

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"H" BENCH, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND**  
**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA No.3004/Mum./2019**  
(Assessment Year : 2013-14)

**ITA No.611/Mum./2020**  
(Assessment Year : 2014-15)

**ITA No.4229/Mum./2019**  
(Assessment Year : 2015-16)

**ITA No.1228/Mum./2020**  
(Assessment Year : 2015-16)

Keystone Realtors Pvt. Ltd.  
(Merged Entity: Rustomjee  
Construction Pvt. Ltd.)  
702, Natraj, M.V. Road  
W.E. Highway, Andheri (East)  
Mumbai 400 069 PAN – AAACK2499Q

..... Appellant

v/s

Dy. Commissioner of Income Tax  
Circle-(2)4, Mumbai

..... Respondent

Assessee by : Shri Naresh Kumar  
Revenue by : Shri Rakesh Ranjan

Date of Hearing – 18/08/2022

Date of Order – 14/11/2022

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present batch of 4 appeals has been filed by the assessee challenging the separate impugned orders passed under section 250 of the Income Tax Act, 1961 (*the Act*) by the learned Commissioner of Income Tax (Appeals)-48, Mumbai [*learned CIT(A)*].

2. Since these appeals pertain to the same assessee and the issues involved are also, inter-alia, common, therefore, as a matter of convenience,

these appeals were heard together and are being disposed off by way of this consolidated order. With the consent of the parties, the assessee's appeal for the assessment year 2013-14 is taken up as a lead case.

**ITA No. 3004/Mum./2019**  
**Assessee's appeal - A.Y. 2013-14**

3. This appeal has been filed by the assessee challenging the impugned order dated 28/02/2019, passed by the learned CIT(A), for the assessment year 2013-14.

4. In this appeal, the assessee has raised the following grounds:

*"1. On the facts and circumstances of the case and in 17,62 law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with regards to disallowance u/s. 14A of the Income Tax Act, 1961 of Rs. 54,33,62,192/- in relation to exempt income earned during the year under consideration. It is submitted that the disallowance made by the learned assessing officer is incorrect.*

*Without prejudice to the above, it is submitted that no amount of interest on secured loan should be taken into consideration while making disallowance u/s. 14A r.w.r. 8D of the Income Tax Rules, 1962 for the year under consideration. Further it is submitted that the net interest expenses of Rs. 79,31,65,273/- (Interest expenses of Rs. 94,67,75,590 /-(except interest on secured loan) minus interest income of Rs. 15,36,10,317/-) should only be considered for working of disallowance u/s. 14A r.w.r. 8D of the Income Tax Rules, 1962 for the year under consideration. It is therefore prayed that in any case, disallowance u/s. 14A r.w.r. 8D of the Income Tax Act, 1962 should be reworked taking into consideration the above figures.*

*2. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to disallowance of interest expenses of Rs. 1,02,05,95,730/- as not admissible to be claimed as expenses and added the same to the WIP of the Project. It is submitted that the appellant has already capitalized finance cost of Rs.6,69,81,882/- on the basis of project inflows, project outflows, cumulative fund utilization and hence the balance portion of the finance cost is debited to P&L account and not capitalized to P&L account.*

*Without Prejudice to the above it is submitted that the appellant company has offered the income on the basis of the percentage completion method during*

*the year under consideration and therefore proportionate allowance of interest expenses should be allowed during the year under consideration. It is therefore prayed that necessary direction should be given in this regard.*

*3. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to disallowance of commission expenses of Rs.97,30,774/- as not admissible to be claimed as expenses and added the same to the WIP of the Project.*

*4. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to disallowing interest on delayed expenses of Rs.48,53,314/- out of the total disallowance Rs.54,54,550/- as not admissible to be claimed as expenses u/s. 37 of the Income Tax Act, 1961.*

*5. Your appellant craves to add, alter, or amend any of the grounds of appeal on or before the date of hearing of appeal."*

5. The brief facts of the case are: The assessee is engaged in the business of construction and development of real estate. For the year under consideration, the assessee filed its return of income on 30/09/2013, declaring a total loss of Rs. 1,37,32,91,478. The return of income filed by the assessee was selected for scrutiny and notices under sections 143(2) and 142(1) along with questionnaire were issued. The Assessing Officer ('AO') vide assessment order dated 30/03/2016, passed under section 143(3) of the Act computed the total income of the assessee at Rs. 20,62,41,284, after making certain disallowances/additions. In further appeal, learned CIT(A) vide impugned order dismissed the appeal filed by the assessee. Being aggrieved, the assessee is in appeal before us.

6. The issue arising in ground No. 1, raised in assessee's appeal, is pertaining to disallowance under section 14A r/w Rule 8D of the Income Tax Rules, 1962.

7. The brief facts of the case pertaining to this issue are: During the course of assessment proceedings, the assessee was asked to show cause why the disallowance under section 14A of the Act be not made. In response, assessee submitted that it has already disallowed Rs. 7,49,654, under section 14A for the year under consideration. However, in absence of any details of the expenses disallowed by the assessee under section 14A of the Act and the basis of computing the above disallowance, the AO vide order passed under section 143(3) of the Act made the disallowance of Rs. 54,33,62,192, under section 14A r/w Rule 8D. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

8. During the hearing, the learned Authorised Representative (*'learned AR'*) submitted that during the year no dividend income was earned by the assessee.

9. On the other hand, the learned Departmental Representative (*'learned DR'*) vehemently relying upon the orders passed by the lower authorities submitted that the assessee has suo moto made disallowance under section 14A of the Act and it indicates that the assessee believes that some expenditure is attributable to the income which does not form part of the total income. The learned DR also submitted that in view of amendment by the Finance Act, 2022, section 14A is applicable even if no dividend income has accrued in the year under consideration.

10. We have considered the rival submissions and perused the material available on record. From the financial statement of the assessee, forming part of the paper book from pages 41 to 66, it is evident that no dividend income was earned by the assessee during the year under consideration. The aforesaid fact has also not been disputed by the Revenue. However, the Revenue has placed reliance upon the recent amendment vide Finance Act, 2022, whereby non-obstante clause and explanation have been inserted in section 14A of the Act to the effect that section shall apply even if no exempt income has accrued or arisen or has been received during the year. We find that while dealing with the issue of whether the aforesaid amendment by the Finance Act, 2022 is prospective or retrospective in operation, Hon'ble Delhi High Court in PCIT vs M/s Era infrastructure (India) Ltd, [2022] 288 Taxman 384 (Delhi) held that the amendment by Finance Act, 2022 in section 14A is prospective and will apply in relation to the assessment year 2022-23 and subsequent assessment years. Thus, in view of the aforesaid decision of Hon'ble Delhi High Court, we find no merits in the submission of learned DR.

11. We further find that the Hon'ble Delhi High Court in Cheminvest Ltd. v. CIT: [2015] 378 ITR 33 (Delhi) held that section 14A will not apply if no exempt income is received or receivable during the relevant previous year. Therefore, respectfully following the aforesaid decision, the AO is directed to delete the disallowance made under section 14A read with Rule 8D. As a result, ground No. 1 raised in assessee's appeal is allowed.

12. The issue arising in ground No. 2, raised in assessee's appeal, is pertaining to the disallowance of interest expenses.

13. The brief facts of the case pertaining to this issue are: During the year, the assessee incurred finance cost of Rs. 108,75,77,612 out of which Rs. 6,69,81,882 was allocated to those contracts of which construction has been completed and the balance interest of Rs. 102,05,95,730 was debited to the profit and loss account and not capitalised to work in progress ('WIP'). During the course of assessment proceedings, the assessee was asked to show cause as to why the balance interest should not be disallowed as revenue expenditure and capitalised to the WIP. In response, the assessee submitted that it has followed the accounting policy for recognition and capitalisation of borrowing cost which is as per the Accounting Standards ('AS') 16. Therefore, the said interest expenses are not transferred to WIP and debited to the profit and loss account. The AO vide order passed under section 143(3) of the Act did not agree with the submissions of the assessee and held that there is a direct nexus between the borrowed fund and the projects undertaken and therefore the interest of the respective project fund can be attributed to the respective project on actual basis and the same should not be claimed as an expenditure. The AO further held that once the interest is attributable to the project, the same is to be allowed as business expenditure in the ratio of revenue offered from the project and WIP at the end of the year. Accordingly, the AO disallowed the interest of Rs. 102,05,95,730 as revenue expenditure and further increased the closing WIP.

14. The CIT(A), vide impugned order dismissed the appeal filed by the assessee on this issue by observing as under:

*"The details filed by assessee only shows that how much interest expenses are on various types of funds raised - how much interest is on secured loans and how much on unsecured loans and how much are on debentures and others. But assessee has shied away and failed to give details as to where and how these funds (raised through secured / unsecured loans and through debentures etc.) are deployed. Which fund is related to which project and within a project, no bifurcations of application of funds as capital and Revenue is provided....."*

Being aggrieved, the assessee is in appeal before us.

15. During the hearing, learned AR submitted that the assessee has followed the method of accounting as per AS 16 and capitalised the direct cost as WIP as it takes longer for the project to get complete. Further, the remaining cost was claimed as an expenditure.

16. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

17. We have considered the rival submissions and perused the material available on record. In the present case, insofar as the borrowing cost which was directly allocated to the project was capitalised and the balance cost which was not directly attributable to the project was debited by the assessee to the profit and loss account as revenue expenses. The AO disallowed the expenditure on the basis that interest expenditure has a direct nexus with the project undertaken and therefore same is to be allowed as business expenditure in the ratio of revenue offered from the project. The AO, however,

admitted that finance cost as debited by the assessee is on borrowed funds, which are sanctioned on the basis of specific projects. However, as noted above, the learned CIT(A) dismissed the appeal filed by the assessee on this issue in absence of the details of the projects to which these funds were applied. Thus, the borrowing of funds for the purpose of business has not been doubted by any of the lower authorities. The assessee has now produced before us the details of parties from whom the loan was availed and projects as well as the purpose for which the loan was utilized.

18. In this regard, it is relevant to note that the Hon'ble jurisdictional High Court in CIT vs Lokhandwala Constructions Inds. Ltd., (2003) 260 ITR 579 (Bom.), in case of a builder held that where the loan was obtained for the project of construction of flats, which is stock in trade, the assessee is entitled to deduction under section 36(1)(iii) of the Act in respect of interest expenditure on such loans. The Hon'ble Court further held that while adjudicating the claim of deduction under section 36(1)(iii) of the Act the nature of the expense, whether the expense was on capital account or revenue account was irrelevant, as the section itself says that interest paid by the assessee on capital borrowed is allowable as a deduction.

19. In the present case, undisputedly funds were borrowed for the purpose of the projects undertaken by the assessee, and only based on accounting treatment, the claim of the assessee was denied. It is pertinent to note that the allowability of any deduction is to be decided based on the provisions of the Act. In the present case, since the funds were borrowed for the purpose of

projects undertaken by the assessee, therefore, the interest paid on such borrowing is allowable under section 36(1)(iii) of the Act, in view of the aforesaid decision of Hon'ble jurisdictional High Court. Accordingly, the AO is directed to grant the deduction under section 36(1)(iii) of the Act in respect of the interest expenditure claimed by the assessee. As a result, ground No. 2 raised in assessee's appeal is allowed.

20. The issue arising in ground No. 3, raised in assessee's appeal, is pertaining to the disallowance of commission expenses.

21. The brief facts of the case pertaining to this issue are: During the year, assessee has debited commission and brokerage expenses of Rs. 1,31,46,860 to the profit and loss account. Following the matching principle, the assessee was issued show cause notice to explain why the commission and brokerage expenses in proportionate to cost of sales be not disallowed as revenue expenditure and capitalized in WIP. In reply, the assessee submitted that commission paid to brokers which is the selling and marketing expenses are not related to the single project directly. The assessee further submitted that commission expenses do not add value to or increase the cost of production and therefore the same cannot be added to the WIP. The AO vide order passed under section 143(3) of the Act did not agree with the submissions of the assessee and held that selling costs incurred in the business are based on the specific project and these are never in the nature of general advertisement/marketing. The AO further held that since the commission expenses are directly attributable to the projects, the same shall be debited to

the cost of construction and is to be allowed in the proportion to revenue recognised from the project. Accordingly, the AO disallowed the amount of Rs. 97,30,774 under section 37 of the Act and added the same to the total income of the assessee. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

22. During the hearing, learned AR submitted that commission expenses are selling and marketing expenses and are incurred by the company irrespective of whether a project is implemented or not. It was further submitted that these costs are incurred by the assessee under all circumstances during the entire tenure of carrying on business operations and these costs are not associated with any particular project. In support of its submission, learned AR placed reliance upon the decision of the coordinate bench of the Tribunal in DCIT vs Rustomjee Evershine joint-venture private Ltd, ITA No. 5613/Mum/2014.

23. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

24. We have considered the rival submissions and perused the material available on record. The assessee claims that the commission expenses incurred by the assessee are not in respect of any particular project and these expenses are required to be incurred under all circumstances while carrying on the business. Further, as per AS 7 para 19 selling costs cannot be attributed to

contract activity and the same cannot be allocated to the contract and therefore are to be excluded from the cost of the construction contract. We find that para 20 of AS 7 reads as under:

*"20. Contract costs include the costs attributable to a contract for the period from the date of securing the contract to the final completion of the contract. However, costs that relate directly to a contract and which are incurred in securing the contract are also included as part of the contract costs if they can be separately identified and measured reliably and it is probable that the contract will be obtained. When costs incurred in securing a contract are recognised as an expense in the period in which they are incurred, they are not included in contract costs when the contract is obtained in a subsequent period."*

25. Thus, as per para 20 of AS 7 if the cost which is directly related to the contract and is incurred for securing the contract is also included as part of the contract cost if they can be separately identified and measured reliably and there is a possibility that the contract will be obtained. From the perusal of pages 67 – 68 of the paper book, we find that assessee has provided the details of commission and brokerage expenses, which were paid to various brokers in respect of flats in its various projects. The said details were further confirmed vide written submission filed by the learned AR. Thus it is evident that in the present case the commission expense has been identified by the assessee not only in respect of each project undertaken by it but also in respect of each flat for which such commission expenses were incurred. Insofar as the decision of the coordinate bench of the Tribunal in Rustomjee Evershine Joint-Venture Private Ltd (supra), we find that in para 7 the coordinate bench after perusal of AS-7 noted that general administrative costs and selling costs are not considered as part of the contract cost unless they

are contract specific. Since in the present case the commission expense incurred by the assessee is separately identifiable therefore we are of the considered view that commission expenditure should be allowed proportionally to the revenue offered. Thus we find no infirmity in the impugned order passed on this issue. As a result, ground No. 3 raised in assessee's appeal is dismissed.

26. The issue arising in ground No. 4, raised in assessee's appeal, is pertaining to the disallowance of interest amounting to Rs. 48,53,314.

27. The assessee vide application dated 13/08/2022 has also raised the following additional ground:

*"Additional Ground No. 1- On the facts and in the circumstances of the case and in law, the Ld. AO has erred in not allowing the Interest on late payment of TDS of Rs. 6,01,236 debited to profit and loss account"*

28. As the issue raised by the assessee, by way of additional ground of appeal, is a legal issue that can be decided based on material available on record, we are of the view that the same can be admitted for consideration and adjudication in view of the ratio laid down by the Hon'ble Supreme Court in NTPC Ltd v/s CIT: 229 ITR 383.

29. The brief facts of the case pertaining to aforesaid two grounds are: During the year under consideration, assessee debited Rs. 89,54,967 towards interest on delayed payments of TDS, VAT, WCT, etc. The assessee was asked to justify the claim of these expenditures under provisions of section 37 of the

Act. The assessee, in response, submitted the following breakup of interest of Rs. 89,54,967:

<i>Nature of Interest</i>	<i>Amount (in Rs.)</i>
<i>Late Payment Interest – Prof Tax</i>	<i>28,297</i>
<i>Late Payment Interest – Service tax</i>	<i>33,73,409</i>
<i>Late Payment Interest – TDS</i>	<i>6,01,236</i>
<i>Interest – others</i>	<i>48,53,314</i>
<i>Late Payment Interest – VAT</i>	<i>96,657</i>
<i>Late Payment Interest – WCT</i>	<i>2054</i>
<i>Total</i>	<i>89,54,967</i>

30. The assessee further submitted that interest on late payment of professional tax, service tax, VAT and WCT are no expenses incurred in relation to an offence or which is prohibited by law, thus disallowance under section 37 of the Act should not be made. The assessee agreed for disallowance of interest on late payment of TDS of Rs. 6,04,236. However, the assessee failed to provide any details of 'Interest – Others' of Rs. 48,50,314. Accordingly, the AO vide order passed under section 143(3) of the Act disallowed interest on late payment of TDS of Rs. 6,01,236 and Interest - Other of Rs. 48,53,314. In its appeal before the learned CIT(A) assessee challenged the disallowance of Interest - Other of Rs. 48,53,314. The learned CIT(A) vide impugned order in absence of details regarding the exact nature of the expenditure dismissed the appeal filed by the assessee and upheld the disallowance of Rs. 48,53,340. Being aggrieved, the assessee is in appeal before us.

31. Having considered the rival submissions, and perused the material available on record and judicial pronouncements relied upon, we find that even now no details regarding the expenditure incurred under the head Interest – Others have been filed by the assessee. Therefore, we find no infirmity in the impugned order passed upholding the disallowance of Rs. 48,53,340. As a result, ground No. 4 raised in assessee's appeal is dismissed.

32. Insofar as additional ground No. 1 is concerned, as noted above during the assessment proceedings, the assessee agreed to disallowance of interest on late payment of TDS. Further, in its appeal before the learned CIT(A) the assessee raised no ground challenging the disallowance of interest on late payment of TDS. Thus, when the assessee has agreed to disallowance of interest on late payment of TDS, we find no infirmity in the order passed by the AO on this issue. In any case, nothing has been brought on record to show that the said expenditure was incurred wholly and exclusively for the purpose of the business for being allowed under section 37 of the Act. Therefore, in view of the above, additional ground No. 1 raised by the assessee is dismissed.

33. In the result, the appeal by the assessee is partly allowed.

**ITA No. 611/Mum/2020**  
**Assessee's appeal–A.Y. 2014–15**

34. This appeal has been filed by the assessee challenging the impugned order dated 31/10/2019 passed by the learned CIT(A), for the assessment year 2014–15.

35. In this appeal, the assessee has raised the following grounds:

"1. On the facts and circumstances of the case and in 96,32,258 law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with regards to disallowance u/s. 14A of the Income Tax Act, 1961 of Rs. 2,83,38,504/- in relation to exempt income earned during the year under consideration. It is submitted that the disallowance made by the learned assessing officer is incorrect.

Without prejudice to the above, it is submitted that no amount of interest on secured loan should be taken into consideration while making disallowance u/s. 14A r.w.r. 8D of the Income Tax Rules, 1962 for the year under consideration. Further it is submitted that the net interest expenses of Rs. 39,32,08,170/- (Interest expenses of Rs. 63,02,29,058 /-(except interest on secured loan) minus interest income of Rs. 23,70,20,888 /-) should only be considered for working of disallowance u/s. 14A r.w.r. 8D of the Income Tax Rules, 1962 for the year under consideration, It is therefore prayed that in any case, disallowance u/s. 14A r.w.r. 8D of the Income Tax Act, 1962 should be reworked taking into consideration the above figures.

2. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to disallowance of interest expenses of Rs. 88,29,67,692/- as not admissible to be claimed as expenses and added the same to the WIP of the Project. It is submitted that the appellant has already capitalized finance cost of Rs. 26,69,03,344/- on the basis of project inflows, project outflows, cumulative fund utilization and hence the balance portion of the finance cost is debited to P&L account and not capitalized to P&L account.

Without Prejudice to the above it is submitted that the appellant company has offered the income on the basis of the percentage completion method during the year under consideration and therefore proportionate allowance of interest expenses should be allowed during the year under consideration. It is therefore prayed that necessary direction should be given in this regard.

3. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to disallowance of commission expenses of Rs. 34,00,541/- as not admissible to be claimed as expenses and added the same to the WIP of the Project.

4. Your appellant craves to add, alter, or amend any of the grounds of appeal on or before the date of hearing of appeal."

36. Apart from the aforesaid grounds, the assessee vide application dated 28/07/2022, raised the following additional ground of appeal:

*"Additional Ground No. 1- On the facts and in the circumstances of the case and in law, Ld AO and the Hon'ble CIT(A) erred in not restricting the disallowance u/s 14A to the exempt income."*

37. As the issue raised by the assessee, by way of additional ground of appeal, is a legal issue that can be decided based on material available on record, we are of the view that the same can be admitted for consideration and adjudication in view of the ratio laid down by the Hon'ble Supreme Court in NTPC Ltd v/s CIT: 229 ITR 383.

38. The issue arising in ground No. 1 and additional ground No. 1 is pertaining to disallowance under section 14 A r/w Rule 8D.

39. The brief facts of the case pertaining to this issue are: During the year under consideration, the assessee earned a dividend income of Rs. 75,048 which was claimed as exempt. From the perusal of the financial statement of the assessee, it was observed that the assessee has debited an amount of Rs. 24,29,09,528 as interest on the loan. Further, as per the balance sheet of the assessee, the total investment is Rs. 75,26,83,846. Vide order dated 20/12/2016 passed under section 143(3) of the Act the AO computed the disallowance under section 14A r/w Rule 8D at Rs. 3,72,65,887. Since the assessee has already disallowed Rs. 89,27,383 under section 14A, the disallowance as computed by the AO was accordingly restricted to a balance amount of Rs. 2,83,28,504. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

40. During the hearing, learned AR submitted that disallowance under section 14A should be restricted to the exempt income earned by the assessee during the year. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

41. We have considered the rival submissions and perused the material available on record. We find that Hon'ble jurisdictional High Court in Nirved Traders (P.) Ltd. v/s Dy. CIT, I.T. Appeal No.149 of 2017, vide judgement dated 23.04.2019, has held that disallowance under section 14A of the Act cannot be more than exempt income. Thus, respectfully following the aforesaid decision of the Hon'ble jurisdictional High Court, we direct the AO to restrict the disallowance made under section 14A of the Act to the extent of exempt income earned by the assessee, during the year under consideration. As a result, ground No. 1 raised in assessee's appeal is partly allowed, while additional ground No. 1 is allowed.

42. The issue arising in ground No. 2 is pertaining to the disallowance of interest expenses. Since a similar issue has already been decided in the assessee's appeal being ITA No. 3004/Mum./2019, therefore, our findings/conclusion rendered in said appeal shall apply *mutatis mutandis*. Accordingly, ground No. 2 raised in assessee's appeal is allowed.

43. The issue arising in ground No. 3 is pertaining to disallowance of commission expenses. Since a similar issue has already been decided in assessee's appeal being ITA No. 3004/Mum./2019, therefore, our

findings/conclusion rendered in said appeal shall apply *mutatis mutandis*.

Accordingly, ground No. 3 raised in assessee's appeal is dismissed.

44. In the result, the appeal by the assessee is partly allowed.

**ITA No. 4229/Mum/2019**  
**Assessee's appeal – A.Y.2015–16**

45. This appeal has been filed by the assessee challenging the impugned order dated 28/03/2019. passed by the learned CIT(A), for the assessment year 2015–16.

46. In this appeal, the assessee has raised the following grounds:

*"1. On the facts and circumstances of the case and in NIL law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with regards to disallowances/additions on account of Interest Expenses, Commission Cost and Disallowance u/s 14A of the Income tax Act,1961 which is outside the purview of limited scrutiny for the year under consideration. The Ld. AO has erred in exceeding his scope beyond his jurisdiction while completing the assessment in Limited. Scrutiny. Therefore, it is requested that the disallowances/additions made in the Assessment Order which are outside the purview of limited scrutiny should be deleted.*

*2. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to not taking the approval from Principal Commissioner of Income Tax for conversion of limited scrutiny case to complete scrutiny case.*

*3. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to disallowance of interest expenses of Rs.65,32,97,664/- as not admissible to be claimed as expenses and added the same to the WIP of the Project. It is submitted that the appellant has capitalized finance cost on the basis of project inflows, project outflows, cumulative fund utilization and hence the part of the finance cost is debited to P and L account and not capitalized to Work In progress account.*

*Without Prejudice to the above it is submitted that the appellant company has offered the income on the basis of the percentage completion method during the year under consideration and therefore proportionate allowance of interest*

*expenses should be allowed during the year under consideration. It is therefore prayed that necessary direction should be given in this regard.*

*4. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to disallowing commission expenses of Rs 1,24,80,859/- as not admissible to be claimed as expenses and added the same to the WIP of the Project*

*5. That on the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to disallowance u/s 14A of the Income Tax Act, 1961 of Rs.1,86,50,166/- in relation to exempt income earned during the year under consideration. It is submitted that the disallowance made by the learned assessing officer is incorrect.*

*Without prejudice to the above it is submitted that no amount of interest on secured loan should be taken into consideration while making disallowance u/s. 14A r.w.r. 8D of the Income Tax Rules, 1962 for the year under consideration. Further it is submitted that the net interest expenses of Rs. Nil/- (Interest expenses of Rs.4,82,59,847/-(except interest on secured loan) minus interest income of Rs.39,78,82,488/-) should only be considered for working of disallowance u/s. 14A r.w.r. 8D of the Income Tax Rules, 1962 for the year under consideration. It is therefore prayed that in any case, disallowance u/s. 14A r.w.r. 8D of the Income Tax Act, 1962 should be reworked taking into consideration the above figures. Therefore it prayed that necessary direction is given in this regard.*

*Without prejudice to the above, that on the facts and in the circumstances of the case and in law, the Ld. AO has erred in making disallowance U/s 14(A) r.w.r 8D clause (ii) considering the total interest expenses of Rs. 65,32,97,664 resulting the double disallowance of the same: interest expenditure to extent of Rs.88,74,327 which tantamount to double taxation. It is therefore submitted that necessary direction should be given in this regard.*

*6. Your appellant craves to add, alter, or amend any of the grounds of appeal on or before the date of hearing of appeal."*

47. The issue arising in grounds No. 1 and 2, raised in assessee's appeal, is pertaining to the scope of assessment proceedings in case of limited scrutiny.

48. The brief facts of the case pertaining to this issue are: For the year under consideration, the assessee filed its return of income on 30/09/2015 declaring total income at a loss of Rs. 41,80,08,944. The return filed by the assessee was selected for scrutiny under CASS under the limited scrutiny

category and accordingly notice under section 143(2) was issued and duly served upon the assessee. Subsequently, notice under section 142(1) of the Act was issued and duly served to the assessee. The assessee in its appeal before the learned CIT(A) challenged the additions made by the AO being outside the purview of limited scrutiny under CASS. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue by observing as under:

*"Clearly, point No. 3 "Low Net Profit or Loss Shown from Large Gross Receipts" and also point No. 4 "Large Other Expenses Claimed in Profit & Loss Account" would cover the expenses relating to interest and commission and verifiability u/s. 14A. Hence it is abundantly clear that AO has not transgressed outside the jurisdiction of CASS criteria. Hence there was also no requirement to take approval from the Pr. CIT as the additions made by AO are well within the issues identified by CASS for the impugned scrutiny assessment. Hence ground No. 1 and 2 of assessee's appeal are dismissed singly and collectively."*

Being aggrieved, the assessee is in appeal before us.

49. During the hearing, learned AR submitted that it was a limited scrutiny case and no approval was taken by the AO from CIT for expanding the scope of its jurisdiction. On the other hand, learned DR vehemently relied upon the order passed by the learned CIT(A).

50. We have considered the rival submissions and perused the material available on record. It is the plea of the assessee that as the assessment was selected for scrutiny under the category of limited scrutiny, the AO has erred in exceeding its scope of jurisdiction by making addition beyond the purview of limited scrutiny. In this regard, reliance has also been placed upon Instruction No. 7 of 2014 dated 26/09/2014, wherein it has been provided that in the

cases selected for scrutiny during the financial year 2014 – 15 under CASS, the scope of enquiry should be limited to verification of these aspects only and the assessing officer shall confine the questionnaire and subsequent enquiry for verification only to the specific points on the basis of which particular return has been selected for scrutiny. We further find that in the aforesaid notification it has further been provided that the assessing officer while issuing notice under section 142(1) of the Act which is enclosed with the first questionnaire would proceed to verify only the specific aspects requiring examinations/verification. From the perusal of notice issued under section 142(1) of the Act, forming part of the paper book on page 27, wherein reasons for the selection of case under CASS are mentioned, we find that explanation and justification were required from the assessee, inter-alia, for the following CASS reasons:

".....  
*iii. lower net profit or loss shown from large gross receipt.*  
*iv. large other expenses claimed in the Profit & Loss a/c.*  
....."

51. From the perusal of the record, it is evident that the AO vide assessment order passed under section 143(3) of the Act disallowed the interest expenditure and commission expenditure debited by the assessee in its profit and loss account. The AO also made disallowance under section 14 A r/w Rule 8D after considering the interest expenditure debited to the profit and loss account. Thus, in view of the above, we are of the considered opinion that the additions made by the AO are covered under aforesaid point (iii) and (iv) of the CASS reasons and the scope of enquiry by the AO was also limited to the

verification of the aforesaid aspects. Therefore, we find no infirmity in the impugned order passed on this issue. As a result, grounds No. 1 and 2 raised in assessee's appeal are dismissed.

52. The issue arising in ground No. 3 is pertaining to the disallowance of interest expenses. Since a similar issue has already been decided in assessee's appeal being ITA No. 3004/Mum./2019, therefore, our findings/conclusion rendered in said appeal shall apply *mutatis mutandis*. Accordingly, ground No. 3 raised in assessee's appeal is allowed.

53. The issue arising in ground No. 4, is pertaining to disallowance of commission expenses. Since a similar issue has already been decided in assessee's appeal being ITA No. 3004/Mum./2019, therefore, our findings/conclusion rendered in said appeal shall apply *mutatis mutandis*. Accordingly, ground No. 4 raised in assessee's appeal is dismissed.

54. The issue arising in ground No. 5, is pertaining to disallowance under section 14A of the Act. In this regard, it is the plea of the assessee that disallowance under section 14A of the Act should be restricted to the exempt income earned by the assessee during the year. We find that a similar issue has already been decided in assessee's appeal being ITA No. 611/Mum./2020, therefore, our findings/conclusion rendered in said appeal shall apply *mutatis mutandis*. Accordingly, ground No. 5, raised in assessee's appeal is partly allowed.

55. In the result, the appeal by the assessee is partly allowed.

**ITA No. 1228/Mum/2020**  
**Assessee's appeal – A.Y. 2015-16**

56. This appeal has been filed by the assessee challenging the impugned order dated 30/10/2019 passed by the learned CIT(A), for the assessment year 2015-16.

57. In this appeal, the assessee has raised the following grounds:

*"1. On the facts and circumstances of the case and in N.A law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with regards to issuance of notice u/s 143(2) of the Income Tax Act, 1961 and completing the assessment proceedings in the name of Construction Pvt Ltd instead of Keystone Realtors Pvt Ltd on 28.09.2016.*

*2. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to disallowance of interest expenses of Rs. 5,62,71,472/- as not admissible to be claimed as expenses and added the same to the WIP of the Project. It is submitted that the appellant has already capitalized finance cost of Rs. 14,97,14,842/- on the basis of project inflows, project outflows, cumulative fund utilization and hence the balance portion of the finance cost is debited to P&L account and not capitalized to P&L account.*

*Without Prejudice to the above it is submitted that the appellant company has offered the income on the basis of the percentage completion method during the year under consideration and therefore proportionate allowance of interest expenses should be allowed during the year under consideration. It is therefore prayed that necessary direction should be given in this regard.*

*3. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to disallowance of selling and marketing expenses of Rs. 88,49,739/- as not admissible to be claimed as expenses and added the same to the WIP of the Project.*

*Without Prejudice to the above it is submitted that the appellant company has offered the income on the basis of the percentage completion method during the year under consideration and therefore proportionate allowance of selling and marketing expenses should be allowed during the year under consideration. It is therefore prayed that necessary direction should be given in this regard.*

*4. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with respect to*

*disallowance of Other expenses of Rs. 28,12,425/- as not admissible to be claimed as expenses and added the same to the WIP of the Project.*

*Without Prejudice to the above it is submitted that the appellant company has offered the income on the basis of the percentage completion method during the year under consideration and therefore proportionate allowance of Other expenses should be allowed during the year under consideration. It is therefore prayed that necessary direction should be given in this regard.*

*5. Your appellant craves to add, alter, or amend any of the grounds of appeal on or before the date of hearing of appeal."*

58. The issue arising in ground No. 1, raised in assessee's appeal, is pertaining to the validity of assessment proceedings in the name of the erstwhile entity.

59. The brief facts of the case pertaining to this issue are: The assessee filed its return of income, for the year under consideration, on 26/09/2015 declaring a loss of Rs. 1,32,43,876. The return of income was selected for scrutiny and notice under section 143(2) of the Act was issued on 28/09/2016 and the same was duly served on the assessee. In response to the same assessee filed various details. The AO after considering the submissions of the assessee passed the order under section 143(3) of the Act in the name of M/s Rustomjee Constructions Private Limited after making certain additions. In its appeal before the learned CIT(A) assessee challenged the assessment order on the basis that the same has been passed in the name of a non-existing entity as M/s Rustomjee Constructions Private Limited has been merged with Keystone Realtors Private Ltd. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue after noting that at no stage the AO was informed about the order approving the scheme of

amalgamation passed by the Hon'ble National Company Law Tribunal ('Hon'ble NCLT') on 14/09/2017. Being aggrieved, the assessee is in appeal before us.

60. During the hearing, learned AR by referring to the notice dated 25/04/2017 issued under section 230(5) of the Companies Act, 2013 submitted that the Income Tax authority was informed about the proceeding before Hon'ble NCIT regarding the merger of M/s Rustomjee Constructions Private Limited with Keystone Realtors Private Ltd. The learned AR further submitted that despite the aforesaid notice the AO proceeded to passed the assessment order in the name of the erstwhile entity and thus the same is void ab initio.

61. On the other hand, learned DR vehemently relying upon the impugned order passed by the learned CIT(A) submitted that there is no communication by the assessee after the aforesaid notice informing about the culmination of proceedings before the Hon'ble NCLT resulting in the merger of M/s Rustomjee Constructions Private Limited with Keystone Realtors Private Ltd.

62. We have considered the rival submissions and perused the material available on record. In the present case, the return of income was filed in the name of the erstwhile entity i.e. Rustomjee Constructions Private Ltd. Thereafter, the scrutiny proceedings were commenced upon issuance of notice under section 143(2) issued on 28/09/2016, and thereafter various details were sought from the assessee vide notice issued under 142(1) of the Act. It is the plea of the assessee that vide notice dated 25/04/2017 issued under

section 230(5) of the Companies Act, 2013 the income tax authorities were informed about the continuation of the proceeding of the merger before the Hon'ble NCLT. Apart from the aforesaid notice no other documents or correspondence has been placed on record to show that the assessee has intimated to the AO about the culmination of the merger proceedings and passing of the final order regarding the merger by the Hon'ble NCLT. We further find that even after the order dated 14/09/2017 passed by the Hon'ble NCLT approving the scheme of merger of M/s Rustomjee Constructions Private Limited with Keystone Realtors Private Ltd., the assessee filed its reply before the AO in the name of the erstwhile entity i.e. M/s Rustomjee Constructions Private Limited. The aforesaid fact is evident from the submission dated 18/09/2017 and 16/11/2017 filed by the assessee before the AO, forming part of the paper book from pages 15 - 22. Even before us, nothing has been brought on record to show that the assessee had informed the AO about the order dated 14/09/2017 passed by the Hon'ble NCLT approving the scheme of merger. We are of the considered view that merely issuing notice to the income tax authorities in compliance provision of section 230(5) of the Companies Act 2013 as per directions of the Hon'ble NCLT intimating the continuation of merger proceedings cannot be treated as intimation regarding the merger of M/s Rustomjee Constructions Private Limited with Keystone Realtors Private Ltd., as it is only upon the passing of final order approving the scheme of the merger the entity can be said to have been merged and lost its legal existence, even though the merger took effect from the retrospective date. It is further pertinent to note that the date of effect of the merger also

came into existence only on 14/09/2017. Therefore, in light of the decision of the Hon'ble Supreme Court in PCIT vs Mahagun Realtors (P.) Ltd, [2022] 443 ITR 194 (SC) we find no infirmity in the impugned order passed by the learned CIT(A) on this issue. As a result, ground No. 1 raised in assessee's appeal is dismissed.

63. The issue arising in ground No. 2 is pertaining to the disallowance of interest expenses. Since a similar issue has already been decided in assessee's appeal being ITA No. 3004/Mum/2019, therefore, our findings/conclusion rendered in said appeal shall apply *mutatis mutandis*. Accordingly, ground No. 2 raised in assessee's appeal is allowed.

64. The issue arising in ground No. 3 is pertaining to the disallowance of selling and marketing expenses. Since a similar issue has already been decided in assessee's appeal being ITA No. 3004/Mum/2019, therefore, our findings/conclusion rendered in said appeal shall apply *mutatis mutandis*. Accordingly, ground No. 3 raised in assessee's appeal is dismissed.

65. The issue arising in ground No. 4 is pertaining to the disallowance of other expenses which are debited by the assessee as consultancy and professional charges. The AO has not disputed that these charges are directly attributable to the projects. Thus, we are of the considered view that these expenses should be allowed proportionally to the revenue offered. We accordingly direct the AO. As a result ground No. 4 raised in assessee's appeal is allowed for statistical purposes.

66. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 14/11/2022

**Sd/-**  
**PRASHANT MAHARISHI**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 14/11/2022**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai