आयकर अपीलीय अधिकरण, हैदराबाद पीठ

IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad

Before Shri R.K. Panda, Accountant Member
AND
Shri K. Narasimha Chary, Judicial Member

ITA No.864/Hyd/2017		
Assessment Year: 2008-09		
M/s. Rain Cements Ltd (Formerly known as Rain CII Carbon (India) Ltd Hyderabad PAN:AABCR8858F	Vs.	Dy. Commissioner of Income Tax, Circle 3 (1) Hyderabad
(Appellant)		(Respondent)
Assessee by:	Advocate Prathishta Singh & Advocate Deepak Chopra	
Revenue by:	Dr.Rajendra Kumar, CIT-DR	
Date of hearing:	20/03/2023	
Date of pronouncement:	31/05/2023	

ORDER

Per R.K. Panda, A.M

This appeal filed by the assessee is directed against the final assessment order dated 24.03.2017 passed u/s 143(3) r.w.s. 144C(5) r.w.s. 260 of the I.T. Act for the A.Y 2008-09.

2. This appeal was earlier decided by the Tribunal vide order dated 18.10.2019. Subsequently vide MA No.15/Hyd/2020, dated 23.3.2021, the Tribunal recalled the entire order for fresh adjudication. Therefore, this is a recalled matter.

3. Facts of the case, in brief, are that the assessee is a company engaged in the business of manufacturing Calcinated Petroleum Coke (CPC) and generation of electricity through waste heat recovery method. It has established two separate units which carry out manufacturing and export of CPC. It filed its return of income on 30.09.2008 declaring loss of Rs.23,71,90,124/- after claiming exemption of Rs.84,87,05,352/- u/s 10B under normal provisions of the Act and Rs.70,09,87,659/- u/s 115JB of the I.T. Act. The case was selected for scrutiny and the Assessing Officer issued statutory notices u/s 143(2) and 142(1) of the I.T. Act. Since the assessee had entered into certain international transactions, the Assessing Officer referred the matter to the TPO u/s 92CA(1) of the Act who vide order dated 17.11.2011 proposed upward adjustment of Rs.6,34,39,200/- on account of the corporate guarantee. The Assessing Officer passed the draft assessment order on 26.12.2011 wherein apart from the addition of Rs. 6,34,39,200/- proposed by the TPO, the Assessing Officer made addition of R.13,08,62,793/- on account of disallowance of loss on transfer of cement business. The assessee did not file any objection before the DRP. The Assessing Officer thereafter completed the assessment on 25.1.2012 determining the total income at Rs.80,58,17,221/- after restricting the exemption u/s 10B of Rs.84,87,05,352/- to Rs.80,58,17,221/- and determined the taxable income at Rs. Nil. He however, accepted the book profit declared by the assessee at Rs.70,09,87,659/-.

4. The assessee filed an appeal before the learned CIT(A) which was pending for disposal.

5. In the meantime, the Assessing Officer reopened the assessment after recording the following reasons which has been provided to the assessee on 31.07.2017 and which read as under:

"Office of the Dy. Commissioner of income tax, Circle-3(1) Hyderabad
Room No.722, 7h Floor, B' Block, Income Tax Towers, A C Guards,
Hyderabad-500 004. (040) 23425434

F.No. DCIT-3(1)14Z(12-13 *Dated: 31.072017*

To

The Principal Officer,
M/s. Rain CII Carbon India Ltd.,
34, Rain Centre,
Srinagar Colony,
Hyderabad.

Sir,

Sub:- Reopening of Assessment u/s.147 - A.Y 2008-09 - Your own - Communication of reasons - Reg.

Ref:- 1. This office notice u/s.148, dated.21-03-2013 Dated: 31-07-2013
2. Your letter dated 16-04-2013

Vide reference cited at '2' above, you have sought the reasons for issue of notice u/s.148 and the same are given below:

"It was seen that the assessee did not maintain separate books of account for the different units, and instead furnished a statement detailing the apportionment of incomes (sales, and 'other incomes), and various items of expenditure, along with the basis (sales / total assets/ actual) and the ratio for apportionment, and thus worked out the incomes in respect of units eligible for exemptions u/s.10B and the other units. The incomes before adjustment as per IT Act were worked at Rs.63,17,21,356/- & Rs,62,27,25,323 In respect of 'co-generation and bending & trading' units respectively. Examination of the apportionment statement revealed certain omissions in the computation of exemption us/. 108 and that some of the items of expenditure were not apportioned on appropriate basis/ incorrectly allowed, and thus resulted In short computation of income of the taxable units, besides excess claim of exemption u/s 10B. The same are detailed as follows:

a) It Is seen that 'other income' credited to P & L amounting to Rs.46,37,99,429/- included interest on fixed deposits, gain on exchange fluctuations income from services (termination fee received from Great Lakes Carbon Income Fund' income from carbon emission reductions and miscellaneous income. Out of these, incomes aggregating to Rs.6,13,94,923/ and Rs.6, 05,20, 726 were apportioned between 'exempt Units , It Is observed in audit that as these Incomes

cannot be considered as 'derived from export of articles or things they ought to be excluded In the computation of exemptions u/s.10B. Omission to do so resulted in excess allowance of exemption.

b) *It was seen that the assessee claimed interest expenditure of Rs.19,52,26,888/- in respect of borrowings of USD 9,70,00,000 taken for acquisition of USA Rain CII Carbon, LCC, USA, Which is also engaged in manufacture and trade of CPC. However, it was observed from the 'statement of apportionment of expenses' that the entire interest expenditure, 'of Rs. 19,52,26,888/- was claimed against the taxable blending and trading' unit only, and no part was apportioned to 'CPC units, eligible for exemption u/s. 10B. It was seen from para 1.2,4 of the Transfer Pricing Study Report' by the Auditor firm M/s. Price Water House Coopers that:*

During the year RCCIL (the assessee) through its subsidiaries acquired all ci the outstanding equity interests of Rain Ci Carbon, LCC USA (RCC). RCC Is engaged in manufacture of CPC and has calcining plants located in USA. RCC is also responsible for procuring Green Petroleum Coke for RCCIL'S operations and also in facilitating the sales of CPC manufactured by RCCIL's plant in India. During the year the assessee purchased GPC raw material required for manufacture of CPC, from RCC.

Thus, it is evident that the investment in Rain CI! Carbon, LCC, USA was directly beneficial to the exempt units (Kiln I & I) engaged in manufacture of CPC, and as such the interest expenditure ought to be attributed to the exempt expenditure of units only. The incorrect apportionment of interest expenditure of Rs. 19,52,26,888/- against taxable units, resulted in excess allowance of exemptions u/s 10B and at the same time in short computation of income in respect of 'taxable units' by Rs.19,52,26,888/-.

As per schedule T- Notes to accounts - point -IV, M/s: Rain CII Holdings Inc, a wholly owned subsidiary company of the assessee, acquired shares in M/s. Juniper Investment LLC, which in turn owned all the outstanding shares of CII Carbon LLC from M/s. Cadogan Holdings B.V. For this purpose, the assessee company borrowed USD 120.67 Million from Banks, and incurred finance charges' amounting to Rs.17,65,88,101/- towards processing fees, and the same was debited to the profit & loss account as 'extraordinary Item' under the head 'finance charges. It was observed in Audit that the investment was made by the subsidiary of the assessee M/s. Rain CII Holdings Inc, and as such the allowance of related expenditure of Rs. 17,65,88,101/- against Income of the assessee is not in order. This resulted in short computation of income in respect of taxable units.

It was seen from the order u/s.92CA(3) / dt. 17-10-2011 of the Transfer Pricing officer, that the TPO made an adjustment to the extent of Rs.6,34,39,200/- towards 'fees not charged, for the 'Corporate guarantee given by the assessee company to M/s. RCC, USA. The fee chargeable was worked at 2% of the amount

guaranteed, for the period from 09-07-2007 to 17-12-2007 on Rs.360 Crore, and on Rs.600 Cr. from 17-12-2007 to 31-03-2012. It is observed that while working the guarantee fees chargeable, the period of guarantee from 09-07-2007 to 17-12-2007 was taken as 148 days instead of 161 days. This resulted in short computation of guarantee fee by Rs.29,87,704/- as follows:

2% fee on Rs.360 cr. For 161 days (from 9.7.2007 to 17.12.2007) (Rs.360 crore x 2% x 161/365 days)	*Rs.3,17,58,904*
2% fee on Rs.360 crore computed for 148 days	*Rs.2,887,71,299*
Guarantee fees short – computed	*Rs. 29,87,704*

2. A notice u/s 143(2) of the I.T. Act posting your case for hearing on 19.08.2013 at 12.00 Pm is enclosed herewith. You are required to appear either in person or through your AR without fail.

Yours faithfully
Sd/-
(G.N.Raghavendra Rao)
Dy.CIT, Circle-3(1)
Hyderabad"

6. Accordingly, notice u/s 148 of the Act was issued on 21/03/2013 in response to which the assessee submitted that the return originally filed may be treated as return filed in response to notice u/s 148 of the I.T. Act. The assessee also requested the reasons of the reopening which were provided to the assessee by the Assessing Officer on 31/07/2013 which has been reproduced in the preceding para. The assessee filed objection to the re-assessment proceedings which were disposed of by the Assessing Officer by passing a speaking order.

7. During the course of re-assessment proceedings, a fresh reference was made to the TPO for determination of the ALP and the TPO vide order dated 13.11.2014, like the previous order, proposed an adjustment of Rs.6,63,99,205/- on account of corporate guarantee fee. Thereafter, the Assessing Officer passed the draft assessment order on 26.03.2014 wherein the Assessing Officer made TP adjustment proposed by the Assessing Officer. He

also restricted the claim of deduction u/s 10B by making adjustment to the profit of the eligible undertaking. On receipt of the draft assessment order the assessee filed its objection before the DRP on 18.09.2014. In the meanwhile, vide CBDT instructions, the DRP was reconstituted by virtue of which the DRP Bengaluru assumed jurisdiction of Andhra Pradesh & Telangana. This instruction came on 1.1.2015 and in terms of this instruction, the objection filed by the assessee at Hyderabad were transferred to DRP Bengaluru. The DRP Bengaluru passed its order on 22.6.2015 rejecting such objection given that the period of 9 months had expired on 31.12.2014 and they do not have any jurisdiction to issue directions. Immediately after the said DRP direction, the Assessing Officer passed the final assessment order on 28.8.2015. The assessee approached the Hon'ble High Court by way of a writ petition and the Hon'ble High Court on 31.8.2016 set aside the final assessment order dated 28.8.2015 and directed the DRP to dispose of the objection in a time bound manner. Subsequently, the DRP Bengaluru passed its directions on 2.2.2017. Thereafter, the Assessing Officer passed the final assessment order on 24.3.2017. Against this order of the Assessing Officer, the assessee is in appeal before the Tribunal by raising the following grounds:

> "*Each ground given below is independent and without prejudice to the other grounds of appeal preferred by the Appellant:*
>
> *RE-ASSESSMENT PROCEEDINGS*
>
> *1. That on the facts and circumstances of the case, the Ld. AO has erred in law as well as in facts in assuming jurisdiction w/s 147 of the Act and issuing notice u/s 148 of the Act to the Appellant, in as much as there has been no escapement of assessment of income chargeable to tax for the year under appeal.*
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> *TRANSEER PRICING (TP) MATTERS Corporate Guarantee Fee:*

2. The Ld. TPO erred in making TP adjustment of Rs. 6,63,99,205/- on shareholder corporate guarantee provided to Bank without appreciating the specific facts of the case (ie. the wholly owned subsidiary (WOS') was set up as a SPV for acquisition of business in USA).

3. The Ld. DRP/ TPO erred in not appreciating that the shareholder corporate guarantee is not covered under the definition of international transaction u/s 92B of the Act as there is no bearing on the profits, income. losses or assets of the Company.

4. The Ld. DRP/TPO erred in not appreciating that the provisions of Chapter X apply only when there is any income arising from the international transaction,

5. The Ld. DRP/TPO erred in not appreciating that the amendment to section 92B would not apply to the year under consideration as it was inserted on a later date. The amendment has to be interpreted as prospective in nature.

6. The Ld. DRP/TPO erred in not appreciating the fact that Rain CII Carbon, LLC (RCC') had also provided guarantee to the loan taken by RCL and hence the transaction is reciprocating in nature.

7. The Ld. TPO erred in not undertaking an objective analysis for determining the arm's length price on the shareholder corporate guarantee and making adjustment by determining the benefit to US WOS as difference in the interest rate of differently rated bonds in the Indian market.

CORPORATE TAX MATTERS

8. The Ld. DRP/ AO erred in concluding that only the realized foreign fluctuations can be said to be derived from 10B units, thereby eligible for 10B benefit, without appreciating that the reinstated foreign fluctuations also forms part of the income of the undertakings as per the principles of accounting.

9. The Ld. DRP/ AO erred in holding the other incomes (i.e., insurance claim, interest on fixed deposits, miscellaneous income) are not to be considered for the purpose of computation of profits eligible for deduction u/s 10B of the Act.

10. The Ld. DRP/AO erred in facts and law by concluding the interest expenditure incurred for the purpose of making investments (i.e., acquisition of RCC in USA) is to be allocated to the CPC units without appreciating the separate and specific function of the CPC units vis-à-vis Blending, Trading and Investment Unit.

11. The Ld. DRP/ AO erred in disallowing the finance charges amounting to Rs.17,65,88,101/- by contending it to be not for the purpose of business and simultaneously also considering the same to be of capital nature.

OTHER GROUNDS

12. The Ld. AO inadvertently considered the relief provided by the DRP on corporate guarantee fees as Rs. 19,72,603/- instead of Rs. 23.29,890/-.

13. The Ld. AO inadvertently allowed short deduction u/s 10B Rs. 10,98,79,594/-
14. The Ld. AO provided a short credit of TDS to an extent of Rs. 9,70.814/-

15. The Ld. AO erred in computing interest u/s 234B of Rs. 31,16.646/-

16. The Ld. AO erred in computing interest u/s 234C of Rs. 37,20,130/-.

The Appellant craves, to consider each of the above grounds of appeal without prejudice to each other and craves leave to add, alter, delete or modify all or any of the above grounds of appeal."

8. The assessee has also raised the following additional grounds:

" Grounds on Re-assessment proceedings

The Learned Assessing Officer/Dispute Resolution Panel, erred in law and facts, in initiation / not quashing the reassessment proceedings as:
1.1 There was no reason to believe that income escaped assessment as the reassessment is merely based on audit objections.

1.2. No reasons were recorded for initiation of reassessment. prior to issue of notice us 148. thereby making the reassessment proceedings bad-in-law.

1.3 There was no new material on record to justify that there existed a reason to believe that income has escaped assessment.

1.4 There is a mere change of opinion on the same sets of facts as existed and under the knowledge of the Assessing Officer during the original assessment proceedings.

1.5. The process laid down by the Apex Court in the case of GKN Driveshafts (India) Limited [259 ITR 19 (SC)] was not followed, wherein the

objections raised by the Appellant against initiation of 147 proceedings was not separately disallowed.

1.6 Without prejudice to the above, even post reassessment proceedings, there is no additional tax liability and that Appellant is liable to pay tax under the provisions of Minimum Alternative Tax (no adjustment made to the book profits) and thus the question of income having escaped assessment does not arise.

Corporate Tax Matters:

17. The d A0/DRP erred in assuming the finance charges for loans taken by the Appellant as capital in nature, without appreciating that the same qualifies as interest under the provisions of the Income-tax Act, 1961 and the Appellant had also deducted tax at source in respect of finance charges.

18. Without prejudice to the above, assuming without admitting. even if the interest and finance charges in relation to global acquisition is considered to benefit the Appellant s business. the same ought to have been apportioned among all the business divisions based on an appropriate allocation key.

The Appellant craves leave to add, alter, delete or modify all or any of the grounds of appeal."

9. The learned Counsel for the assessee referring to the decision of the Hon'ble Supreme Court in the case of NTPC Ltd reported in 229 ITR 383 and Jute Corporation of India Ltd reported in 187 ITR 688 submitted that the grounds raised earlier in respect of re-assessment proceedings are general in nature and after discussion with the Counsel, the assessee filed specific grounds with respect to the re-assessment proceedings for the sake of clarity. He submitted that since all the material facts are already available on record, therefore, these additional grounds being more specific should be admitted for adjudication.

9.1 The ld DR, on the other hand, opposed the admission of the additional grounds.

9.2 After hearing both the sides and considering the fact that the additional grounds raised by the assessee are purely legal in nature and all material facts are already available on record and no new facts are required to be investigated, therefore, these additional grounds raised by the assessee are admitted for adjudication.

10. The learned Counsel for the assessee at the outset challenged the validity of the re-assessment proceedings and in his first plank of argument submitted that the Assessing Officer has recorded the following 4 reasons for initiating the re-assessment proceedings which are as under:

> *a) In respect of the claim u/s 10B-examination of the "apportionment statement" (refer page 40 of the paper book) revealed certain omissions in the computation of income u/s 10B. Other incomes credited to P&L Account amounting to INR 46,37,99,429/- included interest on fixed deposits, gain on exchange fluctuations from services, income from carbon emissions deductions and miscellaneous incomes. The reasons further refer to the observations of the 'audit' that 'such incomes cannot be considered as derived from export or article or things for the purposes of section 10B.*
>
> *b) Apportionment of interest expenditure of INR 19,52,26,888/- it was observed from the statement of "statement of apportionment of expenses" that the above interest expenditure was claimed against taxable income and no part was apportioned to CPC Units eligible for exemption u/s 10B.*
>
> *c) As per schedule T, notes to accounts, the assessee company had borrowed in foreign currency and for which processing charges of INR 17,65,88,101 had been debited to the P&L Account. "It was observed in 'audit' that since the investment was made by the subsidiary of the assessee, the assessee was not eligible to claim such expenditure'.*
>
> *d) Short calculation of corporate guarantee fee- On the basis of the TPO's order dated 17.11.2011 the Assessing Officer noted that the fee had to be calculated for a period of 161 days which instead was erroneously charged for 148 days and hence an addition of INR 29,87,704 has escaped assessment".*

11. He submitted that the reasons (a) & (c) are on the basis of audit objections and the assessee had agitated before the DRP objecting to the reopening of the assessment on the basis of audit objection. While disposing of the said objection, the DRP relied on the decision of the Hon'ble Supreme Court in the case of CIT vs. PVS Beedi Pvt. Ltd (237 ITR 13) (S.C) and concluded that the position of law pointed out by the internal audit party was a valid basis for reopening. He submitted that the question whether reopening on the basis of audit party objection is valid or not was examined by the Hon'ble Supreme Court in the case of Indian and Eastern Newspaper Society vs. CIT (1979) 2 Taxman 197 wherein it has been held that opinion of the audit party on a point of law cannot constitute information so as to initiate re-assessment proceedings. He submitted that the reliance placed by the DRP on the decision of the Hon'ble Supreme Court in the case of CIT vs. PVS Beedi Pvt Ltd (Supra) is wholly misplaced and erroneously construed. He submitted that a plain reading of that judgment would reveal that in that case there was a factual inaccuracy pointed out by the audit party which rendered the assessee not eligible to claim deduction u/s 80G. In para 3 of its judgment, the Apex Court clearly held that “this is not a case of information on a question of law”. Thus, the said judgment is clearly distinguishable and has erroneously been relied upon by the DRP.

12. He submitted that as per reason (a) reproduced above, the observation in the Audit was that other incomes could not be considered as derived from export of articles and things for the purposes of deduction u/s 10B. This was an opinion on the point of law and not a factual error and as such could not form the basis for initiation of re-assessment proceedings, there being no independent application of mind by the Assessing Officer.

13. He submitted that the question whether any income is derived from the export of any article or thing has been a subject matter of interpretation right up to the Hon'ble Apex Court. He submitted that the Hon'ble Supreme Court in the case of Hindustan Lever Ltd vs. CIT (239 ITR 297) has laid down the principle of first degree which has to be applied to determine whether the income can be eligible for deduction u/s 10B. He submitted that there are a series of decisions where the matter has travelled right upto the Apex Court and it has been held that foreign exchange fluctuation gain, provisions written back and interest income could have a direct nexus with the income of the undertaking and hence eligible for deduction u/s 10B. In that view of the matter, the audit objection being the sole basis of initiation of proceedings qua this issue was wholly untenable in law.

14. He submitted that reason (c) is also on the basis of the audit objection according to which as per Schedule T of the notes to the accounts, a subsidiary of the assessee acquired shares of M/s. Juniper Investment LLC which in turn owned all the outstanding shares of CII Carbon LLC from a Dutch company Cadogen Holdings BV. When the matter travelled to the DRP, the DRP held that this expenditure could not be allowed u/s 36(I)(iii) and section 37(1) of the Act. He submitted that a bare perusal of the reason would reveal that it is only on the basis of the audit objection which evidently is on a point of law, forms a basis for such initiation qua this issue. However, the audit party has not pointed out any factual inaccuracy. Therefore, the question whether any expenditure meets the requisites of section 36(1)(iii) or section 37(1) is a legal issue and not a factual inaccuracy.

15. Referring to various decisions including the decision of the Hon'ble Supreme Court in the case of Indian & Eastern News Paper (Supra), he submitted that re-assessment proceedings qua this issue was also bad in law. He submitted that the principle of commercial expediency and nexus between the expenditure stands settled by the decision and for the audit party to opine whether any expenditure met the requisite of section 36(1)(iii) or section 37 of the Act was beyond its competence.

16. The learned Counsel for the assessee in another plank of his argument submitted that a bare perusal of the reasons recorded would reveal that there is no new material on record or new fact which has come to the notice of the Assessing Officer post the original scrutiny assessment which could lead to a reason to believe that any income chargeable to tax has escaped assessment. Referring to page 40 of the Paper Book, he submitted that the reasons refer to the statement of apportionment of income and expenses between the various units. He submitted that the statement is on the basis of a certificate issued by the CA dated 30.09.2008 (page 176 & 177 of the paper book) issued to the management of the company for the purposes of claiming deduction u/s 10B. The certificate was also filed before the DRP, which is evident from the DRP order dated 2.2.2017. As regards other issues i.e. (b), (c) and (d), he submitted that again reference is either being made to the apportionment sheet or the notes to the accounts of the audited balance sheet which were already on record at the time of original assessment and hence there was no new material or information which could have led to any reason to believe that income chargeable to tax has escaped assessment.

17. Referring to the following decisions, he submitted that in absence of any new tangible material, the Assessing Officer cannot reopen the assessment:

a) Pr.CIT vs. Fibres and Fabrics International (P) Ltd (2022) 139 taxmann.com 562 (S.C)
b) Pr.CIT vs. Graphite India Ltd (2022) 142 taxmann.com 385 (Hon'ble Calcutta High Court).
c) Pr.CIT vs. West Bengal Essential Commodities Supply Corporation Ltd (2022) 42 taxmann.com 323 (Hon'ble Calcutta High Court).
d) Cognizant Technoloty Solutions India (P) Ltd vs. ACIT (2021) 131 Taxmann.com 346 (Hon'ble High Court of Madras).

18. The learned Counsel for the assessee referring to the decisions of the Hon'ble Supreme Court in the case of CIT vs. Kelvinator India (2010) 187 Taxmann 312(S.C) and in the case of Dy.CIT vs. Financial Software and Systems (P) Ltd (2022) 145 Taxmann.com 37 submitted that the Hon'ble Apex Court in the above decision has held that re-assessment proceedings cannot be initiated on account of change of opinion. He submitted that for the year under consideration, scrutiny assessment proceedings were conducted which culminated in an assessment order dated 25.01.2012 and all the issues raised in the re-assessment proceedings were either a subject matter of detailed scrutiny by the Assessing Officer or full details were provided where information was sought for.

19. So far as the allocation of income and expenses between the CPC and taxable unit as per points (a) and (b) of reasons recorded are concerned, he submitted that both the

issues are confined to the allocation of income and expenses between the CPC Units and the taxable unit. Referring to pages 31-33 and 34 of the paper book, he drew the attention of the Bench to the query raised by the Assessing Officer vide his letter dated 09.08.2011 and 13.08.2010 seeking the details of various income and expenses in support of the claim of 10B and the allocation. Further, regarding point (b) of the re-assessment notice i.e. issue relating to the expenses of 19.52 crores, another notice was issued on 29.10.2010 where specific query was raised regarding the allocation of the expenses to the blending and trading division and not the CPC units (page 374 of the Paper Book Vol.II). He submitted that as regards the allocation of income and expenses is concerned, a perusal of the detailed allocation sheet (page 40 of the Paper Book) as well as the certificate of the C.A (pages 176-177 of the Paper Book) clearly shows that all the queries raised by the Assessing Officer were specifically responded to and examined during the course of original assessment proceedings. As regards the contention that there is no discussion regarding these issues and hence the bar of change of opinion would not apply is concerned, he submitted that this issue is also no longer res integra as the Hon'ble Courts including the Hon'ble Supreme Court has repeatedly held in the context of change of opinion, that the contents of the assessment order are not in the control of the assessee. Referring to the decision of the Hon'ble Supreme Court in the case of Jt. CIT vs. Cognizant Technology Solutions India (P) Ltd (2023) 146 taxmann.com 197, he submitted that the SLP filed by the Revenue against the decision of the Hon'ble Karnataka High Court was dismissed by the Hon'ble Apex Court where it has been held that the manner and contents of the assessment order are not under the control of the assessee.

20. So far as the 3rd reason recorded by the Assessing Officer which refers to the finance charges of INR 17.65 crores is concerned, the learned Counsel for the assessee drew the attention of the Bench to page 374 of the paper Book (Vol.II) which is the notice dated 29.10.2010 and reply of the assessee dated 02.11.2010 (page 375 of the Paper Book Vol.II) and submitted that specific query was raised and information regarding the expenses of INR 17.65 crores was duly provided to the Assessing Officer. He submitted that in the notice dated 29.10.2010, the query of the Assessing Officer was regarding the adjustments to the book profit and as such all necessary details qua these expenses were on record. He submitted that there is no denial by the Assessing Officer in the reasons recorded that details of such expenses were not furnished since the Assessing Officer refers to Schedule T, notes to accounts of the audited balance sheet. In view of the above, it is clear that on all these issues the bar of change of opinion would apply and the re-assessment proceedings were wholly untenable in law.

21. So far as the last issue i.e. transfer pricing adjustment is concerned, he submitted that a calculation error has been pointed out identifying the escaped income at INR 29,87,704/- which relates to the corporate guarantee fee which has been computed by the TPO. He submitted that the TPO had made the adjustment on the basis of the quantum of the corporate guarantee taking into account the number of days and applied a rate of 2% on such amount. Referring to the reasons recorded, he submitted that only basis is that the adjustment towards corporate guarantee fee had to be computed from 9.7.2007 and in the TPO's order dated 17.10.2011 (TPO's first order), this period has been erroneously taken as 148 days instead on 151 days and

hence there was short computation of guarantee fee by INR 29,87,704/-.

22. Referring to the final assessment order dated 24.03.2017, he submitted that the Assessing Officer while giving effect to the DRP direction order dated 2.2.2017 found that the start of the corporate guarantee date was from 19.07.2007. Thus, in view of the factual findings of the Assessing Officer, the reason which was recorded on the basis of the TPO's 2011 order is no longer factually tenable.

22.1 Without prejudice to the above, he submitted that when the matter travelled upto the Tribunal, the Tribunal vide its order dated 17.03.2022, fixed the rate at 0.53% of the guarantee amount. The Tribunal also observed that while computing the amount of adjustment, the TPO should also consider the cross guarantee given by the AE in respect of the loan availed by the assessee. Therefore, the computational error recorded in the reasons no longer has any bearing as the quantum would significantly reduce from what was computed by the TPO in the original assessment. However, given the cross adjustment that has to be made, there may not be any balance adjustment. He submitted that the TPO is yet to give effect to the order of the Tribunal passed in March, 2022. Therefore, the issue would be rendered academic.

22.2 Without prejudice to the above, the learned Counsel for the assessee submitted that if this was only a computational error, the Assessing Officer had recourse to the proceedings u/s 154 of the Act to rectify the same. However, no steps were taken in that connection. He submitted that a computational or

arithmetical error which would have easily been resolved in section 154 proceedings cannot be a subject matter of initiating re-assessment proceedings. He accordingly submitted that the initiation of re-assessment proceedings are not in accordance with law and therefore should be quashed.

23. So far as the merit of the case is concerned, both sides argued extensively and filed detailed written submission which we shall deal at appropriate place.

24. The learned DR, on the other hand, heavily relied on the order of the Assessing Officer/DRP. Referring to para 2.1 of the order of the DRP, he drew the attention of the Bench to the same and submitted that the DRP had given valid reasons while upholding the validity of the re-assessment proceedings and thereafter, the Assessing Officer passed the final order. Therefore, the speaking order of the DRP on this issue should be considered and the grounds raised by the assessee on the issue of reopening of the assessment should be dismissed.

25. We have heard the rival arguments made by both the sides, perused the orders of the AO and the learned CIT (A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both sides. We find the AO in the instant case completed the assessment u/s 143(3) on 25.01.2012 determining the total income of the assessee at Rs.80,58,17,221/- and after restricting the deduction u/s 10B to Rs.80,58,17,221/- out of the allowable deduction of Rs.84,87,05,352/- determined the taxable income at Nil. We find subsequently, the AO reopened the assessment u/s 147 of the I.T. Act by recording the reasons which have already been reproduced

at Para 5 of the order. A perusal of the reasons recorded shows that the AO has reopened the assessment basically on four points i.e.

(a) certain omissions in the computation of income u/s 10B on the basis of audit objection according to which the other income credited to P&L A/c amounting to Rs.46,37,99,429 included interest on fixed deposits, gain on exchange fluctuations from services, income from carbon emissions deductions and miscellaneous income. According to the audit party such incomes cannot be considered as derived from export of article or things for the purposes of sec 10B.

(b) The statement of apportionment of expenses shows that the interest expenditure to the tune of Rs.19,52,26,888/- was claimed against taxable income and no part was apportioned to CPC Units eligible for exemption u/s 10B.

(c) As per schedule T, Notes to accounts, the assessee company had borrowed in foreign currency and for which processing charges of Rs.17,65,88,101/- had been debited to the P&L Accounts. According to the audit party since the investment was made by the subsidiary of the assessee, the assessee was not eligible to claim such expenditure.

(d) There is short calculation of corporate guarantee fee on the basis of TPO order dated 17.11.2011 which was calculated for 148 days as against for 161 days for which an amount of Rs.29,87,704/- has escaped assessment.

26. So far as the reopening of the assessment as per clause (a) is concerned i.e. claim of deduction u/s 10B, we find

the assessee before the AO during the course of assessment proceedings on the basis of query raised by the AO vide letter dated 13.08.2010 had given the details of other income as per Pages 355 to 373 of the Paper Book which are as under:

> *"Question # 5: Details of other income*
>
> *During the AY 2008-09, the Company has other income of Rs 463,799,429. Break up of the same is enclosed herewith and marked as Annexure II.*
>
> *The company has entered into an USA. However, the agreement said acquisition was not materialized and hence the USA entity has paid termination fee of Rs.192,026,420 to the Company. The said amount has been shown as other income in other business of the company including blending and trading division. Further, on account of exchange fluctuation on ECB loan taken by the Company the said acquisition an amount of Rs 55,290,000 has also been considered as income.*
>
> *The details of other income of the blending and trading division of RCCIL are as follows:*

Particulars	*Amount (in Rs)*
Termination fee from USA entity	*192,026,420*
Exchange fluctuation	*55,290,000*
Total other income of blending and trading division	*247,316,420"*

Rain CII Carbon (India) Limited
Other Income details for the A.Y. 2008-09

ANNEXURE - II

(Amount in Rs.)

OTHER INCOME		
Particulars	**Amount**	**Total Amount**
A. Interest on Fixed Deposits (Gross)		
CITIBANK BANK	534,434	
HDFC BANK LTD	1,602,228	
INDIAN BANK	3,575,118	
INDUSTRIAL DEVELOPMENT BANK OF	715,664	
STATE BANK OF INDIA (HYD)	807,808	
UTI BANK LIMITED	1,929,418	9,164,670
B. Insurance Claims		82,628
C. Gain/ (Loss) on Exchange Fluctuations		
EXCHANGEFLUCTUATIONONREINSTATED A/C. (Including Tranche D2 ECB Loan Reinstated acmount)	204,928,563	
EXCHANGE FLUCTUATION - SALES	1,717,779	
EXCHANGE FLUCTUATION - BILL PAYMENTS/ RECEIPTS	(19,168,443)	
EXCHANGE FLUCTUATION A/C(STORES AND SPARES)	(220,627)	
EXCHANGE FLUCTUATION ON LOAN REPAYMENT	9,052,225	196,309,498
D. Income from Carbon Emission Reductions		59,983,161
E. Income from Services		
RAIN COMMODITIES LIMITED (USA)	192,026,420	192,026,420
F. Miscellaneous Income		
PROVISONS NO LONGER REQUIRED WRITTENBACK	4,350	
SALES-GYPSUM (EX-DUTY)	3,145	
SALE OF OTHERS	4,355,771	
SALE OF GYPSUM	29,840	
INTEREST-OTHERS	123,729	
PRIOR PERIOD EXPENSES	145,650	
OTHER INCOME	1,570,567	6,233,052
Total Other Income		**463,799,429**

26.1 We find the DRP while upholding the validity of the re-zassessment proceedings had relied upon the decision of the Hon'ble Supreme Court in the case of CIT vs. PVS Beedies (P) Ltd (Supra) on the ground that position of law pointed out by the internal audit party was a valid basis for reopening. It is the submission of the ld Counsel for the assessee that the said decision is not applicable to the facts of the present case since in the said case, the reopening was held to be valid and permissible under the law on the basis of factual error pointed out by the audit party. However, the Hon'ble Supreme Court in the case of Indian and Eastern Newspaper Society vs. CIT (1979) 2 Taxmann.197 has held that the opinion of the audit party on a point of law cannot constitute information so as to initiate re-assessment proceedings.

27. We find merit in the above argument of the ld Counsel for the assessee. In the case of PVS Beedies (P) Ltd (Supra), the Hon'ble Supreme Court has held that the reopening of a case on the basis of a factual error pointed out by the audit party is permissible in law. The relevant observation of the Hon'ble Supreme Court reads as under:

> *3. We are of the view that both the Tribunal and the High Court were in error in holding that the information given by internal audit party could not be treated as information within the meaning of Section 147(b) of the Income Tax Act. The audit party has merely pointed out a fact which has been overlooked by the Income Tax Officer in the assessment. The fact that the recognition granted to this charitable trust had expired on 22-9-1992 was not noticed by the Income Tax Officer. This is not a case of information on a question of law. The dispute as to whether reopening is permissible after audit party expresses an opinion on a question of law is now being considered by a larger Bench of this Court. There can be no dispute that the audit party is entitled to point out a factual error or omission in the assessment. Reopening of the case on the basis of a factual error pointed out by the audit party is*

permissible under law. In view of that we hold that reopening of the case under Section 147(b) in the facts of this case was on the basis of factual information given by the internal audit party and was valid in law. The judgment under appeal is set aside to this extent.

28. We find in the case of Indian & Eastern Newspaper Society vs. CIT (1979) 2 Taxmann.com 197, the Hon'ble Supreme Court has held that the opinion of the audit party on a point of law cannot constitute information so as to initiate re-assessment proceedings. The relevant observation of the Hon'ble Supreme Court reads as under:

"In determining the status of an internal audit report, it is necessary to consider the nature and scope of the functions of an internal audit party. The internal audit organisation of the Income Tax Department was set up primarily for imposing a check over the arithmetical accuracy of the computation of income and the determination of tax, and now, because of the audit of income-tax receipts being entrusted to the A Comptroller and Auditor-General of India from 1960, it is intended as an exercise in removing mistakes and errors in income tax records before they are submitted to the scrutiny of the Comptroller and Auditor-General. Consequently, the nature of its work and the scope of audit have assumed a dimension ca-extensive with that of Receipt Audit. The nature and scope of Receipt Audit are defined by section 16 of the Comptroller and Auditor General's-(Duties, Powers and Conditions of Services) Act, 1971.

Under that section, the audit by the Comptroller and Auditor General is principally intended for the purposes of satisfying him with regard to the sufficiency of the rules and procedures prescribed for the purpose of securing an effective check on the assessment, collection and proper allocation of revenue. He is entitled to examine the accounts in order to ascertain whether the rules and procedures are being duly observed, and he is required, upon such examination, to submit a report. His powers in respect of the audit of income-tax receipts and refunds are outlined in the Board's Circular No. 14/19/ 56-II dated July 28, 1960. Paragraph 2 of the Circular repeats the provisions of section 16 of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971. And paragraph 3 warns that "the Audit Department should not in any way substitute itself for the revenue authorities in the performance of their statutory duties." Paragraph 4 declares:

"4. Audit does not consider it any part of its duty to pass in review the judgment exercised or the decision taken in individual cases by officers entrusted with those duties, but it must be recognised that an examination of such cases may be an important factor in judging the effectiveness of assessment procedure .. It is however, to forming a general judgment rather than to the detection of individual errors of assessment, etc. that the audit enquiries should be directed. The detection of individual errors is an incident rather than the object of audit."

Other provisions stress that the primary function of audit in relation to assessments and refunds is the consideration whether the internal procedures are adequate and sufficient. It is not intended that the purpose of audit should go any further. Our attention has been invited to certain provisions of the Internal Audit Manual more specifically defining the functions of internal audit in the Income Tax Department. While they speak of the need to check all assessments and refunds in the light of the relevant tax laws, the orders of the Commissioners of Income Tax and the instructions of the Central Board of Direct Taxes, nothing contained therein can be construed as conferring on the contents of an internal audit report the status of a declaration of law binding on the Income Tax Officer. Whether it is the internal audit party of the Income Tax Department or an audit party of the Comptroller and Auditor- General, they perform essentially administrative or executive functions and cannot be attributed the powers of judicial supervision over the quasi-judicial acts of income tax authorities. The Income Tax Act does not contemplate such power in any internal audit organisation of the Income Tax Department; it recognises it in those authorities only which are specifically authorised to exercise adjudicatory functions. Nor does section 16 of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971 envisage such a power for the attainment of the objectives incorporated therein. Neither statute supports the conclusion that an audit party can pronounce on the law, and that such pronouncement amounts to "information" within the meaning of section 147(b) of the Income Tax Act, 1961.

But although an audit party does not possess the power to so pronounce on the law, it nevertheless may draw the attention of the Income Tax officer to it. Law is one thing, and its communication another. If the distinction between the source of the law and the communicator of the law is carefully maintained, the confusion which often results in applying section 147(b) may be avoided. While the law may be enacted or laid down only by a person or body with authority in that behalf, the knowledge or awareness of the law may be communicated by anyone. No authority is required for the purpose.

In the present case, an internal audit party of the Income Tax Department expressed the view that the receipts from the occupation of

the conference hall and rooms did not attract section 10 of the Act and that the assessment should have been made under section 9. While sections 9 and 10 can be described as law, the opinion of the audit A party in regard to their application is not law. It is not a declaration by a body authorised to declare the law. That part alone of the note of an audit party which mentions the law which escaped the notice of the Income Tax officer constitutes "information" within the meaning of section 147(b); the part which embodies the opinion of the audit parts in regard to the application or interpretation of the law cannot be taken into account by the Income Tax Officer. In every case, the Income Tax officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to his notice he can reasonably believe that income has escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot for the purpose of such belief, add to or colour the significance of such law. In short, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income Tax officer. Thus the clear mandate of the Court is that the opinion of the audit party on a point of law cannot constitute information so as to initiate reassessment proceedings, in no longer res integra"

29. We find the Hon'ble Bombay High Court in the case of PCIT vs. Yes Bank Ltd (2022) 135 Taxmann.com 161(Bom) while holding that the opinion of Internal Audit Party of Income Tax Department cannot be regarded as information within the meaning of section 147(b) for the purpose of reopening of the assessment has observed as under:

"*4. It is settled law that the opinion of the Internal Audit party of the Income Tax Department cannot be recorded as information within the meaning of section 147(6) of the Act for the purpose of opening the assessment. The courts have also held that notice of reassessment cannot be issued based on information received from audit objection. The Apex Court in Indian & Eastern Newspaper Society v. CIT [197912 Taxman 197 in paragraph 20 has held as under:*

"20. Therefore, whether considered on the basis that the nature and scope of the functions of the internal audit organisation of the Income-tax Department are co-extensive with that of receipt audit or on the basis of the provisions specifically detailing its functions in the Internal Audit Manual Vol. 2, we hold that the opinion of an internal audit party of the Income-tax Department on a point of law cannot be regarded as "information" within the meaning of section 147(6) of the Income-tax Act, 1961"

5. In Indian Eastern Newspaper Society's case (supra), the court further held that in every case, the Income-tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has come to his notice he can reasonably believe that income had escaped assessment. The basis of his belief must be the law of which he has not become aware. The opinion rendered by the audit party to the law cannot, for the purpose of such belief. add to or colour the significance of such law.

6. In another unreported judgment of this Court in Jainam Investments v. Asst. CIT [2021] 131 taxmann.com 327/283 Taxman 439/439 ITR 154, it is held that the reasons for reopening an assessment should be that of the Assessing Officer alone who is issuing the notice and he cannot act merely on the dictates of any another person in issuing the notice. Therefore, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income-tax Officer. Considering this proposition of law, ITAT came to the conclusion that reopening of assessment was not correct and allowed the appeal filed by respondent.

7. We have no reason to take a different view from the View expressed by our own High Court. In our view, ITAT has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analyzed and correct test is applied to decide the issue at hand. then, we do not think that question as pressed raised any substantial question of law."

30. Since in the instant case, the AO after examining the details filed by the assessee in the original assessment proceedings has completed the assessment, therefore, the reopening of the assessment on the basis of the opinion of the audit party on a point of law is not valid.

31. We further find that the Hon'ble Supreme Court in the case of Hindustan Lever Ltd vs. CIT (239 ITR 297) has laid down the principle of first degree which has to be applied to determine whether the income can be eligible for deduction u/s 10B. Since there are series of decisions where the matter has travelled upto the Hon'ble Apex Court where it has been held that foreign exchange fluctuation gain, provisions written back and interest income could have a direct nexus with the income of the undertaking and hence eligible for deduction u/s 10B, therefore, the reopening of the assessment merely on the basis of audit

objection for the sole basis of initiation of proceedings qua this issue is wholly untenable in law. We therefore, hold that the reopening of the assessment on the first issue i.e. certain income to be excluded in the computation of exemption u/s 10B is not in accordance with law. Therefore, the reopening of the assessment on issue No.(a) is held to be not justified.

32. So far as the issue No.(c) is concerned, again which is on the basis of audit objection, we find the AO recorded the reasons on the basis of the Schedule T to notes to account according to which a subsidiary of the assessee company acquired shares in M/s Juniper Investment LLC which in turn owned all the outstanding shares of CII Carbon LLC from a Dutch Company Cadogen Holdings B.V. For making this investment the assessee had borrowed USD 175 Mn (including towards working capital and refinance of old loan) from banks and had incurred finance charges amounting to INR 17.65,88,101 towards processing fee. This expenditure had been debited to the P & L account under the head finance charges as an extraordinary item. Further the AO referred to the observations made in the audit which seems to suggest that the Audit was of the opinion that such allowance of expenditure against the income of assessee was not in order and this resulted in the short computation of income in respect of taxable units.

33. We find when the matter travelled to the DRP, the DRP held that this expenditure could not be allowed under section 36(1)(iii) and section 37(1) of the Act. We find a bare perusal of the reason shows that it is only on the basis of the audit objection which evidently is on a point of law, forms a basis for such

initiation qua this issue. However, we find apart from the audit objection, there is no factual inaccuracy pointed out by the audit. In our opinion, the question whether any expenditure meets the requisites of section 36(1)(iii) or section 37(1) is a legal issue and not a factual inaccuracy. We find before the DRP, the assessee had explained that the intermediate holding company Rain CII Holdings had been specifically set up for strategic acquisitions and was in connection with the business of the assessee company. Although the principle of commercial expediency and nexus between the expenditure has been decided by the Hon'ble Apex Court in the case of SA Builders v. Commissioner of Income-tax (Appeals), Chandigarh (288 ITR 1) however, for the audit to opine whether any expenditure met the requisite of section 36(1)(iii) or section 37 of the Act, in our opinion, was beyond its competence. In view of the above, we are of the opinion that the reasoning adopted by the AO for initiating reassessment proceedings on this issue is wholly untenable in law. Since the assessee in the instant case had given all the details in the audited accounts as per Schedule T of the notes to the Accounts and since the reopening was based on the basis of the opinion of audit party on a question of law, therefore, following our observation in the preceding paragraph, we hold that the reopening is not correct.

34. Apart from the above discussion, we further find there is no new material on record or new fact which has come to the AO’s notice post the original scrutiny assessment which could lead to a reason to believe that any income chargeable to tax has escaped assessment. We find the AO vide notice dated 29.10.2010 raised specific query on this issue and the assessee had replied to the same as available at Page 374 to 383 of the Paper Book.

Thereafter, no new tangible material or fact has come to the notice of the AO except the opinion of the audit party on a question of law.

35. We find the Hon'ble Supreme Court in the case of PCIT vs. Fibres and Fabrics International (P) Ltd (2022) 139 Taxmann.com 562 (S.C) has dismissed the SLP filed by the Revenue against the decision of the Hon'ble Karnataka High Court where it has been held that in absence of any other tangible material available with the AO, the re-assessment and/or reopening of the concluded assessment is not possible.

36. We find the Hon'ble Supreme Court in the case of CIT v Kelvinator India Ltd (187 Taxmann 312(S.C) has held that after 1.4.89, the AO has the power to reopen provided "there is tangible material" to come to conclusion that there is escapement of income from assessment and reasons must have a livelink with formation of belief.

37. We find the Hon'ble Delhi High Court (full Bench) in the case of CIT vs. Usha International has held that the re-assessment proceedings will be invalid in case an issue or query is raised by the AO in the original Assessment Proceedings and the AO does not make any addition in the assessment order. Similar view has been held in other decision to the proposition that the re-assessment is not possible in absence of any tangible material on account of change of opinion. In view of the above discussion, reopening of the assessment on the issue of clause (c) is also not valid in the eyes of law.

38. So far as clause (b) regarding apportionment of interest expenditure of Rs.19,52,26,888/- is concerned, we find the AO during the course of assessment proceedings had raised a specific query which is as under:

> *"2) It is also noticed that an amount of Rs.19,52,26,888/- debited to P&L Account towards interest on Term Loans. When explanation called for in relation to the same in the earlier hearing, it was replied that the company had taken the loan of USD 97000000 for acquisition in USA and the interest of Rs.19,52,26,888/- represent the interest incurred thereon and the same was claimed only in Blending & Trading Division in as much as it was neither used in CPC nor in the generation of power business. In this connection, you are requested to show-cause why the relatable interest as claimed above should not be disallowed since the same is incurred only in connection with acquisitions. Your reply should reach the undersigned by 01-11-2010 at 11.30am on which date your case stands posted for hearing".*

39. We find the assessee vide reply dated 2.11.2010 has submitted as under:

> *"Question on 2: Why the amount of Rs. 19,52,26,888 is debited to P&L Account towards term loan. Whether such expenditure is an allowable expenditure?*
>
> *In this connection we wish to submit as under:*
>
> *Provision of Section 36 (1)(iii) of the Income Tax Act, provides as under*
> *"36(1) (i)....*
> *(ii)*
> *(iii) the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession:*
>
> *Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalized in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.*
>
> *Thus under the provision of section 36 (1)(iii) once it is established that borrowed funds are utilized for the purpose of business, the interest is allowable as deduction. It is not necessary whether the borrowed fund is*

ut1l1zed lor the purpose of capital expenditure or acquisition of assets or on account of revenue account. The only conditions for the allowability of interest u/s 36(1)(iii) is that the borrowed fund shall be used for the purpose of the business of the Company.

The explanation to Section 36(l)(i1i) itscl1 provides the circumstances under which interest is to be treated as capital Expenditure. The only circumstance under which interest is to be treated as capital expenditure is when the interest is paid in capital respect of borrowed for acquisition of capital asset, extension of existing business and such asset has not been put to use. In all other circumstances Interest is to be allowed if it is proved that funds are used for the business whether acquisition of CPC Company is business purpose.

Whether acquisition of CPC Company is business purpose?

The Company is engaged in the business of manufacturing and trading of Calcined purpose. Petroleum Coke (CPC") business. The Company owns a manufacturing plant in Vizag. The Company had taken a loan of USD 97.000.000 for acquisition of a company in USA which is also engaged in the business of manufacturing and trading of CPC. An amount of Rs. 19,52,26,888 is debited to P&L Account towards interest on the above mentioned loan.

The acquired company is engaged in the similar business as the Company. Therefore, funds borrowed and used for the acquisition of the above-mentioned company is for the business of the Company and hence interest expenses would be allowable expenditure under section 36 (1)(ii) of the Act.

In this connection we would like to place reliance on the judgment of the High Court of Delhi in the case of Dalmia Cement (Bharat) Limited (254 ITR 377) has held that:

"If all the requisite conditions for allowance of interest are fulfilled, it is not possible and open to the Revenue to make a part disallowance, unless there is a positive finding recorded that a part of the amount borrowed was not used for the purposes of the business. As was observed in Mahadev Prasad's case (1979) l18 ITR 200 (SC), the expression for the purpose of business appearing in S. 36(1) (iti) and S. 37(1) is wider in scope than the expression for the purpose of making or earning income' used in S. 57(iii). Therefore. the scope for allowing u deduction u/s. 36(1) (ii) is much wider than the one vail-able u/s. 57(iii), "

While pronouncing the above ruling, the High Court of Delhi referred 1o the judgment of the Apex Court in the case of Mahadev Prasad Jatia (118 ITR 200) in which, while dealing with similar provisions under the old Act, the Apex Court bad observed that to be entitled to such deduction the conditions required to be fulfilled were: (a) that money (capital) must have been borrowed by the assessee, (b) that it must have been borrowed for the purpose of business, and (c) that the assessee must have paid interest on the said amount and claimed it as a deduction.

Further, reliance is placed on the Judgment of the Bombay High Court in the case of CIT vs Lokhandwala Construction Inds. Ltd (260 ITR S79) wherein was held that:

"In this case, we are concerned with deduction under section 36(1)(iii). Since the assessee had received loan for obtaining stock-in-trade, the assessee was
entitled to deduction under section 36(1) iii) of he Act. That, while adjudicating the claim for deduction under section 36(l)iüi) 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 the capital borrowed by the assessee was an item of deduction. That the utilization of capital was irrelevant for the purpose of adjudicating the claim for deduction u/s 36(1)(iii) of the Act. …. All that the assessee had to show was that the capital which was borrowed was used for business purpose in the relevant year of account and it did not matter whether the capital was borrowed in order to acquire a revenue asset or a capital asset.

Further in the case of S.A. Builders Lid VS CTT and Anr. (288 TaxInan) the Apex Court has held that:

"It is true that the borrowed amount in question is not utilized by the assessee in its own business, but had been advanced as interest-free loan to its sister concern. However, in our opinion, that fact is not really relevant. What is relevant is whether the assessee advanced such amount to its sister-concern as a measure of commercial expedience.

…… that once it is established that there was nexus between the expenditure and the purpose of the business (1which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the board of directors und assume the role to decide how much is reasonable expenditure having regard maximize to the circumstances of the case. No businessman can be compelled to its profit".

Further, reliance is placed on the judgment of the Mumbai Tribunal in the case of ATE Enterprise out of borrowed Ltd vs JCIT (102 ITD 110) in which it has held that the acquisition of shares funds for increasing with the holding in its company was closely connected the assessee's business and therefore the interest accruing on the borrowed funds was deductible u/s 36(1)(iii) of the Act. While pronouncing the above ruling, the Tribunal held that:

"we hold that the assessee is entitled to claim the deduction not only u/s 36(1)(iii) but also u/s 37(1) of the Act, 1961 to the extent interest is attributable to the amount borrowed and utilized for acquisition of shares of "Trauma".

The Apex Court in the case of DCIT vs. Core Health Care Ltd (298 ITR 194) held that:

"interest on moneys borrowed for the purposes of business is a necessary item of expenditure in a business. For allowance of a claim for deduction of interest under the said section, all that is necessary is that – firstly, the
money, ie capital. must have been borrowed by the assessee; secondly, it must have been borrowed for the purpose of business, and thirdly, the assessee must have paid interest on the borrowed amount. All that it germane is whether the borrowing was, or was not, for the purpose of business. The expression " for the purpose of business" occurring in section 36(1)(iii) indicated that once the test of for the purpose of business; is satisfied in respect of the capital borrowed, the assessee would be entitled to deduction u/s 36(1)(iii) of the 1961 Act. This provision makes no distinction between the money borrowed to acquire a capital asset or a revenue asset. All that the section requires is that the assessee must borrow capital and the purpose of borrowing must be for business which is carried on by the assessee in the year of account".

In view of the above, we humbly submit that the interest paid for funds borrowed for acquisition of company is allowable deduction u/s 36(1)(iii)".

40. Since the AO in the instant case has raised a specific query to which the assessee has given his reply, therefore, the reopening of the assessment on the basis of mere change of opinion and in absence of any tangible material is not valid in view of the decisions cited in the preceding paragraphs. We therefore, hold that reopening of the assessment on the issue of clause (b) above is also not valid.

41 That leaves us the last issue on the basis of which the reopening of the assessment is made on account of some calculation errors due to short calculation of corporate guarantee fee.

42. We find merit in the argument of the ld Counsel for the assessee that a computational error can always be rectified u/s 154 of the I.T. Act and the rigors of 147 is not warranted. We

further find in the reasons recorded the only basis is that the adjustment towards the corporate guarantee fee had to be computed from 9.7.2007 and in the TPO's order dated 17.10.2011 (First TPO order), this period had been erroneously taken as 148 days instead of 151 days and hence there was short computation of guarantee fee by INR 29,87,704/-. Given the factual findings of the AO in the final assessment order dated 24.03.2017, while giving effect to the DRP Direction dated 2.2.2017, the AO found that the start of the corporate guarantee date was from 19.07.2007. Thus, in view of the factual findings of the AO, this reason which was recorded on the basis of the TPO's 2011 order is no longer factually tenable.

43. Thus, on all 4 counts, the reopening of the assessment is not possible. We therefore, hold that the reopening of the assessment by the AO is not in accordance with law and is to be quashed. We hold and direct accordingly. Since the assessee succeeds on this legal ground, the other grounds challenging the addition on merit become academic in nature. Therefore, these grounds are not being adjudicated.

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

Order pronounced in the Open Court on 31st May, 2023.

Sd/-	**Sd/-**
(K. NARASIMHA CHARY) **JUDICIAL MEMBER**	**(R.K. PANDA)** **ACCOUNTANT MEMBER**

Hyderabad, dated 31st May, 2023
Vinodan/sps

Copy to:

S.No	Addresses
1	M/s. Rain Cements Ltd (Formerly known as Rain CII Carbon (India) Ltd, 34, Rain Center, Srinagar Colony, Hyderabad 500073
2	Dy. Commissioner of Income Tax, Circle 3 (1), 7th Floor, Signature Towers, Kondapur, Serilingampally, Hyderabad
3	DRP Bengaluru
4	Add. CIT (Transfer Pricing) 3rd Floor, D Block IT Toweres, ZAC Guards, Hyderabad 500004
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order