आयकर अपीलीय अधिकरण,**'**डी**'** न्यायपीठ**,** चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

श्रीवी. दुर्गा राव**,माननीयन्यायिकसदस्य**एवं
श्री**जी. मंजूनाथा, माननीय**लेखासदस्य**केसमक्ष**
BEFORE SHRI V. DURGA RAO, HON'BLEJUDICIAL MEMBER AND SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकरअपीलसं./**ITA Nos.3201-3202, 3203-3204 & 3205/Chny/2016**
निर्धारणवर्ष**/Assessment Years: 2009-10, 2010-11 & 2012-13**

M/s.PVP Ventures Ltd., KRM Centre, 9th Floor, No.2, Harrington Road, Chennai-600 031. [**PAN:**AAACS 3101 P]	**v.**	The Dy. Commissioner- of Income Tax, Corporate Circle-5(2), Chennai.
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

आयकरअपीलसं./**ITA No.18/Chny/2017**
निर्धारणवर्ष**/Assessment Year: 2010-11**

The Dy. Commissioner of Income- Tax, Corporate Circle-5(2), Chennai.	**v.**	M/s.PVP Ventures Ltd., KRM Centre, 9th Floor, No.2, Harrington Road, Chennai-600 031. [**PAN:** AAACS 3101 P]
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

Assessee by	:	Mr.B. Ramakrishnan, CA
Department by	:	Dr.S.Palanikumar, CIT-DR
सुनवाईकीतारीख/Date of Hearing	:	24.08.2022
घोषणाकीतारीख /Date of Pronouncement	:	21.09.2022

आदेश **/ O R D E R**

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

This bunch of five appeals filed by the assessee and one appeal filed by the Revenue are directed against the order of the Commissioner of Income Tax (Appeals)-3, Chennai, dated 30.09.2016 and pertains to

assessment years 2009-10, 2010-11 & 2012-13. Since, the facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are being disposed off, by this consolidated order.

2. There are two appeals for the AYs 2009-10 & 2010-11 i.e. one against assessment order passed u/s.143(3) of the Act, and another against order passed u/s.143(3) r.w.s.147 of the Act. The assessee has raised various grounds including validity of re-opening of assessment u/s.147 of the Act, and therefore, for the sake of brevity, we deem it not necessary to reproduce the grounds of appeal raised by the assessee for these assessment years.

ITA No.3202/Chny/2016 for the AY 2009-10:

3. The first issue that came up for our consideration from Ground No.2 of the assessee's appeal is disallowance of interest expenditure u/s.36(1)(iii) of the Act. The facts with regard to the impugned dispute are that during the financial year relevant to the AY 2009-10, the assessee has borrowed Rs.40 Crs. from M/s. L& T Infrastructure Finance Ltd., in addition to the loans remain outstanding as on opening date. The assessee had also incurred interest expenditure of Rs.13,31,08,289/-. During the course of assessment proceedings, it was noticed that the assessee has borrowed loans from banks and financial institutions, but

diverted said loans to associate concerns and subsidiary companies in the form of loans for non-business purpose and thus, called upon the assessee to explain, as to why, interest expenditure u/s.36(1)(iii) of the Act, cannot be disallowed. In response, the assessee submitted that loans borrowed from banks and financial institutions have been given to subsidiary companies, for business purpose and thus, argued that there is a business expediency in extending loans to subsidiary companies. Because, the assessee has derived business advantage from extending loans and thus, question of disallowance of interest expenditure does not arise. The AO, however, was not satisfied with the explanation of the assessee and according to the AO, the assessee has borrowed huge funds from banks and financial institutions and given interest free loans and advances to subsidiary companies. Therefore, opined that no part of borrowed funds was utilized for the purpose of business of the assessee and hence, rejected the arguments of the assessee and disallowed total interest debited to P & L A/c amounting to Rs.13,31,08,289/- u/s.36(1)(iii) of the Act.

4. On appeal, the Ld.CIT(A) confirmed the additions made by the AO towards disallowance of interest.

5. The Ld.AR for the assessee submitted that the Ld.CIT(A) erred in not appreciating the fact that the assessee has taken loans from the year

1993 and advanced to subsidiary companies for business purpose. The assessee has entered into a JDA with M/s.Unitech Cestos Realtors Pvt. Ltd., for development of the property on 22.05.2008 and started generating revenue from AY 2011-12. Therefore, it is incorrect on the part of the AO as well as the Ld.CIT(A) to allege that there is a diversion of interest bearing funds for non-business purpose. In this regard, he relied upon the decision of the Hon'ble Supreme Court in the case of SA Builders Ltd.,reported in [2007] 158 Taxman 74 (SC) and also the decision of the Hon'ble Punjab& Haryana High Court in the case of Bright Enterprises (P) Ltd. v. CIT reported in [2015] 61 taxmann.com 73.

6. The ld. DR, on the other hand, supporting the order of the Ld.CIT(A) submitted that there is no business activity for the impugned assessment years, which is evident from the financial statements of the assessee, where except other income being interest income, there is no income from operation, which means, the assessee has not carried out any business activity. It is also an admitted fact that the assessee has borrowed huge funds from banks and financial institutions and given loans and advances to subsidiary companies and associate concerns without any interest. The AO after considering relevant facts has rightly disallowed interest expenses and their order should be upheld.

7. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The facts borne out from the record indicates that during the impugned assessment year, the assessee does not generate any income from business operations except other income being interest income as per published accounts which is available in Paper Book filed by the assessee. It is also an admitted fact that the assessee has borrowed huge loans and advances from banks and financial institutions and advanced interest free loans to subsidiary companies and associate concerns. Although, the assessee claims that there is a business expediency in advancing loans and advances to subsidiary companies and associate concerns, but, on perusal of financial statements filed by the assessee, we find that even the subsidiary companies does not have any business activity to support the claim of the assessee. Further, the Ld.CIT(A) had recorded categorical findings that loans borrowed from M/s.L& T Infrastructure Pvt. Ltd., has been utilized for acquiring shares and advancing loans to sister concerns. The assessee had not also filed any details to support the commercial expediency to justify its case. Mere stating that loans given to sister concerns on account of commercial expediency without any evidences, can be at best be considered only claim without any substance. Therefore, we are of the considered view that there is no error in the reasons given by the AO as well as the Ld.CIT(A) to disallow interest paid

on loans borrowed from banks and financial institutions u/s.36(1)(iii) of the Act.

8. As regards, the decision relied upon by the assessee in the case of SA Builders (supra), there is no dispute with regard to the ratio laid down by the Hon'ble Supreme Court on the issue of interest vis-a-vis business expediency. However, said judgment cannot be universally applied, but to get the benefit of this case, the assessee proves with evidence that there is commercial expediency in advancing loans to sister concerns. In this case, the assessee fails to establish any commercial expediency in extending loans to subsidiary. In this case, nothing was brought on record to prove the claim of the assessee that loans and advances to subsidiary companies and associate concerns is for business purpose and there is a commercial expediency, which benefitted the business of the assessee and therefore, we cannot find fault with the reasons given by the AO to disallow interest u/s.36(1)(iii) of the Act. Thus, we reject the arguments of the assessee and sustained the addition towards disallowance of interest u/s.36(1)(iii) of the Act.

9. The next issue that came up for our consideration from Ground No.3 of the assessee's appeal is disallowance of depreciation on plant & machinery amounting to Rs.3,29,95,364/-. The AO has disallowed depreciation claimed on plant & machinery on the ground that the

assessee has not admitted any income from business or profession for the impugned assessment years. It was the arguments of the assessee before the AO that depreciation on plant & machinery, cannot be disallowed, because, once depreciation has been allowed in the initial years on block of assets, even if, no business activity carried out in the subsequent financial years, the depreciation for normal wear and tear needs to be allowed. The assessee further contended that it has entered into joint development agreement with M/s.Unitech Cestos Realtors Pvt. Ltd., for development of 70 acres of land and income from said project is recognized from FY 2012-13 on the basis of Accounting Standard-9. Further, M/s.SSI Ltd., which was directly amalgamated with assessee vide High Court order dated 25.04.2008 also indicates that the assessee is entered into real-estate business through its subsidiaries. Therefore, the assessee argued that the depreciation on plant & machinery, cannot be disallowed.

10. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The AO has disallowed depreciation on plant & machinery on the ground that the assessee has not generated any business income for the impugned assessment years except other income being interest income. We find that as per declared financial results for the year ending 31.03.2009, except other income being interest income on debentures and deposits

and income from current investments, the assessee has not earned any receipts from operations including so called real estate business. Further, as admitted by the assessee itself, revenue from real estate business was started from FY 2011-12 onwards. From the above, it is very clear that for the impugned assessment years, there is business activity. Therefore, the question of allowing depreciation on plant & machinery needs to be examined in light of all the assets, on which, depreciation was claimed and the use/deployment of the said assets in the business of the assessee. As per financial statements of the assessee, the assessee has claimed depreciation on plant & machinery, vehicles, computers, etc. The assessee could not explain how these assets were used in business of the assessee and how it is eligible for depreciation claim. Although, the assessee argued that once depreciation has been allowed in the initial years on block of assets, then in subsequent FYs depreciation needs to be allowed even if some plant & machinery or assets are not put in the business of the assessee, but we do not find any merits in the arguments of the assessee for the simple reason that the assessee has claimed these assets from M/s.SSI Ltd., by virtue of amalgamation of the said company by the order of the High Court. Further, SSI Ltd was into different business other than real estate business and the assets of SSI Ltd which were acquired may not be useful for the business of the assessee. Therefore, merely for the simple reason that those assets were come into the books of accounts of the assessee on amalgamation, it cannot be said

that the assessee has put to use those assets in its business. In this case, the assessee could not substantiate its claim of depreciation on plant & machinery in light of reasons given by the AO that there is no business carried out for the impugned assessment years. Therefore, we are of the considered view that the assessee is not entitled for depreciation on plant & machinery. The assessee has relied upon various case laws on the issue of depreciation on plant & machinery and we find that those case laws are not applicable to the assessee's case and thus, case laws relied upon by the assessee are rejected.

11. In this view of the matter and considering facts and circumstances of the case, we are of the considered view that the assessee is not entitled for depreciation on plant & machinery, and thus, we are inclined to uphold the findings of the Ld.CIT(A) and reject the ground taken by the assessee.

12. The next issue that came up for our consideration from Ground No.4 of the assessee's appeal is disallowance of foreign travel expenses. The AO has disallowed foreign travel expenses on the ground that the assessee has failed to prove nexus between the expenditure for foreign travel and business purpose. It was the explanation of the assessee that the Director of the company has taken a foreign travel for the purpose of business of a parent company but not for the assessee's business.

13. Having heard both the sides and considering relevant material on record and we find that the assessee could not justify foreign travel expenses with necessary evidence to prove that said expenditure has been incurred for the purpose of business of the assessee. If the assessee has incurred foreign travel expenses for the business of the parent company, then, the parent company should have incurred the cost of travel of the Director, but not the assessee company. Therefore, we are of the considered view that the assessee is not entitled for deduction towards foreign travel expenses and thus, we are inclined to uphold the findings of the Ld.CIT(A) and reject the ground taken by the assessee.

14. In the result, appeal filed by the assessee in ITA No.3202/Chny/2016 for the AY 2009-10 is dismissed.

ITA No.3201/Chny/2016 for the AY 2009-10:

15. The first issue that came up for our consideration from the assessee's appeal is re-opening of assessment u/s.147 of the Act.

16. The brief facts of the case are that the assessee company is engaged in the business of urban infrastructure and development, filed its return of income for the AY 2009-10 on 30.09.2009 admitting a total loss of Rs.26,08,16,306/-. The assessment has been completed u/s.143(3) of

the Act, on 30.01.2015 and determined total loss at Rs.5,69,21,225/-. The assessment has been subsequently re-opened u/s.147 of the Act, for the reasons recorded, as per which, income chargeable to tax had been escaped assessment on account of assessment of interest income under the head 'income from business' as against 'income from other sources'. According to the AO, the assessee has offered interest income under the head 'income from business and profession' and also claimed various expenses against income, even though, there was no business activity for the year under consideration. Further, business of the assessee was started in the FY 2008-09 relevant to AY 2009-10 and expenses incurred by the assessee on administration and finance charges are required to be debited to the project work-in-progress. Since, the assessee has considered interest income under the head 'income from business' and also claimed expenses against income without debiting to project work-in-progress, the income chargeable to tax had been escaped assessment and thus, re-opened assessment u/s.147 of the Act, and completed assessment u/s.143(3) r.w.s.147 of the Act, on 30.01.2015 and determined total income at Rs.14,82,884/-.

17. On appeal, the Ld.CIT(A) upheld the validity of re-opening of assessment and also confirmed the additions made by the AO towards disallowance of expenses and also assessment of other income under the head 'income from other sources'.

18. The Ld.AR for the assessee submitted that the Ld.CIT(A) is erred in confirming the re-opening of assessment u/s.147 of the Act, without appreciating the fact that the re-opening of assessment is without any fresh tangible materials and on change of opinion with same set of facts and materials which cannot be done under the law. The Ld.AR for the assessee submitted that if you see reasons recorded for re-opening of assessment, the AO refers to financial statements and income and expenditure reported by the assessee for the relevant assessment year to form reasonable belief of escapement of income without there being any fresh tangible material to suggest escapement of income. Therefore, he submitted that in absence of fresh tangible material, re-opening of assessment is invalid and liable to be quashed. In this regard, he relied upon the decision of the Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Ltd., reported in 320 ITR 561 (SC) and also the decision of the Hon'ble Madras High Court in the case of RPG Transmissions Ltd., reported in [2014] 48 taxmann.com 57 (Madras).

19. The Ld.DR, on the other hand, supporting the order of the Ld.CIT(A), submitted that assessment for the impugned assessment year has been re-opened within four years from the end of the relevant assessment years. Further, there is tangible material in the possession of the AO to form reasonable belief of escapement of income. Further, at

the stage of re-opening of assessment what is required to be seen is formation of belief on the basis of material in the possession of the AO. However, the AO does not require to establish escapement of income. In this case, the assessment has been re-opened on the basis of fresh materials and thus, there is no merit in the arguments of the assessee for re-opening of assessment is on change of opinion. In this regard, he relied upon the decision of the Hon'ble Madras High Court in the case of Cairn India Ltd. v. Dy. Director of Income Tax-1, (International Taxation), Chennai, reported in [2021] 130 taxmann.com 167 (Madras).

20. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The AO re-opened the assessment u/s.147 of the Act, for the reasons recorded, as per which, income chargeable to tax had been escaped assessment on account of assessment of other income under the head 'income from other sources' and also deduction allowed towards expenditure incurred by the assessee against other income without debiting to capital work-in-progress. We have gone through reasons for re-opening of assessment in light of arguments of the assessee and we find that the AO has formed reasonable belief of escapement of income within the meaning of Sec.147 of the Act, on the basis of financial statements filed by the assessee and relevant income and expenditure disclosed in the said financial statements without there being any reference to fresh material come to

the possession of the AO subsequent to completion of assessment u/s.143(3) of the Act. The law is very clear in as much as wherever assessment is re-opened within four years or beyond years, but the basis for re-opening of assessment should be on the basis of fresh material come to the possession of the AO subsequent to the completion of original assessment proceedings. In other words, there should be live nexus between reasonable belief of escapement of income and material relied upon by the AO to form said belief. In absence of any material which suggest escapement of income re-opening of assessment on same set of materials amounts to change of opinion. In our considered view, which is not permissible under the law. The Hon'ble Supreme Court in the case of Kelvinator of India Ltd., (supra) has considered the issue of re-opening of assessment and after considering relevant facts held that the AO has power to re-open provided that there is a tangible material to come to the conclusion that there is an escapement of income for assessment, reasons must have a live link for formation of belief. A similar view expressed by the Hon'ble Delhi High Court in the case of CIT v. Usha International Ltd., reported in 348 ITR 485 where the Hon'ble Delhi High Court by following the decision of the Hon'ble Supreme Court in the case of Kelvinator of India Ltd., held that in absence of fresh material, re-opening of assessment is invalid and liable to be quashed. The Hon'ble jurisdictional High Court of Madras in the case of RPG Transmission Ltd., (supra) held

that the re-opening was not justified where the AO had actually before him all relevant materials at time of original assessment itself.

21. In this case, on perusal of reasons recorded for re-opening of assessment, we find that the AO does not have any fresh tangible material to come to the conclusion that there is an escapement of income and further, the basis for reasonable belief of escapement of income is financial statements filed by the assessee for relevant assessment year and thus, we are of the considered view that re-opening of assessment in the given facts and circumstances of the case, is bad in law and liable to be quashed and hence, we quashed re-opening of assessment and consequent re-assessment order passed by the AO u/s.143(3) r.w.s.147 of the Act.

22. In the result, appeal filed by the assessee in ITA No.3201/Chny/2016 for the AY 2009-10 is allowed.

ITA No.3204/Chny/2016 & ITA No.18/Chny/2017:

23. The only issue that came up for our consideration from the assessee as well as the revenue appeal is disallowance u/s.14A r.w.r.8D of Income Tax Rules, 1962, amounting to Rs.12,31,77,832/-. During the course of assessment proceedings, the AO noticed that the assessee has made huge investments in subsidiaries and associate concerns and however, does not make suo-moto disallowance for expenses attributable to

exempt income. The AO further noted that the assessee has borrowed huge loans and advances and paid interest. Therefore, invoked provisions of Rule 8D of IT Rules, 1962 and disallowed interest expenses and other expenses u/s.14A of the Act, amounting to Rs.12,31,77,832/-.

24. On appeal, the Ld.CIT(A) deleted the addition made u/s.14A r.w.r. 8D of The Income Tax Rules, 1962. However, directed the AO to disallow expenses under the head 'interest and finance charges' on account of non-commencement of business activities for the AY 2011-12.

25. The Ld.AR for the assessee submitted that the Ld.CIT(A) erred in directing the AO to consider interest and finance charges, disallowance because of non-commencement of business, even though, he had deleted additions made u/s.14A r.w.r.8D of IT Rules. The Ld.AR further referring to financial statements submitted that for the impugned assessment year, the assessee does not earned any exempt income and in absence of exempt income, expenses relatable to exempt income cannot be disallowed. In this regard, he relied upon the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd., reported in [2015] 61 taxmann.com 118 (Delhi). As regards, disallowance of interest expenditure for non-commencement of business, the assessee submitted that the company has entered into JDA for development of 70 acres of land on 22.05.2008 and income from the said project has been

recognized from AY 2013-14 on the basis of Accounting Standard-9, which has been substantiated in the directions issued u/s.144A dated 09.12.2016 for the AY 2014-15.

26. The Ld.DR, on the other hand, supporting the order of the Ld.CIT(A), submitted that the Ld.CIT(A) erred in deleting the disallowance made by the AO u/s.14A r.w.r.8D of IT Rules, by following the decision of ITAT Chennai Bench in the case of M.Bhaskaran, in ITA No.1717/MDS/2013 dated 31.07.2014 without appreciating the fact that Department has not accepted the decision of Tribunal on merits and has preferred further appeal before the Hon'ble High Court. The DR further submitted that as per CBDT Circular No.5/2014 dated 11.02.2014, sec.14A r.w.r.8D provides for disallowance of expenditure in a particular year, even where the taxpayer is not in receipt of exempt income for that year. The Ld.CIT(A) without appreciating the above facts simply deleted the additions made by the AO.

27. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The issue of disallowance of expenses u/s.14A r.w.r.8D in absence of exempt income is not a ***res integra***. The Hon'ble Delhi High Court in the case of Cheminvest Ltd., had considered a similar issue and held that Sec.14A of the Act, will not apply, if no exempt income is received during the previous year. The ITAT Chennai Bench in the case of M.Baskaran had

considered an identical issue and held that the disallowance cannot be made u/s.14A of the Act, where assessee had not earned/received any exempt income during relevant year. The jurisdictional High Court of Madras in the case of Redington (India) Ltd., reported in [2017] 77 taxmann.com 257 (Madras), held that where there is no exempt income in relevant year, there cannot be a disallowance of expenditure u/s.14A of the Act, in relation to any assumed income. The Hon'ble Supreme Court in the case of Chettinad Logistics (P.) Limited (2018) 95 taxmann.com 250 (SC) held that Sec.14A of the Act, cannot be invoked where no exempt income earned by the assessee in relevant assessment year. In this case, there is no dispute with regard to the fact that the assessee has not earned any exempt income. Therefore, we are of the considered view that the AO is erred in disallowing expenditureu/s.14A r.w.r.8D(ii) of IT Rules 1962. The Ld.CIT(A) after considering relevant facts has rightly deleted the addition made u/s.14A r.w.r.8D of IT Rules. Hence, we are inclined to uphold the findings of the Ld.CIT(A) and reject the ground taken by the Revenue.

28. As regards enhancement of income by the Ld.CIT(A) towards disallowance of interest and finance charges for non-commencement of business, we find that for the impugned assessment year as per declared financial results of the assessee, the assessee has not earned any income from operations except other income being interest income from

debentures and income from current investments. Although, the assessee claims to have commenced its business activity of real estate in light of JDA with M/s.Unitech Cestos Realtors Pvt. Ltd., for development of 70 acres of land by virtue of JDA on 22.05.2008, but from the admission of the assessee itself income from operations in relation to real estate business has been commenced from AY 2013-14 onwards. Therefore, we are of the considered view that any expenditure incurred including interest and finance charges in connection with said business should be added back to project work-in-progress to be claimed in appropriate year. Therefore, we are of the considered view that there is no error in the reasons given by the Ld.CIT(A) in directing the AO to disallow interest and finance charges for non-commencement of business. Hence,we are inclined to uphold the findings of the Ld.CIT(A) and reject the ground taken by the Revenue.

29. In the result, appeal filed by the assessee in ITA No.3204/Chny/2016 & appeal filed by the Revenue in ITA No.18/Chny/2017 are dismissed.

ITA No.3203/Chny/2016 for the AY 2010-11:

30. The first issue that came up for our consideration from Ground No.2 of the assessee's appeal is validity of re-opening of assessment. The facts with regard to the impugned dispute are that the assessee is engaged in the business of Urban Infrastructure Development, filed its

return of income for the AY 2010-11 on 29.09.2010 admitting a loss of Rs.23,30,76,150/-. The case was selected for scrutiny and the assessment has been completed u/s.143(3) of the Act, on 31.03.2013 and determined total loss at Rs.10,98,98,318/-, by making disallowances u/s.14A r.w.r.8D of Income Tax Rules, 1962. The assessment has been subsequently re-opened u/s.147 of the Act, for the reasons recorded, as per which, income chargeable to tax had been escaped assessment on account of depreciation on plant & machinery and accordingly, notice u/s.148 of the Act, dated 24.01.2014 was served on the assessee. In response to the notice, the assessee vide letter dated 27.01.2014 submitted that return of income filed on 29.09.2010 may be treated as return of income filed in response to the notice u/s.148 of the Act. In the meantime, the assessee has filed objection for re-opening of assessment and the AO without disposing off objection filed by the assessee issued a show cause notice on 23.02.2014 to file necessary details. The assessee has filed a Writ Petition before the Hon'ble High Court vide WP No.8096 which was disposed off on 19.03.2014 by the Hon'ble High Court with the direction to AO to pass a reasoned order as per the decision of the Hon'ble Supreme Court in the case of GKN Drive Shaft India Ltd., reported in 259 ITR 19. As per the directions of the Hon'ble High Court, the assessee has filed objection before the AO and the AO has disposed off objection filed by the assessee and completed assessment u/s.143(3) r.w.s.147 of the Act as on 31.03.2013 and disallowed depreciation on

plant & machinery amounting to Rs.3,29,95,364/-. The assessee carried the matter in appeal before the First Appellate Authority, but could not succeed. The Ld.CIT(A), for the reasons stated in his appellate order dated 27.04.2015, rejected the ground taken by the assessee and upheld the re-opening of assessment.

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

32. The Ld.AR for the assessee submitted that the Ld.CIT(A) is erred in confirming the re-opening of assessment u/s.147 of the Act, without appreciating the fact that the re-opening of assessment is without any fresh tangible materials and on change of opinion with same set of facts and materials which cannot be done under the law. The Ld.AR for the assessee submitted that if you see reasons recorded for re-opening of assessment, the AO refers to financial statements and income and expenditure reported by the assessee for the relevant assessment year to form reasonable belief of escapement of income without there being any fresh tangible material to suggest escapement of income. Therefore, he submitted that in absence of fresh tangible material, re-opening of assessment is invalid and liable to be quashed. In this regard, he relied upon the decision of the Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Ltd., reported in 320 ITR 561 (SC) and also the

decision of the Hon'ble Madras High Court in the case of RPG Transmissions Ltd., reported in [2014] 48 taxmann.com 57 (Madras).

33. The Ld.DR, on the other hand, supporting the order of the Ld.CIT(A), submitted that assessment for the impugned assessment year has been re-opened within four years from the end of the relevant assessment years. Further, there is tangible material in the possession of the AO to form reasonable belief of escapement of income. Further, at the stage of re-opening of assessment what is required to be seen is formation of belief on the basis of material in the possession of the AO. However, the AO does not require to establish escapement of income. In this case, the assessment has been re-opened on the basis of fresh materials and thus, there is no merit in the arguments of the assessee for re-opening of assessment is on change of opinion. In this regard, he relied upon the decision of the Hon'ble Madras High Court in the case of Cairn India Ltd. v. Dy. Director of Income Tax-1, (International Taxation), Chennai, reported in [2021] 130 taxmann.com 167 (Madras).

34. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The AO re-opened the assessment u/s.147 of the Act, for the reasons recorded, as per which, income chargeable to tax had been escaped assessment on account of assessment of other income under the head 'income from other sources' and also deduction allowed towards depreciation on plant

and machinery. We have gone through reasons for re-opening of assessment in light of arguments of the assessee and we find that the AO has formed reasonable belief of escapement of income within the meaning of Sec.147 of the Act, on the basis of financial statements filed by the assessee and relevant income and expenditure disclosed in the said financial statements without there being any reference to fresh material come to the possession of the AO subsequent to completion of assessment u/s.143(3) of the Act. The law is very clear in as much as wherever assessment is re-opened within four years or beyond years, but the basis for re-opening of assessment should be on the basis of fresh material come to the possession of the AO subsequent to the completion of original assessment proceedings. In other words, there should be live nexus between reasonable belief of escapement of income and material relied upon by the AO to form said belief. In absence of any material which suggest escapement of income re-opening of assessment on same set of materials amounts to change of opinion. In our considered view, this is not permissible under the law. The Hon'ble Supreme Court in the case of Kelvinator of India Ltd., (supra) has considered the issue of re-opening of assessment and after considering relevant facts held that the AO has power to re-open provided that there is a tangible material to come to the conclusion that there is an escapement of income for assessment, reasons must have a live link for formation of belief. A similar view expressed by the Hon'ble Delhi High Court in the case of CIT

v. Usha International Ltd., reported in 348 ITR 485 where the Hon'ble Delhi High Court by following the decision of the Hon'ble Supreme Court in the case of Kelvinator of India Ltd., held that in absence of fresh material, re-opening of assessment is invalid and liable to be quashed. The Hon'ble jurisdictional High Court of Madras in the case of RPG Transmission Ltd., (supra) held that the re-opening was not justified where the AO had actually before him all relevant materials at time of original assessment itself.

35. In this case, on perusal of reasons recorded for re-opening of assessment, we find that the AO does not have any fresh tangible material to come to the conclusion that there is an escapement of income and further, the basis for reasonable belief of escapement of income is financial statements filed by the assessee for relevant assessment year and thus, we are of the considered view that re-opening of assessment in the given facts and circumstances of the case, is bad in law and liable to be quashed and hence, we quashed re-opening of assessment and consequent re-assessment order passed by the AO u/s.143(3) r.w.s.147 of the Act.

36. In the result, appeal filed by the assessee in ITA No.3203/Chny/2016 for the AY 2010-11 is allowed.

ITA No.3205/Chny/2016 for the AY 2012-13:

37. The first issue that came up for our consideration from Ground Nos.2 & 3 of the assessee's appeal is disallowance u/s.14A r.w.r.8D of Income Tax Rules, 1962. During the course of assessment proceedings, the AO noticed that the assessee has earned dividend income of Rs.50,22,099/-. However, does not made suo moto disallowance of expenses relatable to exempt income u/s.14A of the Act. Therefore, invoked Rule 8D and determined total disallowance of Rs.1,28,31,758/-. On appeal, the Ld.CIT(A) has sustained the additions made by the AO towards disallowance u/s.14A of the Act.

38. The Ld.AR for the assessee submitted that the Ld.CIT(A) erred in sustaining the disallowance u/s.14A r.w.r.8D without appreciating the fact that the assessee has made investments in equity shares for the purpose of controlling interest. The Ld.AR further submitted that if at all any disallowance is required to be made, then it cannot exceed exempt income earned for the year.

39. The Ld.DR, on the other hand, supported the order of the Ld.CIT(A).

40. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The issue of disallowance of expenses u/s.14A r.w.r.8D in absence of exempt income

is not a ***res integra***. The Hon'ble Delhi High Court in the case of Cheminvest Ltd., had considered a similar issue and held that Sec.14A of the Act, will not apply, if no exempt income is received during the previous year. The ITAT Chennai Bench in the case of M.Baskaran had considered an identical issue and held that the disallowance cannot be made u/s.14A of the Act, where assessee had not earned/received any exempt income during relevant year. The jurisdictional High Court of Madras in the case of Redington (India) Ltd., reported in [2017] 77 taxmann.com 257 (Madras), held that where there is no exempt income in relevant year, there cannot be a disallowance of expenditure u/s.14A of the Act, in relation to any assumed income. The Hon'ble Supreme Court in the case of Chettinad Logistics (P.) Limited (2018) 95 taxmann.com 250 (SC) held that Sec.14A of the Act, cannot be invoked where no exempt income earned by the assessee in relevant assessment year. In this case, there is no dispute with regard to the fact that the assessee has not earned any exempt income. Therefore, we are of the considered view that the AO is erred in disallowing expenditureu/s.14A r.w.r.8D(ii) of IT Rules. The sum and substance of ratio laid down by various courts is that disallowance contemplated u/s 14A cannot exceed exempt income. In this case, the assessee has earned exempt income of Rs. 50,22,099/-, whereas the Assessing Officer has disallowed expenditure u/s 14A of the Act, at Rs. 1,28,31,758/- contrary to settled law. Therefore, we direct the

AO to restrict disallowance u/s.14A of the Act, to the extent of exempt income earned for the year amounting to Rs.50,22,099/-.

41. In the result, appeal filed by the assessee in ITA No.3205/Chny/2016 is partly allowed.

Order pronounced on the day of 21st September, 2022, in Chennai.

Sd/-	***Sd/-***
(वी. दुर्गा राव)	**(जी.मंजूनाथा)**
(V. DURGA RAO)	**(G. MANJUNATHA)**
न्यायिकसदस्य**/JUDICIAL MEMBER**	लेखासदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 21st September, 2022.
TLN

आदेशकीप्रतिलिपिअग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF