Rs. 1,72,59,614/- made on account of unutilized CENVAT credit under section 145A of the Act.

24

40. The assessee during the year shown unutilized CENVAT credit of Rs. 1,72,59,614/- which was not included in value of closing inventory as per the provision of section 145A of the Act. On question, the assessee during assessment proceeding submitted that provision of section 145A applies on the tax paid /payable in respect of purchase and sale of goods whereas the CENVAT represents the service tax paid on services availed. Therefore provision of section 145A of the Act does not apply to the services.

41. However, the AO held that as per the provision of section 145A of the Act the assessee was required to use inclusive method of accounting for the CENVAT whereas as assessee is following the exclusive method of accounting. Due to exclusive method of accounting employed by the assessee, the unutilized CENVAT were kept outside the value of closing inventory which is against the provision of law. Therefore, the AO added the unutilized CENVAT credit of Rs. 1,72,59,614/- to the total income of the assessee.

42. The assessee preferred an appeal before the learned CIT(A) and reiterated that the provisions of section 145A of the Act are not applicable on the CENVAT credit accrued on purchase of services.

43. The learned CIT(A) after following the order of his predecessor in own case of the assessee for A.Y. 2011-12 deleted the addition made by the AO.

44. Being aggrieved by the order of the learned CIT(A), the Revenue is in appeal before us.

45. The learned DR before us vehemently supported the stand of the AO by reiterating the findings contained in the assessment order which we have already adverted to in the preceding paragraph. Therefore we are not repeating the same for the sake of brevity.

46. On the other hand, the learned AR submitted that the issue is covered in its favor. The Id. AR vehemently supported the order of the Id. CIT-A.

47. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we find that identical issue was there before us in the own case of the assessee for AY 2011-12 in ITA No. 2030/Ahd/2016 where we have decided the issue is favour of the assessee by observing as under:

73. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below. The issue in the present case is with respect to inclusion of unutilized CENVAT credit to the closing stock. We find that Id.CIT(A) while deleting the addition has given a finding that the assessee was following exclusive method of accounting and the CENVAT was not debited or credited to the Profit & Loss account and the aforesaid method has been consistently followed by the assessee in earlier and succeeding years and the same is tax natural excursive. We further find that the Hon'ble Apex Court in the case of CIT vs. Indo Nippon Chemicals Co. Ltd. reported at (2003) 261 ITR 275 (SC) observed that un-availed MODVAT credit cannot be construed as income and there is no liability to pay tax on such un-availed MODVAT credit. Further, before us, Revenue has not brought any contrary binding decision in its support. In view of the aforesaid facts, we do not see any reason to interfere with the order of the Id.CIT(A). Thus, the ground of Revenue's appeal is dismissed.

47.1 In view of the above finding in own case of the assessee for AY 2011-12 we do not find any infirmity in the order of the learned CIT(A). Hence the ground of appeal raised by the Revenue is hereby dismissed.

48. The next issue raised by the Revenue is that the learned CIT(A) erred in deleting the addition of Rs. 1,15,15,902/- in the book profit under section 115JB of the Act on account of provision for leave encashment.

49. The AO in the assessment while calculating the book profit under section 115JB of the Act added back the amount of provision for leave encashment amounting Rs. 1,15,15,902/- only.

50. Aggrieved assessee preferred an appeal before the learned CIT(A), who deleted the addition after following the order of his predecessor in the own case of the assessee for AY 2011-12.

51. Being aggrieved by the order of the learned CIT(A), the Revenue is in appeal before us.

52. Both the learned DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

53. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we find that identical issue was there before us in the own case of the assessee for AY 2011-12 in ITA No. 2030/Ahd/2016 where we have decided the issue is favour of the assessee by observing as under:

95. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the present case revolves whether the provision for leave encashment claimed by the assessee represents the unascertained or ascertained liabilities. Admittedly provisions made with respect to unascertained liabilities has to be disallowed while computing the book profit under the provisions of section 115 JB of the Act. However on perusal of the order of learned CIT (A) we note that the assessee has claimed such provision with respect to ascertained liabilities as discussed above. This fact has not been disputed by the learned DR appearing on behalf of the revenue. The Hon'ble Himachal Pradesh High Court in the case of CIT vs. HP Tourism Corpn. Ltd. reported in 35 taxmann.com 450 has held as under:

"The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain."

95.1 In view of the above we hold that the liabilities in respect of which the assessee has made the provisions in the books of accounts was not unascertained liability and therefore such provision is outside the purview of the adjustments provided under the provisions of section 115JB of the Act. Thus we do not find any infirmity in the order of the learned CIT (A) and accordingly, we deny to interfere in the order of the learned CIT (A). Hence the ground of appeal of the revenue is by dismissed.

53.1 In view of the above finding in own case of the assessee for AY 2011-12 we do not find any infirmity in the order of the learned CIT(A). Hence the ground of appeal raised by the Revenue is hereby dismissed.

53.2 In the result, the appeal of the revenue is hereby partly allowed.

Coming to CO No. 81/Ahd/2020 by the assessee for A.Y. 2013-14

54. The assessee has raised the following cross objection:

1. *In law and in the facts and circumstances of the appellant's case, the Ld.CIT(A) has grossly erred in confirming disallowance of deduction for QIP issue expenses u/s.35D for Rs.7,89,540/- being 1/5th of total QIP issue expenses of Rs.39,47,698.*

2. *The appellant craves leave to add, amend and/or alter the ground or grounds of appeal either before or at the time of hearing of the appeal.*

55. The issue raised by the assessee in cross objection is that the learned CIT-A erred in confirming the part addition of Rs. 7,89,540/- made on account of disallowances of claim under section 35-D of the Act.

56. The assessee during the year claimed 1/5th of the QIP issue expenses being an amount of Rs. 8,77,57,017 as deduction under section 35-D of the Act. However, the AO found that QIP issue expenses includes expenditure on account of staff travel, travel insurance, bank charges, forex rate difference etc. amounting to Rs. 39,47,698/- only. The AO was of the view only those expenses incurred in connection with the issue of public subscription being underwriting commission, brokerage, drafting charges, printing and advertisement of prospectus are allowable under the provision of section 35-D of the Act. Therefore, the amount of expenses incurred on travelling and other expenses are not allowable under section 35D of the Act. Accordingly, the AO disallowed 1/5th of the Rs. 39,47,698/- i.e. 7,89,540/- and added same to the total income of the assessee.

57. Aggrieved assessee carried the matter before learned CIT(A), who, following the order of his predecessor in own case of the assessee for the A.Y. 2012-13, upheld the disallowances made by the AO.

58. Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us.

59. The learned AR before us contended that the issue is covered in favour of the assessee by the order of this tribunal in the own case of the assessee for AY 2011-12 and 2012-13 bearing ITA No. 2035/Ahd/2016 and 941/Ahd/2018.

60. On the other hand learned DR before us contended that there are certain kinds of expenses specified under section 35D(2)(c)(iv) of the Act which can be allowed as deduction. As such, the expenses which are not falling within the parameters provided under section 35D(2)(c)(iv) of the Act cannot be allowed as deduction to the assessee.

61. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we find that identical issue was there before us in the own case of the assessee for AY 2011-12 in ITA No. 2035/Ahd/2016 where we have decided the issue is favour of the assessee by observing as under:

30. We have heard the rival contentions of both the parties and perused the materials available on record. In this regard, we find pertinent to refer the judgment of Hon'ble Madhya Pradesh High Court in the case of CIT vs. Shree Synthetics Ltd. 162 ITR 819 cited above. The relevant extract of the judgment is reproduced as under:

The word 'being' has been used in section 35D(2)(c)(iv) by way of illustration and is not restricted only to the words 'underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus'. There are the following stages in connection with the issue of shares for public subscription: (1) issue of prospectus and invitation to the public to subscribe, (2) making of calls, that is, entertainment of applications by subscribers, (3) acceptance by the company represented by allotment of shares, (4) actual issue of share scrip and entering the names of the shareholders in the register of members; and (5) expenses incurred after issue, i.e., payment of brokerage and underwriting commission, as also refund of excess amount over-subscribed. The word "being" used in section 35(D) must be read with reference to the context in which the words are used. It would include the last stage in connection with the issue of shares, namely, even refund of the amount of oversubscription in relation to those shares for which applications were invited.

30.1 A perusal of the judgment reveals that the expenses which have been specified under the provisions of section 35D(2)(c)(iv) of the Act are illustrative in nature, meaning

thereby, the list of the expenses given therein is not exhaustive or restrictive. In other words, the expenses which have not been specified under section 35D(2)(c)(iv) of the Act, but the same were incurred in connection with the public issue are eligible for deduction in the manner as provided therein. The above judgment of the Hon'ble Madhya Pradesh High Court was cited by the assessee at the time of hearing before the learned CIT (A) but the same was not considered by him in giving his finding on the issue on hand. Even at the time of hearing, the learned DR appearing on behalf of the revenue has not brought anything on record against the argument advanced by the learned AR for the assessee. It is also pertinent to note that the genuineness of the expenses and the nature of the expenses that these were incurred in connection with the public issue have not been doubted. In view of the above, we hold that the assessee is entitled for all the expenses incurred by it as discussed above in the manner provided under section 35D(2)(c)(iv) of the Act. Hence the ground of appeal of the assessee is allowed whereas the ground of appeal of the revenue is by dismissed.

61.1 In view of the above finding in own case of the assessee for A.Y. 2011-12 we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence the ground of cross objection raised by the assessee is hereby allowed.

61.2 In the result cross objection of the assessee is hereby allowed.

Coming to ITA No. 336/Ahd/2020 an appeal by the Revenue for A.Y. 2014-15

62. The Revenue has raised following grounds of appeal:

(1) *The Id. CIT(A) has erred in law and facts in deleting the transfer pricing adjustment of Rs. 17,66,21,209/- for benchmarking of purchase of coal..*

(2) *The Id. CIT(A) has erred in law and facts in deleting the Section 14A disallowance of Rs.62,03,43,162/- under both general and MAT provisions.*

(3) *The Id. CIT(A) has erred in law and facts in deleting the disallowance of depreciation of Rs.4,29,308/- claimed on shares despite the fact that shares are not depreciable assets.*

(4) *The Id. CIT(A) has erred in law and facts in deleting the depreciation disallowance of Rs.49,54,278/-.*

(5) *It is, therefore, prayed that the order of Id. CIT(A) may be set aside and that of the Assessing Officer be restored.*

63. **The first** issue raised by the Revenue is that the learned CIT-A erred in deleting the downward adjustment made by the AO/TPO under TP provisions for Rs. 17,66,21,209/- on account import of coal.

64. At the outset we note that the issues raised by the Revenue in its grounds of appeal for the AY 2014-15 are identical to the issues raised by the Revenue in ITA No. 285/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in ITA No. 285/AHD/2020 shall also be applicable for the year under consideration i.e. AY 2014-15. The appeal of the Revenue for the assessment 2013-14 has been decided by us vide paragraph Nos. 17 to 17.2 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2014-15. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

65. The next issue raised by the Revenue is that the learned CIT (A) erred in deleting the addition of Rs. 62,03,71,216/- made under section 14A of the Act read with rule 8D of Income Tax Rule and under computation of MAT in pursuance to the provisions of section 115JB of the Act.

66. At the outset, we note that the issues raised by the Revenue in its grounds of appeal for the AY 2014-15 are identical to the issues raised by the Revenue in ITA No. 285/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in ITA No. 285/AHD/2020 shall also be applicable for the year under consideration i.e. AY 2014-15. The appeal of the Revenue for the assessment 2013-14 has been decided by us vide paragraph Nos. 23 to 23.8 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2014-15. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

67. The Next issue raised by the Revenue is that the learned CIT (A) erred in deleting the disallowance of depreciation on office premises for Rs. 4,29,308/- only.

68. At the outset, we note that the issues raised by the Revenue in its grounds of appeal for the AY 2014-15 are identical to the issues raised by the Revenue in ITA No. 285/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in ITA No. 285/AHD/2020 shall also be applicable for the year under consideration i.e. AY 2014-15. The appeal of the Revenue for the assessment 2013-14 has been decided by us vide paragraph Nos. 29 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2014-15. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

69. The next issue raised by the Revenue is that the learned CIT (A) erred in deleting the disallowance of depreciation on motor car and office equipment and UPS for Rs. 49,54,278/- only.

70. At the outset, we note that the issues raised by the Revenue in its grounds of appeal for the AY 2014-15 are identical to the issues raised by the Revenue in ITA No. 285/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in ITA No. 285/AHD/2020 shall also be applicable for the year under consideration i.e. AY 2014-15. The appeal of the Revenue for the assessment 2013-14 has been decided by us vide paragraph No. 38 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2014-15. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

71. In the result appeal of the Revenue is hereby dismissed.

Coming to CO No. 80/Ahd/2020 by the assessee for A.Y. 2014-15

72. The assessee has raised the following cross objection:

1. *In law and in the facts and circumstances of the appellant's case, the Ld.CIT(A) has grossly erred in confirming disallowance of deduction for QIP issue expenses u/s.35D for Rs.7,89,540/- being 1/5th of total QIP issue expenses of Rs.39,47,698/-*

2. *The appellant craves leave to add, amend and/or alter the ground or grounds of appeal either before or at the time of hearing of the appeal.*

73. The issue raised by the assessee in cross objection is that the learned CIT-A erred in confirming the part addition of Rs. 7,89,540/- made on account of disallowances of claim under section 35-D of the Act.

74. At the outset, we note that the issues raised by the assessee in its cross objection for the AY 2014-15 are identical to the cross objection raised by the assessee in CO No. 81/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in CO No. 81/AHD/2020 shall also be applicable for the year under consideration i.e. AY 2014-15. The CO of the assessee for the assessment 2013-14 has been decided by us vide paragraph No. 61 of this order in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2014-15. Hence, the grounds of cross objection filed by the assessee is hereby allowed.

75. In the result cross objection of the assessee is hereby allowed.

Coming to ITA No. 472/Ahd/2020 an appeal by the Revenue for A.Y. 2015-16

76. The Revenue has raised the following grounds of appeal:

(1) *The ld. CIT(A) has erred in law and Facts in deleting the transfer pricing adjustment of Rs.5,34,61,394/- for benchmark/o'ng of purchase of coal.*

33

(2) The Id. CIT(A) has erred in law and facts in deleting the section 14A disallowance of Rs. 137,53,16,006/- under both general and MAT provisions.

(3) The Id. CIT(A) has erred in law and facts in deleting the disallowance of depreciation of Rs.3,86,3771/- claimed on share despite the fact that shares are not depreciable assets.

(4) The Id. CIT(A) has erred in law and facts in deleting the depreciation disallowance of Rs.51,39,190/-

(5) It is, therefore, prayed that the order of Id. CIT(A) may be set aside and that of the Assessing Officer be restored.

77. The first issue raised by the Revenue is that the learned CIT-A erred in deleting downward adjustment made under Transfer Pricing provision for Rs. 5,34,61,394/- on account import of coal.

78. At the outset, we note that the issues raised by the Revenue in its grounds of appeal for the AY 2015-16 are identical to the issues raised by the Revenue in ITA No. 285/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in ITA No. 285/AHD/2020 shall also be applicable for the year under consideration i.e. AY 2015-16. The appeal of the Revenue for the assessment 2013-14 has been decided by us vide paragraph Nos. 17 to 17.2 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2015-16. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

79. The next issue raised by the Revenue is that the learned CIT (A) erred in deleting the addition of Rs. 137,53,16,006/- made under section 14A of the Act read with rule 8D of Income Tax Rule and under computation of MAT in pursuance to the provisions of section 115JB of the Act.

80. At the outset we note that the issues raised by the Revenue in its grounds of appeal for the AY 2015-16 are identical to the issues raised by the Revenue in ITA No. 285/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in ITA No. 285/AHD/2020 shall also be applicable for the year under

consideration i.e. AY 2015-16. The appeal of the Revenue for the assessment 2013-14 has been decided by us vide paragraph Nos. 23 to 23.8 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2015-16. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

81. The Next issue raised by the Revenue is that the learned CIT (A) erred in deleting the disallowance of depreciation on office premises for Rs. 3,86,377/- only.

82. At the outset, we note that the issues raised by the Revenue in its grounds of appeal for the AY 2015-16 are identical to the issues raised by it in ITA No. 285/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in ITA No. 285/AHD/2020 shall also be applicable for the year under consideration i.e. AY 2015-16. The appeal of the Revenue for the assessment 2013-14 has been decided by us vide paragraph No. 29 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2015-16. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

83. The next issue raised by the Revenue is that the learned CIT (A) erred in deleting the disallowance of depreciation on motor car and office equipment and UPS for Rs. 51,39,180/- only.

84. At the outset we note that the issues raised by the Revenue in its grounds of appeal for the AY 2015-16 are identical to the issues raised by it in ITA No. 285/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in ITA No. 285/AHD/2020 shall also be applicable for the year under consideration i.e. AY 2015-16. The appeal of the Revenue for the assessment 2013-14 has been

decided by us vide paragraph No. 38 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2015-16. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

85. In the result appeal of the Revenue is hereby dismissed

Coming to CO No. 02/Ahd/2021 by the assessee for A.Y. 2015-16

86. The assessee has raised the following ground in cross objection:

1. *In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) has grossly erred in confirming disallowance of deduction for QIP issue expenses u/s. 35D for Rs.7,89,540 being 1/5th of total QIP issue expenses of Rs. 39,47,698.*

2. *In law and in the facts and in the circumstances of the appellant's case, the learned CIT(A) has erred in upholding addition of Rs. 14,97,000/- made by Ld. Assessing Officer treating renewal subscription license fees as expense to be deferred in three years. The Ld. CIT(A) ought to have appreciate that entire expenditure is allowable as revenue expense in the year in which it is incurred.*

3. *In law and in the facts and circumstances of the appellant's case, the appellant is entitled for deduction of education cess and higher education cess paid while computing income from business and profession in view of the CBDT CIRCULAR F.No. 91/58/66-ITJ(19) DT.18th May, 1967;. Hon'ble ITAT may direct for allowing deduction for education cess and higher education cess as allowable expenditure in view of binding CBDT circular and in view of decision of Hon'ble Rajasthan HC in the case of Income Tax Appeal No. 52/2018 Pr. Commissioner Of Income Tax Vs. M/s. Chambal Fertilizers And Chemicals Ltd.*

4. *The appellant craves leave to add, amend and/or alter the ground or grounds of appeal either before or at the time of hearing of the appeal.*

87. The issue raised by the assessee in cross objection is that the learned CIT-A erred in confirming the part addition of Rs. 7,89,540/- made on account of disallowances of claim under section 35D of the Act.

88. At the outset, we note that the issues raised by the assessee in its crossobjection for the AY 2015-16 are identical to the objection raised by the it in CO No. 81/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in CONo. 81/AHD/2020 shall also be applicable for the year under

consideration i.e. AY 2015-16. The CO of the assessee for the assessment 2013-14 has been decided by us vide paragraph No. 61 of this order in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2015-16. Hence, the ground of cross objection filed by the assessee is hereby allowed.

89. The 2nd issue raised by the assessee in its cross objection is that the learned CIT(A) erred in confirming the addition of ₹14,67,000/- (in ground 14,97,000) representing the renewal subscription license fees for a period of 3 years instead of treating the same as revenue in nature.

90. The assessee in the year under consideration has made payment to Seclore Technology Pvt. Ltd. was company for a sum of Rs. 22,00,500/- representing the subscription of some license for 3 years which is renewable on yearly basis. The assessee has debited the entire amount in profit and loss account. As per the assessee license was acquired to protect file secure identity, management system and file secure policy server as such the expenses incurred by it was very much connected to its business. Further by acquiring license no new assets come into existence any of enduring benefit and furthermore such license are subject to obsolescence considering the dynamic and ever changing of file secure technology. It is possible that the assessee may acquire a new license in the 2nd year itself and therefore it cannot be said that you license on hand was obtained by the assessee for 3 years. Besides the above it was also contended by the assessee that there is no concept of deferred revenue expenses under the provisions of law and therefore the expenses should be allowed as deduction in the year under consideration.

91. However the AO disregarded the contention of the assessee by observing that there is no provision for allowing the expenses paid in advance under the

provisions of section 37 of the Act accordingly the AO disallowed the 2/3rd of the expenses amounting to Rs. 14,67,000/- being pertaining to future years.

92. On appeal by the assessee learned CIT(A) confirmed the order of the AO.

93. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal cross objection before us the learned AR before us reiterated the submissions by contending that there is no concept of deferred revenue expenses under the provisions of law. According to the learned AR entire impugned expenses should be allowed deduction under consideration.

94. On the contrary the learned DR vehemently supported the order of authorities below.

95. We have heard the rival contentions of both the parties and perused the materials available on record. The provisions under section 37 of the Act recognizes expenses being revenue in nature and capital in nature. There is no concept of deferred revenue expenses under the provision of the Act. Thus essentially the expenses incurred in the year under consideration should be allowed as deduction treating them as revenue in nature. In holding so we draw support and guidance from the order of special bench of this tribunal in case of ACIT vs. AshinaSyntex Ltd in ITA Nos. 2001 & 2002/Ahd./2001 reported in 117 ITD 1, where it was held as under:

8. We have heard rival contentions and gone through the facts of the case. The concept of deferred revenue expenditure is essentially an accounting concept and alien to the Act. The relevant provisions of the Act recognise only capital or revenue expenditure. Deferred revenue expenditure denotes expenditure for which a payment has been made or a liability incurred, which is essentially revenue in nature but which for various reasons like quantum and period of expected future benefit etc., is written off over a period of time e.g., expenditure on advertisement, sales promotion etc. Though the nature of such expenditure is revenue, keeping in view the fact that the benefits arising therefrom are expected to be derived over a period of time, stretching sometimes over several accounting years, the taxpayers have been amortising the same over the expected time period over which the benefits are likely to accrue therefrom. Accordingly, only a proportion of such expenditure is amortised in the Profit and Loss Account but an appropriate adjustment is made in the computation of income, claiming the entire as

allowable revenue expenditure in terms of provisions of section 37(1) of the Act. The expenditure which is treated as deferred revenue in the books almost in all cases comprises of items, the benefits derived wherefrom are ephemeral and transitory in nature in as much as these are incurred as a part of a continuous process and need to be expended in order to generate and increase the brand recall and sustain it in the minds of customers. Whether or not expenditure is of enduring nature, the Hon'ble Supreme Court in the case of Alembic Chemical Works Co. Ltd. v. CIT [\[1989\] 177 ITR 377](#) has itself observed that :

"The idea of "once for all" payment and "enduring benefit" are not to be treated as something akin to statutory conditions; nor are the notions of "capital" or "revenue" a judicial fetish. What is capital expenditure and what is revenue are not eternal verities but must needs be flexible so as to respond to the changing economic realities of business. The expression "asset or advantage of an enduring nature" was evolved to emphasise the element of a sufficient degree of durability appropriate to the context."

9. Moreover, the deferred revenue expenditure is essentially revenue in nature and the decision to treat the same as deferred revenue only represents a management decision taken in view of the magnitude of the expenditure involved. For the purpose of allowability of any expenditure under the Act, what is material is the classification between the capital and revenue and the same does not recognise of any concept of deferred revenue expenditure. That is why Assessing Officer himself allowed the amount debited in the profit and loss account. In a number of judgments viz. Amar Raja Batteries Ltd. v. Asstt. CIT [\[2004\] 91 ITD 280 \(Hyd.\)](#), Jt. CIT v. Modi Olivetti Ltd. [\[2005\] 4 SOT 859 \(Delhi\)](#), Asstt. CIT v. Medicamen Biotech Ltd. [\[2005\] 1 SOT 347 \(Delhi\)](#), Hero Honda Motors Ltd. v. Jt. CIT [\[2005\] 3 SOT 572 \(Delhi\)](#) and Charak Pharmaceuticals v. Jt. CIT [\[2005\] 4 SOT 393 \(Mum.\)](#), it has been affirmed that where any expenditure is treated as a deferred revenue expenditure, it presupposes that the concerned expenditure, creating benefit is in the revenue field and is a revenue expenditure, but considering its enduring benefits as well as the fact that it does not result in the creation of any new asset or advantage of enduring nature in the capital field, the same is required to be treated distinctly from capital expenditure. However, where any identifiable capital asset, tangible or intangible comes into existence as a result of the amount expended, the same will have to be treated as a capital expenditure and depreciation allowable thereon as per the prescribed rules and procedures under the Income-tax Act.

96. In view of the above finding of special bench of this tribunal and respectfully following the same we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the addition. Hence the ground assessee objection is allowed.

97. The 3rd issue raised by the assessee in its cross objection is that it is entitled for the deduction of education's as and higher education says while computing the income under the head business and profession.

98. The assessee in the cross objection has claimed the deduction of the cess paid on the income tax on the reasoning that same is revenue expenditure. However, we note that there is an amendment under the provisions of section 40(a)(ii) of the Act wherein an explanation has been inserted with retrospective effect i.e. assessment year 2005-06. The amendment reads under:

[Explanation 3.—For the removal of doubts, it is hereby clarified that for the purposes of this sub-clause, the term "tax" shall include and shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax;]

99 As per the above amendment, there remains no ambiguity to the fact that the assessee cannot claim the deduction of the cess by treating the same as revenue expenditure. Thus, we do not find any merit in the cross objection raised by the assessee. Hence, the ground of objection raised by the assessee is hereby dismissed.

100. In the result cross objection of the assessee is hereby partly allowed.

Coming to ITA No. 523/Ahd/2020 an appeal by the Revenue for A.Y. 2016-17

101. The Revenue has raised following grounds of appeal:

(1) The Id. CIT(A) has erred in law and facts in directing the AO to allow the claim of Rs.7,33,500/- without tagging it to the finality of claim by the assessee and contingent upon the foot that double deduction shall not be allowed.

(2) The Id. CIT(A) has erred in law and facts in deleting the Section MA disallowance of Rs.7,10,83,986/- under both general and MAT provisions.

(3) The id. CIT(A) has erred in law and facts in deleting the disallowance of depreciation of Rs.3,47,739/- claimed on shares despite the fact that shares are not depreciable assets.

(4) The Id. CIT(A) has erred in law and facts in deleting the depreciation disallowance of Rs.52,78,662/-.

(5) The appellant craves, to leave, to amend and/or to alter any ground or add a new ground which may be necessary.

102. The first issue raised by the Revenue is that the learned CIT-A erred in deleting the addition made by the AO for an amount of ₹ 7,33,500/- which was contingent in nature.

103. At the outset, we note that the assessee has claimed an expense of ₹22,00,500.00 representing the subscription of license for the file protection/management system which was for a period of 3 years. Accordingly, the AO allowed 1/3 deduction of the same in that particular assessment year i.e. 2015-16 which was also confirmed by the learned CIT. However we note that the ITAT in CO No. 02/AHD/2021 has allowed hundred percent expenses treating the same as revenue in nature in that particular year. Thus, the question of claiming the same expense in the later years does not arise. Hence, the deduction for ₹ 7,33,500.00 is not allowable to the assessee otherwise it would lead to double deduction which is not permissible under the provisions of law. Hence, we reverse the order of the learned CIT-A and restore the order of the AO. Thus the ground of appeal of the revenue is allowed.

104. The next issue raised by the Revenue is that the learned CIT (A) erred in deleting the addition of Rs. 7,10,83,986/- made under section 14A of the Act read with rule 8D of Income Tax Rule and under computation of MAT in pursuance to the provisions of section 115JB of the Act.

105. At the outset we note that the issues raised by the Revenue in its grounds of appeal for the AY 2016-17 are identical to the issues raised by the Revenue in ITA No. 285/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in ITA No. 285/AHD/2020 shall also be applicable for the year under consideration i.e. AY 2016-17. The appeal of the Revenue for the assessment 2013-14 has been decided by us vide paragraph No. 23 to 23.8 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year

41

under consideration i.e. AY 2016-17. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

106. The Next issue raised by the Revenue is that the learned CIT (A) erred in deleting the disallowance of depreciation on office premises for Rs. 3,47,739/- only.

107. At the outset we note that the issues raised by the Revenue in its grounds of appeal for the AY 2016-17 are identical to the issues raised by it in ITA No. 285/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in ITA No. 285/AHD/2020 shall also be applicable for the year under consideration i.e. AY 2016-17. The appeal of the Revenue for the assessment 2013-14 has been decided by us vide paragraph Nos. 29 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2016-17. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

108. The next issue raised by the Revenue is that the learned CIT (A) erred in deleting the disallowance of depreciation on motor car and office equipment and UPS for Rs. 52,78,662/- only.

109. At the outset, we note that the issues raised by the Revenue in its grounds of appeal for the AY 2016-17 are identical to the issues raised by it in ITA No. 285/AHD/2020 for the assessment year 2013-14. Therefore, the findings given in ITA No. 285/AHD/2020 shall also be applicable for the year under consideration i.e. AY 2016-17. The appeal of the Revenue for the assessment 2013-14 has been decided by us vide paragraph No. 38 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration

i.e. AY 2016-17. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

110. In the result appeal of the Revenue is hereby partly allowed.

111. In the combined results:

| S. No. | Appeal No. | A. Year | Appellant | Result |
|--------|-------------------------------|----------------------|------------|----------------|
| 1. | ITA No. 285 & 523/Ahd/2020 | 2013-14 & 2016-17 | Department | Partly allowed |
| 2. | ITA No. 336 & 472/Ahd/2020 | 2014-15 & 2015-16 | Department | Dismissed |
| 3. | CO No. 81 & 80/Ahd/2020 | 2013-14 & 2014-15 | Assessee | Allowed |
| 4. | Co No. 02/Ahd/2021 | 2015-16 | Assessee | Partly allowed |

Order pronounced in the Court on 17/08/2022at Ahmedabad.

**Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

True Copy

Ahmedabad; Dated 17/08/2022

Manish

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण / DR, ITAT,
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad