INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI

BEFORE

SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 2162/Del/2017
Asstt. Year 2013-14
AND
ITA No. 7273/Del/2017
Asstt. Year 2014-15

PTC India Financial Services Ltd., 7th Floor, MTNL Building, 8, Bhikaji Cama Place, New Delhi – 110 066 PAN AAECP0501C	Vs.	DCIT, Circle-19(1) & (2), New Delhi
(Appellant)		(Respondent)

ITA No. 2175/Del/2017
Astt. Year: 2013-14

ACIT, Circle-19(2), Room No. 221, C.R. Building, I.P. Estate New Delhi.	Vs.	PTC India Financial Services Ltd., 7th Floor, MTNL Building, 6, Bhikaji Cama Place, New Delhi – 110 066 PAN AAECP0501C
(Appellant)		(Respondent)

ITA No. 7433/Del/2017
Asstt. Year 2014-15

Addl CIT, Special Range-7, Room No. 211, C.R. Building, I.P. Estate New Delhi.	Vs.	PTC India Financial Services Ltd., 7th Floor, Telephone Exchange Building, 8, Bhikaji Cama Place, New Delhi – 110 066 PAN AAECP0501C
(Appellant)		(Respondent)

Assessee by:	Shri Salil Kapoor, Advocate Shri Sumit Lalchandani, Advocate Ms. Ananya Kapoor, Advocate Shri Tarun Chanana, Advocate
Department by:	Shri Vivek Vardhan, Sr. DR
Date of Hearing:	27.09.2023
Date of pronouncement:	29.11.2023

O R D E R

PER ASTHA CHANDRA, JM

These cross appeals filed by the Assessee and the Revenue arise out of separate orders dated 30.01.2017 and 21.09.2017 of the Ld. Commissioner of Income Tax (Appeals)-7, New Delhi **("CIT(A)")** pertaining to Assessment year **("AY")** 2013-14 and 2014-15 respectively. Since common issues are involved, these were heard together and are being disposed of by this common order.

2. The grounds taken by the assessee and the Revenue year-wise are as under:-

Assessee's Grounds of Appeal- AY 2013-14

"1. That the additions/disallowances made and sustained by the Commissioner of Income Tax (Appeals) are illegal and bad in law.

2. That in view of the facts and circumstances of the case, the CIT (Appeals) has erred on facts and in law in sustaining the disallowance of Rs 20,54,47,894/- (Rs. 18.82 Crore 2- being Loss on ECB Liability and Rs. 1.72 Crore being loss on Hedging contracts for ECB) claimed by the appellant as a deduction on account of exchange rate fluctuation.

3. That the CIT(A), in view of the facts and circumstances of the case, has erred on facts and in law in not allowing deduction on account of foreign exchange fluctuations as allowable deduction, when it is an

admitted fact that the loan received is used as circulating capital for the purpose of business.

4. *That the CIT(A), in view of the facts and circumstances of the case, has erred on facts and in law in treating the loss of Rs. 18.82 Crore (rounded off) as notional loss in respect of restatement of ECBs.*

5. *That the CIT(A), in view of the facts and circumstances of the case, has erred on facts and in law in treating the loss of Rs. 1.72 Crore (rounded off) as a speculative loss which is incurred on account of foreign exchange loss in respect to currency derivative contracts.*

6. *That the CIT(A), in view of the facts and circumstances of the case, has erred on facts and in law in restoring the matter to the Assessment Officer and not allowing the deduction claimed by the Assessee under Section 36(1)(viii) of the Income Tax Act 1961.*

7. *That the disallowance of Rs. 1,76,16,528/- is illegal and bad in law and the CIT(A) has erred in not deleting the same.*

8. *That the CIT(A), in view of the facts and circumstances of the case, has erred on facts and in law in restoring the matter to the Assessment Officer and not allowing the deduction of Rs. 9,69,602/- claimed by the Assessee on account of Advertisement Expenses, under Section 37 of the Income Tax Act 1961.*

9. *That the disallowances made/upheld and the observations made are unjust, unlawful and based on mere surmises and conjectures. The additions/disallowances made cannot be justified by any material on record and in any case they are excessive.*

10. *That the explanation given and the evidence produced, material placed and available on record has not been properly considered and judicially interpreted and the additions made cannot be justified in view of the said material and explanation.*

11. *That the AO erred in law and on facts in charging interest u/s 234B and 234C of the Income Tax Act 1961. The AO has failed to appreciate that the assessee could have never foreseen these additions being made against the assessee.*

The above objections are without prejudice to each other. The assessee craves leave to alter, amend or withdraw all or any objections herein or add any further grounds as may be considered necessary either before or during the hearing."

<u>Revenue's Grounds of Appeal- AY 2013-14</u>

a) *"In the facts and circumstances of the case, the Ld CIT(A) erred in deleting the addition made on account of disallowance of depreciation*

of Rs. 57,05,766/- ignoring the fact that the assessee company has made investment in windmill."

b) *"In the facts and circumstances of the case, the Ld CIT(A) erred in deleting the addition made on account of short deduction of TDS of Rs. 56,97,665/-"*

c) *"In the facts and circumstances of the case, the Ld CIT(A) erred in deleting the addition made on account of disallowance u/s 14 A of Rs. 1,16,97,590/-*

d) *The appellant craves to be allowed to add any fresh ground(s) of appeal and/or delete or amend any of the ground(s) of appeal*

Assessee's Grounds of Appeal- AY 2014-15

"1. That the additions/disallowances made and sustained by the Commissioner of Income Tax (Appeals) are illegal and bad in law.

2. That in view of the facts and circumstances of the case, the CIT (Appeals) has grossly erred on facts and in law in upholding the disallowance of Rs 18,64,61,000/- claimed by the appellant as a deduction on account of foreign exchange rate. This addition may kindly be deleted.

3. That the CIT(A) has grossly erred on facts and in law in upholding the addition/ disallowance of Rs 18,64,61,000 without appreciating the well settled position of law and the facts of the case. This addition may kindly be deleted.

4. That the CIT(A) has grossly erred on facts and in law in upholding the addition/ disallowance of Rs 7,92,643/- under Sec 14A and Rule 8D. The disallowance of Rs 7,92,643/- upheld is totally illegal and bad in law and may kindly be deleted.

5. That the CIT(A), in view of the facts and circumstances of the case, has grossly erred on facts and in law in upholding the addition/disallowance made by the AO of Rs 2,89,99,437/- under section 36(1)(viii). This addition may kindly be deleted.

6. That the disallowances made/upheld and the observations made are unjust, unlawful and based on mere surmises and conjectures. additions/disallowances made cannot be justified by any material on record and in any case they are excessive.

7. That the explanation given and the evidence produced, material placed and available on record has not been properly considered and judicially interpreted and the additions made cannot be justified in view of the said material and explanation.

8. *That the AO erred in law and on facts in charging interest u/s 234B and 234C of the Income Tax Act 1961. The AO has failed to appreciate that the assessee could have never foreseen these additions being made against the assessee.*

The above objections are without prejudice to each other. The assessee craves leave to alter, amend or withdraw all or any objections herein or add any further grounds as may be considered necessary either before or during the hearing."

<u>Revenue's Grounds of Appeal- AY 2014-15</u>

"1. On the facts and under the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 11,41,153/- made by disallowing depreciation on the ground that the investment made by the assessee in Wing Turbine Generation (WTG) cannot be equated with activities in the nature of trade or business or adventure.

2. On the facts and in the circumstances of the case, Ld. CIT(A) has erred in law in deleting disallowance of Rs. 1,05,63,232/- u/s 14A of the IT Act ignoring the mandatory nature of Rule SD and the binding CBDT Circular No. 5/2014 dated 11.02.2014.

3. "On the facts and under the circumstances of the case, Ld. CIT(A) has erred in law in deleting the disallowance of Rs. 59,58,893/- u/s 40(a)(ia) of the IT Act for non-deduction of TDS, ignoring the direct decision on identical issue of ITAT Delhi in the case of M/s Neemrana Hotels Pvt. Ltd. ITA No. 3134/Del/2013.

4. The appellant craves to be allowed to add and alter any fresh ground(s) of appeal and/ or delete or amend any of the ground(s) of appeal."

3. Briefly stated the common facts are that the assessee company is a Non-Banking Financial Company **("NBFC")** engaged in the business of providing finance to companies in energy sector in the form of equity investment and/or debt. For AY 2013-14 and 2014-15 it filed its return on 30.09.2013 and 30.09.2014 declaring income of Rs. 1,29,02,65,078/- and Rs. 207,96,59,220/- respectively. Both the returns were selected for scrutiny under CASS. Statutory notices were issued/served and complied with. Details filed were examined and considered by the Ld. Assessing Officer **("AO").**

4. The Ld. AO completed the assessment under section 143(3) of the Income Tax Act, 1961 **(the "Act")** on total income of Rs. 1,53,74,00,120/- on 19.01.2016 for AY 2013-14 including therein disallowance of depreciation of Rs. 57,05,766/- on investment made in windmills; disallowance of Rs. 20,54,47,894/- being notional loss booked under the head foreign exchange loss; disallowance of Rs. 56,97,665/- for non-deduction of TDS; disallowance of Rs. 1,16,97,590/- under section 14A; disallowance of Rs. 1,76,16,528/- under section 36(1)(viii) and disallowance of Rs. 9,69,602/- under section 37 aggregating in all to Rs. 24,71,35,045/-.

5. The Ld. AO completed the assessment for the AY 2014-15 on 23.12.2016 on total income of Rs. 2,31,35,75,580/- under section 143(3) of the Act including therein disallowance of depreciation of Rs. 11,41,153/-; disallowance of notional loss of Rs.18,64,61,000/- booked under the head foreign exchange loss; disallowance of Rs. 59,58,893/- for non-deduction of TDS; disallowance of Rs. 1,13,55,875/- under section 14A and disallowance of Rs. 2,89,99,437/- under section 36(1)(viii) of the Act aggregating in all to Rs. 2,31,35,75,580/-.

6. Aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A). In both the years, the Ld. CIT(A) partly allowed the appeal of the assessee. He confirmed the disallowance of Rs. 20,54,47,894/- and Rs. 18,64,61,000/- on account of notional loss booked under the head foreign exchange loss in AY 2013-14 and 2014-15 respectively and restored the matter to the Ld. AO in respect of disallowance of Rs. 1,76,16,528/- in AY 2013-14 and Rs. 2,89,99,437/- in AY 2014-15 under section 36(1)(viii); upheld the disallowance of Rs. 7,92,643/- under section 14A in AY 2014-15 and restored the matter to the Ld. AO in respect of the deduction of Rs. 9,69,602/- claimed by the assessee on account of advertisement expenses in AY 2013-14. The assessee is in appeal before the Tribunal challenging the order of the Ld. CIT(A) in sustaining the above disallowances and restoring the above issues to the Ld. AO and all the grounds of the assessee in both the years relate thereto.

6.1 The Ld. CIT(A) gave relief to the assessee by deleting the disallowance of Rs. 57,05,766/- on investment made in windmill; disallowance of Rs. 56,97,665/- for non-deduction of TDS and disallowance of Rs. 1,16,97,590/- under section 14A in AY 2013-14 against which the Revenue is in appeal before the Tribunal. Likewise, the Revenue has challenged the deletion of depreciation of Rs. 11,41,153/- on investment made in windmill; disallowance of Rs. 1,05,63,232/- under section 14A and disallowance of Rs. 59,58,893/- for non-deduction of TDS in AY 2014-15.

7. We take up the assessee's appeal first.

8. Ground No. 1 in both the years is of general nature not requiring adjudication.

9. Ground No. 2 to 5 and Ground No. 2 & 3 in AY 2013-14 and 2014-15 relate to disallowance on account of exchange rate fluctuation. The Ld. CIT(A) has discussed this issue in para 5 at pages 6-17 of his appellate order in AY 2013-14 and in para 5 at pages 9-23 of his order in AY 2014-15. The Ld. CIT(A) incorporated the submission of the assessee made before him in para 5.1 of his orders and recorded his findings in para 5.2 of his orders. In para 5.2 of the appellate order in AY 2013-14 his observation and findings are as follows:-

> *"5.2 I have carefully considered the order passed by the AO and the submissions filed by the Ld. AR. The appellant is a financial institution. It had taken foreign currency loans by way of External Commercial Borrowings (ECB) and claims to have utilised the same for onward lending to its customers. This claim is not disputed by the AO. The value of the ECB was higher, due to exchange rate fluctuation, on the balance-sheet date, i.e 31.01.2013. The enhanced liability of Rs. 18.82 crores was treated as revenue expenditure and claimed as deduction u/s 37(1) of the Act by the appellant. The deduction was disallowed by the AO as the same, according to him, constituted contingent liability. Aggrieved against the disallowance, the appellant has preferred the appeal."*

9.1 The Ld. CIT(A) followed his order (supra) in AY 2014-15. The assessee is dissatisfied and is before the Tribunal.

10. The Ld. AR drew our attention to the submission made before the Ld. CIT(A) during the course of appellate proceedings for AY 2014-15 wherein

the assessee has rebutted the contentions based on which the Ld. CIT(A) decided the matter against the assessee. The Ld. AR submitted that foreign exchange loss in relation to ECBs is an allowable deduction under section 37(1) of the Act and is duly covered by the judgment of Hon'ble Supreme Court in CIT vs. Woodward Governor India (P) Ltd. (2009) 312 ITR 354(SC) and the principles laid down therein have been followed in Oil and Natural Gas Corpn Ltd. (2010) 230 CTR (SC) 313. The Ld. AR further submitted that the decisions in Indian Molasses Co. P. Ltd. vs. CIT (1959) 371 ITR 66 (SC) and in Southern Technologies Ltd. vs. JCIT (2010) 320 ITR 577 (SC) referred to by the Ld. CIT(A) are not on the treatment of Forex Gain/Loss. According to the Ld. AR Instruction No. 03/2010 issued by the CBDT is applicable only where there is trading in forex derivatives and is not applicable on loss arising on account of Mark-to-Market reinstatement of derivative contracts. Mark-to Market losses on account of revaluation and re-instatement of pending forward contract for foreign exchange are allowable expense. The Ld. AR pointed out that on similar fact pattern the ITAT in the assessee's own case in ITA No. 4985/Del/2017 and 5051/Del/2017 decided the issue in its favour. (Para 27 at page 188 of the Paper Book 'Law Compilation' refers).

11. The Ld. CIT-DR placed reliance on the order of the Ld. AO/CIT(A) as also on CBDT Instruction No. 3/2010 dated 23.03.2010. He filed copy of Mumbai ITAT order in Vaibhavi Trading(P) Ltd. vs. DCIT (2018) 89 taxmann.com 132 (Mumbai-Trib)

12. We have considered the submission of the parties and perused the records. We observe that during the AY 2012-13 also the assessee had incurred loss of Rs. 10.22 crores on ECB liability which was disallowed by the Ld. AO. On appeal by the assessee, the Ld. CIT(A) affirmed the order of the Ld. AO following the order of the Ld. CIT(A) for AY 2013-14. However, when the assessee carried the matter in appeal before the Tribunal, the Tribunal deleted the disallowance in its order in ITA No. 5051/Del/2017 dated 09.05.2023 for AY 2012-13.

13. While deciding the assessee's appeal for AY 2014-15 the Ld. CIT(A) simply followed his order for the AY 2013-14 without considering the submission of the assessee. In our opinion it is necessary to reproduce the assessee's submission which contains rebuttal of the Ld. CIT(A)'s contentions based on which the order of the Ld. AO was affirmed for AY 2013-14 on the point.

"3.4 It is humbly submitted that the additions made to Appellant's Computation of Income is unwarranted and is void ab-inito, our rebuttal against above allegations are as under:

Foreign Exchange Loss incurred on re-instatement is an allowable expenditure

3.5. At the outset, it is submitted before your Honour that foreign exchange fluctuation loss recorded on re-instatement of a revenue account is an allowable expenditure under section 37 of the Act. In this regard, before asserting any contentions, it is imperative to highlight the provisions of section 37 of the Act.

Legal Provisions

The relevant extract of section 37 of the Act is reproduced below:

**37(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the Assessee), lad out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head Profits and gains of business or profession,*

Therefore the following conditions should be satisfied for claiming an expense to be tax deductible under the provisions of section 37(1) of the Act:

- *There should be nexus between expenses incurred and business activities undertaken by the Assessee. In other words, the expenses should be incurred 'wholly and exclusively for the purpose of the business;*
- *The expenses incurred should satisfy the test of commercial expediency;*
- *The expenses should not be capital in nature;*
- *The expenses should not be in the nature of personal expenses*

Applicability to instant case

3.6. In this regard it is submitted that all the law requires is that the expenditure should not be in the nature of capital expenditure or personal expenditure of the Appellant, and should be wholly and exclusively incurred

for the purposes of the business. Your Honour would appreciate that the impugned expense ie. loss on foreign exchange loss has been incurred by the appellant during the course of its business and is unequivocally justifiable in terms of commercial/business expediency. Expense is neither capital in nature nor a personal expense, hence duly allowable under section 37 of the Act.

3.7 Reference can be drawn from well settled position articulated by various courts including the Apex Court in case of CIT vs Woodward Governor India (P) Ltd SC (2009). Relevant extract of the case which helps to determine the deductibility of an expenditure is stated below:

"21. In conclusion, we may state that in order to find out if an expenditure is deductible the following have to be taken into account (i) whether the system of accounting followed by the assessee is mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received; (ii) whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide; (iii) whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it; (iv) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains; (v) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards; (vi) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation."

3.8. Similar inference has been drawn by corresponding bench of Apex Court in below mentioned judicial precedents

- *Oil & Natural Gas Corp Ltd (SC) (2010) and*
- *Bharat Earth Movers (SC)(2000)*

Applicability of judgements of Apex Court to the instant case

3.9. It is imperative to analyze the applicability of judgements of Apex Court to the facts of the present case especially in light of the tests laid down by Apex Court in case of Woodword Governor (Supra). In this regard, it is submitted that the Appellant is in compliance with all the conditions mentioned by the Hon'ble Supreme Court in the above case with respect to allowability of an expenditure.

- *Consistently following Mercantile System of Accounting*

Appellant has consistently followed mercantile system of accounting and prepared its books as per available guiding principles. It has never been disputed by the Learned AO that Appellant is not following mercantile system of accounting and has not consistently pursued the same. Further, Learned AO has not made any observation with respect to inconsistency or any discrepancy in books of accounts of the Appellant.

- *Consistently following Nationally Accepted Accounting Standards*

Appellate has been consistent in following nationally accepted accounting standards see Accounting Standards, Appellant is required to re-state the value of ECB liability on each balance sheet date depending on the exchange rate prevailing on the date of the balance sheet and to the profit and loss account Accordingly, Appellant profit/loss on such restatement to the restated the value of ECB liability as on March 31, 2014 and based on the accrual principle of accounting stipulated by Accounting Standards, incurred foreign fluctuation exchange loss on such re-statement.

3.10. Further, it is submitted that Appellant is a listed public company incorporated under the Companies Act, NBFC The Appellant is red with the RBI as a 1956 and is registered inter-alia engaged in the business of making principal investments in, and providing financing solutions for companies with projects across the energy value chain. During the year under consideration, ECBs were obtained by the Appellant and were utilized for onward lending in line with the main objective of Appellant. Since, Appellant is a NBFC, it deals in purchase (obtaining) and sale (lending) ECBs to its various customers. Thus foreign exchange loss considered on accrual basis on the ECB liability is a normal business expenditure and should be allowed as expenditure under Section 37(1) of the Act.

3.11. Based on above facts, Appellant vehemently submits that foreign exchange loss recorded by the Appellant on accrual basis on valuation of ECB liability on the balance sheet date should be allowed as expenditure under section 37(1) of the Act.

Misconceived interpretation of Apex Court judgement rendered in case of Woodward Governer (supra)

It is submitted before your Honour, that Learned AO has misconceived the finding of the Apex Court in case of Woodward Governer (supra). As stated above, Learned AO alleged that the facts of the aforesaid mentioned case are not similar to that of the Appellant's as same deals with treatment of foreign exchange loss within the ambit of section 43A of the Act.

3.12. Your Honour would appreciate that Hon'ble Supreme Court not only dealt with treatment of foreign exchange loss with regard to provisions of section 43A but also with respect to the loss outside the purview of section 43A of the Act i.e. profit/ loss arising on account of appreciation/ depreciation in value of foreign currency held by tax payer on revenue account. Relevant findings of Hon ble Supreme Court is this regard have already been stated in para 3.5 above. Further relevant extract of the case law is reproduced as under -

"After careful consideration it held that the assesees's claim for loss arising as a result of fluctuation in foreign exchange rates on the closing day of the year has been disallowed by the Assessing Officer, inter alia, on the ground that this liability was a contingent liability and the loss was a notional one. The

main ingredient of a contingent liability is that it depends upon happening of a certain event. We are of the considered opinion that in the case of the assessed the 'event' le. the change in the value of foreign currency in relation to Indian currency has already taken place in the current year. Therefore, the loss incurred by the assessed is a fait accompli and not a notional one.

....

"We, therefore, reject the submission of the Appellant in these appeals that in the revenue account cases, the increase in liability on account of the fluctuation, in the rate of foreign exchange prevailing on the last day of the financial year is notional or contingent and therefore cannot be allowed as a deduction in terms of Section 37 of the Act."

3.13. In light of above, it is submitted that the aforesaid case laws not only deals with the loss falling under the purview of section 43A of the Act but also other losses outside the purview of section 438 of the Act and are thus are squarely applicable to the instant case.

Non-applicability of judgement - Indian Molasses Co. P. Ltd. to the instant case

3.14 It is respectfully submitted that, recently your Honour while adjudicating the matter for AY 2013-14, placed incorrect reliance on the decision rendered by Hon'ble Apex Court in case of Indian Molasses Co. P. Ltd. (37 ITR 66). Your Honour held that although such loss was revenue in nature, however, it did not qualify as "expenditure" and thus cannot be allowed as deduction under the provisions of the Act.

Further, on the contention of the Appellant that the matter is covered in its favour by Apex Court Judgement in ca of Woodward Governer, your Honour held that the same could not be followed case as this judgement was in direct conflict with the decision of larger bench in case of Indian Molasses Co. P. Ltd. (Supra). Relevant extract of the appellate order is also reproduced hereunder for ease of your Honour's reference-

"5.5 In this case, the foreign currency was utilized as circulating capital and, hence, the gain or loss relating to its appreciation or depreciation is to be treated as on revenue account, ie, income or expenditure, as the case may be. The question is: Whether, for purposes of computing total income under the Income tax Act, such income or loss has to be allowed as deduction on year-to- year basis or at the time of final settlement of accounts.

There is no specific section in the Income Tax Act dealing with Income/expenditure corresponding to the revenue gain/loss due to exchange rate fluctuation. While the gain is treated as income Incidental to business, a loss is treated as expenditure allowable u/s 37(1) the Act. The Hon Supreme Court, In the case of Indian Molasses Co. P. Ltd. vs. CIT (1959) 37 ITR 66 (SC), had occasion to consider the connotation of the term 'expenditure' occurring in section 10(2) of the Income Tax Act, 1922 [which was pari materia with the section 37(1) of Income tax Act, 1961.......

....

5.9 Exchange rate is dynamic and fluctuates virtually on day-to-day basis. Hence, if there is gain today, there may be bigger gain by tomorrow or it may be wiped out or there may even be a loss. Hence, the loss on account of exchange rate fluctuation on a particular day, unless it happens to be the date of settlement of accounts, is transitory in nature. That being the case, it can be said that it does not pass the criteria of being called 'expenditure', as laid down by the Hon. Supreme Court in the case of Indian Molasses Co. P. Ltd. (supra). Incidentally, the same should also apply in the case of gain. But, the case at hand Involves loss and it is for that reason that loss is being discussed:

....

5.15. According to the appellant, the decision in the case of Woodward Governor India. (P) Ltd. (supra) should be taken to be the authority for the general proposition that loss due to exchange rate fluctuation in respect of the value of ECBs is, as a rule, revenue expenditure to be allowed as deduction u/s 37(1) of the Act. In view of the foregoing discussion, this argument is not accepted, it cannot be accepted for the simple reason that, if that were done, it would bring the decision in the case of Woodward Governor India(P) Ltd. (supra) in direct conflict with the decision of the larger bench in the case of Indian Molasses Co. P. Ltd. v CIT (supra) as well as with the subsequent decision by the same bench in the case of Southern Technologies Ltd. (supra).

5.16. In view of the foregoing discussion, the loss claimed by the appellant on account of foreign exchange fluctuation on reinstatement of ECBs at Rs. 18.82 crores cannot be treated as revenue expenditure u/s 37(1) of the Act. The disallowance made by the AO is therefore confirmed."

3.15. At this juncture, it is highlighted that the Apex Court in case of Woodword Governor (supra) has extensively discussed the judgement in case of Indian Molasses (Supra) and distinguished the same. Relevant extract of Woodword Governor is reproduced hereunder for ease of your Honour's reference:

"13. As stated above, one of the main arguments advanced by the learned Additional Solicitor General on behalf of the Department before us was that the word "expenditure" in Section 37(1) connotes "what is paid out and that which has gone irretrievably. In this connection, heavy reliance was placed on the judgment of this Court in the case of Indian Molasses Company (supra). Relying on the said judgment, it was sought to be argued that the increase in liability at any point of time prior to the date of payment cannot be said to have gone irretrievably as it can always come back. According to the learned counsel, in the case of increase in liability due to foreign exchange fluctuations, if there is a revaluation of the rupee vis-à-vis foreign exchange at or prior to the point of payment, then there would be no question of money having gone irretrievably and consequently, the requirement of "expenditure" is not met. Consequently, the additional liability arising on account of fluctuation in the rate of foreign exchange was merely a contingent/notional liability which does not crystallize till payment. In that case, the Supreme Court was considering the meaning of the expression "expenditure incurred while dealing with the question as to whether there was a distinction between the actual liability in presenti and a liability de futuro. The word "expenditure" is not defined in the 1961 Act. The word "expenditure is, therefore, required to be understood in the context in which it is used. Section 37 enjoins that any expenditure not being expenditure of the nature

described in Sections 30 to 36 laid out or expended wholly and exclusively for the purposes of the business should be allowed in computing the income chargeable under the head "profits and gains of business. In Sections 30 to 36, the expressions "expenses incurred" as well as "allowances and depreciation has also been used. For example, depreciation and allowances are dealt with in Section 32. Therefore, Parliament has used the expression "any expenditure" in Section 37 to cover both. Therefore, the expression "expenditure" as used in Section 37 may, in the circumstances of a particular case, cover an amount which is really a "loss" even though the said amount has not gone out from the pocket of the assessee.

......

15. For the reasons given hereinabove, we hold that, in the present case, the "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure under Section 37(1) of the 1961 Act.

.....

21. In conclusion, we may state that in order to find out if an expenditure is deductible the following have to be taken into account (1) whether the system of accounting followed by the assessee is mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received; (ii) whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide; (iii) whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it; (iv) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains; (v) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards; (vi) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation."

3.16. As stated above, the principal as laid down in case of Woodward Governer (supra) was also upheld by coordinated bench of Apex Court in case of Oil & Natural Gas Corpn. Ltd. (2010) 230 CTR (SC) 313. The Apex Court relying on the judgment of coordinated bench in case of Woodward Governer (supra) held as follows-

"We are of the opinion that the ratio of the said decision, with which we are in respectful agreement, squarely applies to the facts at hand and, therefore, the loss claimed by the assessee on account of fluctuation in the rate of foreign exchange as on the date of balance sheet is owable as expenditure under's 37(1) of the Act."

3.17. Accordingly, it is submitted that the facts in instant case are similar to those in case of Woodword Governor (Supra) and thus are distinguishable with the judgment of Indian Molasses Company (supra).

Non-Applicability of Instructions No. 3/2010

3.18. Ld. AO placed reliance on the Instruction No. 3/2010 dated 23-03-2010 issued by CBDT while disallowing the above expense. In this regard, it is No. 3/2010 cannot override the decision humbly submitted that the Instructions of the Apex Court- Woodward (supra). Once the Apex Court has provided its

findings, it shall become binding precedent and any contrary instructions will not override the same. Your Honour's attention is invited to favourable judgments (mentioned below) where, on similar set of facts, various courts have held the issue in favor of the Appellant

- *Hon'ble Delhi High Court in case of Munjal Showa Limited v Deputy Commissioner of Income tax (W.P. (c) 1707/2014 & cm no. 3569/2014) dated February 22, 2016*

Hon ble Delhi Court decided the issue of loss arising on derivative contract on account of Mark to Market reinstatement in favour of assessee and held as under-

"44. This has to be also appreciated in the context of the Assessee following the mercantile system of accounting and Section 145 of the Act. The income of the Assessee is to be computed consistent with the regular method of accounting followed by the Assessee. The Assessee has been following AS-11 and AS-30 issued by the ICAI, in terms of which the loss/gains on outstanding derivatives contracts are to be recognized on mark to market basis. The Assessee is right in contending that CBDT Instruction No. 3 of 2010 cannot possibly override the existing decisions of the Supreme Court/ High Court on similar issues. The legal position in this regard has been explained in Ratan Melting (supra) and has been reiterated in CIT v. Nagesh Knitwears (P.) Ltd. (2012) 345 ITR 135 (Delhi) and CIT v. Indian Oil Co. Ltd., (2012) 254 CTR 113 (Bom)."

(Emphasis supplied)

- *Hon'ble ITAT in case of Reliance Communications Ltd. vs. The Commissioner of Income Tax [I.T.A. No. 671/Mum/2013)*

As per the facts of the case, the assessee company had raised funds to the tune of Rs. 6485 crores by way of foreign currency convertible bonds (FCCB) during the previous Assessment Year. Out of the said FCCB funds, an amount of Rs. 5142 crores are given to M/s Reliance Info Investment Pvt. Ltd. (RIIL), which in turn invested the said money and earned interest of Rs. 389 crores in the year under consideration. The assessee has acquired forex/derivative Instruments for hedging and the losses are recognized on the settlement day or the reporting day whichever is earlier and the same are recognized in the Profit & Loss Account. On appeal, Hon'ble ITAT held as under

7. As regards to mark to market loss/gain the Tribunal for The A.Y. 2007-08 has considered and decided the issue in para 8 to 8.5 as under:-

The Instruction of CBDT simply states the loss on account of forex derivatives cannot be allowed since it is a contingent loss. It cannot be accepted that the deduction claimed by the assessee towards loss due to foreign exchange fluctuation in foreign currency transactions in, derivatives should be considered as contingent and hence ignored but the gain due to such foreign exchange fluctuations in foreign currency-transactions on derivatives should be assessed to tax. Both the loss/ gain assume the same character of either contingent or non-contingents If the forex loss on account of derivatives is

considered as contingent and hence ineligible for deduction, the forex gain will also have to be considered as contingent and hence immune from taxation.

8.5. Be that as it may, it is observed from the impugned order as well as the details of the financial charges that the amount of Rs.21.89 crores represents gain on account of forex derivatives. This fact has also been admitted by ld. CIT in para 6.3 of the impugned order. When there is a net gain of Rs.21.89 crores, which the assessee included in its total income, we fail to appreciate the reason for charging the gain of forex derivatives to tax but ignoring the loss of account of such forex derivatives. As the ultimate net figure on account of forex derivatives in the given facts and circumstances of the case is that of gain which was offered for taxation, it is manifest that the assessment order in accepting said figure of gain as chargeable to tax, cannot be described as prejudicial to the interests of the revenue. We are, therefore, unable to countenance the view canvassed in the Impugned order on this issue."

"8. It is clear that the Tribunal while decided the issue for the A.Y. 2007-08 has also considered the CBDT instruction no. 3/2010 which has been heavily relied upon by the Commissioner as well as the Id. DR. The Tribunal on the identical facts has decided 10 ITA NO.671/Mum/2013 Reliance Communications Ltd, this issue by holding that the view of the Commissioner cannot be countenanced with. Accordingly, we do not find any reason to take a different view from that of already taken by the Tribunal for the A.Y. 2007-08."

Instructions No. 3/2010 cannot be made applicable with respect to forex loss on ECB lability

3.19. Without prejudice to above, your Honour would appreciate that Instruction No. 3 of 2010 issued by CBDT is applicable only where there is trading in forex derivatives, which is the not the situation in the instant case.

3.20. Appellant is an NBFC and inter-alia is in the business of acquiring loan for onward lending. Appellant has incurred loss on foreign exchange fluctuation amounting to Rs. 1864 lacs on account of ECB liability only. Therefore, the conclusion of the AO derived on the basis of CBOT Instruction No. 3 of 2010 in the above circumstances is not fit to be supported with respect to loss incurred on account of re-instatement of ECB liability.

3.21. Reliance is placed on the decision of Hon'ble ITAT in case of Silicon Graphics Systems (India) Pvt. Ltd v DCIT, Circle 8(1), [ITA No. 2976/Del./2013). Hon'ble ITAT adjudicating the matter in favour of the Appellant and held as under ...

"A perusal of assessment order further reveals that the AO has not given concrete findings on the explanation of assessee that Instruction No. 3 of 2010 issued by CBDT is applicable only where there is trading in forex derivatives, which situation does not exist in the instant case, as the AO herself has mentioned the nature of appellant's business as that of Information Technology line, i.e., IT related purchase/sales or services. Therefore, the conclusion of the AO derived on the basis of CBDT Instruction No. 3 of 2010 in the above circumstances is not fit to be supported that the foreign exchange fluctuation loss is a speculative loss."

(Emphasis Supplied)

14. The Revenue has not brought on record any material to contradict the contentions/submissions of the assessee. These remain uncontroverted. In our view, reliance by Ld. CIT-DR on the decision of Mumbai Tribunal in Vaibhavi Trading P. Ltd. does not assist the Revenue. The issue has been decided in favour of the assessee by the decision (supra) of the Tribunal in its own case. Respectfully following the Tribunal's decision (supra) and agreeing with the submissions of the assessee, we delete the impugned disallowance of Rs. 20,54,47,894/- in AY 2013-14 and decide Ground No. 2 to 5 in assessee's favour. Similar disallowance of Rs. 18,64,61,000/- in AY 2014-15 is also deleted. Ground No. 2 and 3 in AY 2014-15 are thus decided in favour of the assessee.

15. Ground No. 6 and 7 of AY 2013-14 and Ground No. 5, 6 & 7 of AY 2014-15 relate to disallowance of Rs. 1,76,16,528/- and Rs. 2,89,99,437/- respectively claimed by the assessee under section 36 (i) (viii) of the Act. The Ld. AO discussed this issue in para 5 page 30-33 of his order for AY 2013-14 and in para 22 page 13-14 of his order for AY 2014-15. The Ld. AO found that the assessee claimed deduction of Rs. 20 crores and Rs. 32.50 crores under section 36(i)(viii) in AY 2013-14 and 2014-15 respectively. When asked to justify, the assessee submitted that it satisfies all the conditions prescribed under section 36(1)(viii) to claim deduction for the amount transferred to special reserve and taking cognisance of timelines prescribed under section 80IA for making any disallowance is not called for. The explanation was not acceptable to the Ld. AO who made the impugned disallowance in both the years.

16. On appeal, the Ld. CIT(A) restored the matter to the Ld. AO with the following directions contained in para 8.5 of his appellate order for AY 2013-14 which he followed in AY 2014-15 also:-

"8.5. The assessee's contention that it provides long term finance with the understanding that the undertaking would be starting operations by the

prescribed date/s but, in case the latter fails to do so (situation II), it is not the assessee's fault and the assessee should not be denied the deduction which it is otherwise entitled to, stands to reason. Also, the outer limit keeps on being extended by the Government. But, in case an undertaking has already started its operations before the prescribed time-capsule kicks in (situation I), such undertaking does not satisfy the requirement of section 80-1A and, hence, the long term finance provided by the assessee to such undertaking cannot be called an 'eligible business for purposes of deduction u/s 36(1)(viii). Consequently, any profit derived by it from such financing is also not eligible for deduction u/s 36(1) (viii) of the Act. It is not clear whether the AO held the assessee ineligible for the deduction due to the existence of situation I or situation II discussed above it is, therefore, held that, if the deduction was denied to the assessee for the reason that the undertakings to which long term finance was provided by it were found to be in situation I, the disallowance is in order and the same would stand confirmed. In case, however, the deduction was disallowed for the reason that the undertakings to which long term finance was provided by it were found to be in situation II, the deduction should not be denied and the disallowance would stand deleted. The assessee is directed to furnish the relevant.documents before the AO and, depending on the factual situation found to exist in this case, the AO will give effect to this order. In case the desired information is not furnished by the assessee before the AO, the addition will stand confirmed. This ground of appeal is disposed off accordingly."

17. Dissatisfied, the assessee is in appeal before the Tribunal.

18. The Ld. AR submitted that the Ld. AO made impugned disallowance holding that deduction under section 36(i)(viii) is available only to those entities which commenced operations after 01.04.1993 or 1.4.1999. The Ld. CIT(A) held that deduction related to undertaking who started its operations before the earliest prescribed date under section 80IA(4)(iv) should be denied and referred back the matter to the Ld. AO for re-examination from that angle. The Ld. AR contended that section 36(1)(viii) is a complete code in itself and taking cognizance to section 80IA for allowing deduction under section 36(1)(viii) is not warranted. It is pointed out that regular amendments have been made in section 80IA extending the outer limit from March 31, 2003 to March 31, 2017 (at present) for applicability of the provisions. He submitted that the deduction contingent on fulfilment of a condition on a future date (i.e. one year from the end of the relevant previous year) could never have been the intention of the Government. The

Ld. AR further submitted that during the assessment proceedings of AY 2017-18, the Ld. AO duly questioned the eligibility of assessee's claim of deduction under section 36(i)(viii) and being satisfied with the submissions made by the assessee allowed the claim. He placed on record documents in support. The Ld. AR also stated that no such disallowance has been made by the Ld. AO in his assessment order for AY 2018-19 and copy of that order was submitted before us.

19 The Ld. CIT-DR relied upon the order of Ld. AO/CIT(A).

20. We have carefully considered the rival submissions and perused the records. It is not in dispute that the assessee is eligible for deduction under section 36(1)(viii) of the Act. The dispute is in a very narrow compass i.e. whether taking cognizance of timeline prescribed under section 80IA to make the impugned disallowance under section 36(1)(viii) is in accordance with law or not. The contention of the assessee is that section 36(1)(viii) is a complete code in itself and reference to section 80IA beyond what has been stated in the section itself is not warranted. Section 36(1)(viii) and 80IA are two separate provisions of the Act and deal with two separate category of taxpayers. Section 36(1)(viii) provides deduction to a taxpayer financing loan to eligible undertaking/infrastructure facility including undertaking referred to in section 80IA whereas section 80IA deals with deduction to the undertaking earning profits from certain specified businesses. We are of the view that the above contentions of the assessee are incontrovertible. Section 36(1)(viii) of 1961 Act corresponds to section 10(2)(xiva) of 1922 Act meaning thereby that the provision of special deduction to an specified entity existed in Income Tax Act 1922 and was retained in 1961 Act whereas the provision of section 80IA came into being w.e.f. 1.4.1991 and the provision for benefit of deduction has been amended many a times and at present section 80IA shall not apply to any enterprise which starts the development or operation and maintenance of infrastructure facility on or after 01.04.2017. There is nothing like that in section 36(1)(viii) of the Act. We, therefore hold that the Ld. AO erred in taking cognizance of timeline prescribed under section 80IA

in making the impugned disallowance. The contention of the Ld. AR that the Revenue has allowed the claim of the assessee in AY 2017-18 and 2018-19 has not been refuted by the Ld. CIT-DR. We therefore do not find any justification in making the impugned disallowance which we hereby delete in both the assessment years.

21. Ground No. 8, 9 and 10 in AY 2013-14 relate to disallowance of Rs. 9,69,602/- out of advertisement expenses claimed by the assessee at Rs. 32,38,894/-. The Ld. AO made the impugned disallowance for want of supporting documents. On appeal, the Ld. CIT(A) restored the matter to the Ld. AO with a direction to him to decide it afresh on production of ledger account containing the details of expenses with bills/vouchers by the assessee. The only grievance of the assessee has been lack of adequate opportunity given to it. Since opportunity to present its case again before the Ld. AO has been allowed by the Ld. CIT(A) we decline to interfere.

22. Ground No. 11 in AY 2013-14 relates to charging interest under section 234B and 234C of the Act. This is consequential.

23. Ground No. 4 in AY 2014-15 relates to disallowance of Rs. 7,92,643/- under section 14A and Rule 8D. The Ld. AO discussed this issue in para 17 page 10-12 of his order. On query the assessee submitted that it earned dividend income of Rs. 45.49 lacs exempt under section 10(34) of the Act. It was also stated that no direct or indirect expenditure was incurred by the assessee with respect to above. However, the assessee suo-moto disallowed an amount of Rs. 37,60,000/- under section 14A of the Act. The said amount was computed on the basis of a prudent and reasonable method adopted by the assessee. Hence reference to Rule 8D is not called for. Strategic investments be not considered while computing disallowance under section 14A vis a vis Rule 8D. Hence no further disallowance be made under section 14A r.w. Rule 8D.

24. The Ld. AO did not accept the explanation of the assessee and relying on several decisions held that investment decisions are very strategic

decisions in which top management is involved and therefore proportionate management expenses are required to be deducted while computing the exempt income from dividend. Not being satisfied with the correctness of the claim of the assessee in respect of expenditure in relation to exempt income, he calculated disallowance as per Rule 8D at Rs.1,51,12,525/- and reducing therefrom suo moto disallowance of Rs. 37,56,650/- made by the assessee, the Ld. AO made disallowance of Rs. 1,13,55,875/- under section 14A and added it to the total income of the assessee.

25. On appeal, following the decision of Hon'ble Delhi High Court in Joint Investment (P) Ltd. 372 ITR 694 the Ld. CIT(A) restricted the disallowance to Rs. 45,49,293/- i.e. to the extent of exempt income earned by the assessee during the year. The assessee is aggrieved by the excess disallowance of Rs. 7,92,643/- (Rs. 45,49,293 - Rs.37,56,650/-) and is in appeal before the Tribunal.

26. We have heard the Ld. Representative of the parties and perused the records. It is observed that before the Ld. CIT(A) it was vehemently argued by the assessee duly supported by judicial pronouncements that disallowance cannot exceed the amount of exempt income earned during the year. The Ld. CIT(A) has accepted this argument of the assessee. We find no reason to interfere with the order of the Ld. CIT(A) and accordingly reject this ground of the assessee.

27. Consequently, the appeals of the assessee for AY 2013-14 and 2014-15 are partly allowed.

28. Now we take up the appeals of the Revenue.

29. Ground No. (a) and Ground No. 1 in AY 2013-14 and 2014-15 relate to disallowance of depreciation of Rs. 57,05,766/- and Rs. 11,41,153/- respectively . In making the impugned disallowances the Ld. AO followed the order of AY 2011-12 and 2012-13 wherein it is, interalia alleged that the assessee has made investment in windmill to earn income from investments

and such investment activity cannot be equated with activities in the nature of trade or business or adventure.

29.1 On appeal, the Ld. CIT(A) deleted the impugned disallowances holding that the assessee can claim depreciation as it owns the assets and the same is put to use for business. The Revenue is dissatisfied and is in appeal in both the years.

29.2 The parties agree that this issue is covered against the Revenue by the decision of Hon'ble Delhi Court in ITA 349/2022 dated 22.09.2022 pertaining to AY 2010-11. Para 6 and 7 thereof refer (copy at page 165-167 of the Paper Book). The Revenue's appeal in AY 2011-12 against the CIT(A)'s order stands dismissed by the order of the Tribunal in ITA No. 1268/Del/2015 dated 14.3.2023. The appeal of the Revenue pertaining to AY 2012-13 against the deletion of similar disallowance by the Ld. CIT(A) has been dismissed by the Tribunal in its order in ITA No. 4985/Del/2017 dated 9.5.2023.

29.3 Following the precedent as above, we find no merit in the appeals of the Revenue which we hereby reject. These grounds are dismissed.

30. Ground No. (b) in AY 2013-14 and Ground No. 3 in AY 2014-15 relate to disallowance of Rs. 56,97,665/- and Rs. 59,58,893/- under section 40(a)(ia) respectively on account of short deduction/non deduction of TDS made by the Ld. AO which have been deleted by the Ld. CIT(A). Briefly stated, the facts are that according to Ld. AO payments made by the assessee to Suzlon Energy Ltd. was in the nature of technical and professional services and therefore liable for TDS under section 194J instead of 194C of the Act. Accordingly, due to the difference in TDS rate, the Ld. AO disallowed 80% of the expense under section 40(a)(ia) of the Act.

30.1 On appeal, the Ld. CIT(A) relying on the decision of Hon'ble Calcutta High Court in CIT vs. S.K. Tekriwal 361 ITR 432 deleted the impugned disallowance in both the years making identical observations and recording identical findings as under:-

"6.2 I have carefully considered the order passed by the AD and the submissions filed by the Ld. AR The AO invoked the provisions of section 40(a)(i) and disallowed an amount of Rs. 56,97,665/- out of expenses claimed on payment made to Suzlon Energy Lid of Rs.71.22,081/ on the ground that the appellant had failed to deduct TDS at applicable rate(s). The AD stated that the services provided by Suzlon Energy Ltd to the appellant company were in the nature of technical and professional services liable for deduction uls 194J (10%) whereas appellant company had incorrectly treated the impugned payment as payment for work as per contract within the section 1940 (@ 2%) There is therefore, a difference of opinion on the nature of expenditure debited by the appellant. The Ld. AR argued that the company had deducted tax at appropriate rates u/s 194C on the payment made to Suzion Energy Ltd. The mischief of section 40(a)(i) is attracted where tax has not been deducted at source or after deduction the same has not been paid as per provisions of the subject section. It is not the case of the AO that TDS has not been made on the aforesaid payment by the appellant. In my view the action of the AO is not justified. in the present facts since there is only a difference of opinion as to the nature of payments under TDS previsions, the AD could have declared the appellant in default u/s 201 but no disallowance could be made u/s 40(a)(i) as the appellant has not defaulted on tax deduction at source."

30.2 The Revenue is dissatisfied and is in appeal before the Tribunal.

30.3 The Ld. CIT-DR relied on the order of the Ld. AO.

30.4 The Ld. AR submitted that section 40(a)(ia) is not applicable on short deduction of TDS. He further pointed out that the issue has been decided in favour of the assessee by the Tribunal in assessee's own case for AY 2012-13.The Ld. AR submitted that the Hon"ble Delhi High Court in PCIT vs. Future First Info Services (P) Ltd. (2022) 447 ITR 299(Del) has held that in cases of short deduction of TDS disallowance under section 40(a)(ia) could not be made. The correct course of action would be to invoke section 201 of the Act.

30.5 On consideration of the rival submissions, we are of the view that there is no infirmity in the order of the Ld. CIT(A) which is duly supported by the decisions (supra) of Hon'ble Calcutta and Delhi High Courts. We therefore uphold the order of the Ld. CIT(A) and reject the appeal of the Revenue in both the AYs involved.

31. Ground No. (c) in AY 2013-14 and Ground No. 2 in AY 2014-15 relate to disallowance of Rs. 1,05,63,232/- and Rs, 1,16,97,590/- under section 14A of the Act respectively. The Ld. AO discussed this issue in para 4 at page 27-30 of his order for AY 2013-14. On query the assessee submitted that it earned dividend income of Rs. 3,032,862/- which it claimed as exempt under section 10(34) of the Act. It was also stated that it suo moto estimated an amount of Rs. 36,50,000/- as expense incurred towards earning the above dividend income and disallowed the same in the computation of income under section 14A of the Act r.w. Rule 8D of the Income Tax Rules. The assessee further submitted that no direct and indirect expenditure were incurred for earning the said income. Thus no disallowance under Rule 8D(i) & Rule 8D(ii) is required. The assessee itself computed disallowance on a prudent and reasonable basis. It was also submitted that strategic investments be not considered while computing disallowance.

31.1 The submission of the assessee was not acceptable to the Ld. AO who relying on several decisions held that investment decisions are very strategic decisions in which top management is involved and therefore proportionate management expenses are required to be deducted while computing the exempt income from dividend and proceeded to calculate disallowance of Rs.1,53,47,590/- under section 14A r.w. Rule 8D. After reducing therefrom suo-moto disallowance of Rs.36,50,000/-, the Ld. AO disallowed Rs.1,16,97,590/-.

31.2 On appeal, the Ld. CIT(A) held that the impugned disallowance of Rs. 1,53,47,590/- under section 14A computed by the Ld. AO is not in order and deleted the additional disallowance of Rs. 1,16,97,590/- by observing and recording his findings as under:-

"7.2 I have carefully considered the order passed by the AD and the submissions furnished by the Ld. AR. The AO invoked provisions of section 14A and computed disallowance under Rule 8D(2)(iii) at Rs.1,53,47,590/- as the appellant had disclosed dividend income (exempt) of Rs. 30,32,862/- The AO computed the disallowance by taking 0.5% of average value investment as per Rule 8D(2)(iii), and after allowing credit of Rs. 36,50,000/- disallowed by

the appellant suo moto, an addition Rs. 1,16,97,590/- was made. The Ld. AR submitted that the appellant had earned dividend Income of Rs. 30,32,862/- from non-trade quoted equity shares of Indian Energy Exchange Ltd. No direct or indirect expenditure was incurred by the appellant with respect to the above. However, a suo moto disallowance of Rs.36,50,862/- u/s 14A of the Act by taking a percentage of salary of employees and administrative expenses to avoid litigation. The Ld. AR further submitted that no direct or indirect expenditure was actually incurred during the year for earning the dividend Income and the AO had included strategic Investment of the appellant while computing the disallowance u/s 14A it was further argued that disallowance could not exceed the amount of exempt income earned during the year. The Ld. AR relied on the ratio of the Hon'ble Delhi High Court in case of Joint Investment (P) Ltd. vs. CIT (2015) 372 ITR 694 (Del)

7.3. As is evident the AO has computed the disallowance which is far in excess of the exempt income disclosed by the appellant. The Hon'ble Delhi High Court in the case of Joint Investment (P) Ltd. vs. CIT 2015/(3) TMI 155 has held that disallowance u/s 14A cannot exceed the exempt income. The Hon'ble Delhi Bench of the ITAT in the case of M/s Ganga Kaveri Credit & Holding (P) Ltd vs ACIT, Circle 12(1). New Delhi in ITA No 919/Del/2014 is also held that disallowance u/s 14A cannot exceed the amount of dividend income. Further, strategic investments of the appellant are to be excluded for computing disallowance under Rule 8D(2)(iii) as held by the Hon'ble High Court of Delhi in the case of CIT v. Oriental Structural Engineers Pvt. Ltd.: 216 Taxman 92 (Del.). The appellant company has suo moto computed disallowance u/s 14A at Rs. 36,50,862/- as against exempt income of Rs 30,32,862/- Respectfully following the decisions cited above, disallowance of Rs. 1,53,47,590/- u/s 14A computed by the AO is not in order. Consequently, additional disallowance of Rs.1,16,97,590/- after allowing benefit of suo moto disallowance of Rs. 36,50,862/- u/s 14A made by the appellant is directed to be deleted. The ground of appeal is ruled in favour of the appellant."

31.3 On similar grounds, the Ld. AO disallowed Rs. 1,13,55,875/- under section 14A in AY 14-15. On appeal, the Ld. CIT(A) restricted the disallowance to Rs. 45,49,293/- i.e. to the extent of exempt income and deleted the additional disallowance of Rs. 1,05,63,232/- under section 14A.

31.4 Dissatisfied the Revenue is in appeal challenging the deletion of the impugned disallowances in both the AY(s).

32. We have heard the Ld. Representative of the parties and perused the records. We observe that in AY 2010-11 against the deletion of disallowance of Rs. 4,74,88,156/- under section 14A by the Tribunal, the Revenue had gone in appeal before the Hon'ble Delhi High Court which vide decision

dated 22.09.2022 in ITA No. 349/2022 upheld the Tribunal's order dated 19.02.2021 in ITA No. 1267/Del/2015 in assessee's own case. In subsequent two AY(s) 2011-12 and 2012-13 identical disallowances made by the Ld. AO were deleted by the Ld. CIT(A) against which the Revenue came in appeal before the Tribunal. The Tribunal dismissed the Revenue's appeal in both the AY(s) vide order dated 14.03.2023 in ITA No. 1268/Del/2015 for AY 2011-12 and order dated 9.5.2023 in ITA No. 4985/Del/2017 for AY 2012-13. Respectfully, following the precedent, we confirm the order of the Ld. CIT(A) in both the AY(s) and consequently reject the appeals of the Revenue on the issue.

36. In the result, the appeals of the assessee for AY 2013-14 and 2014-15 are partly allowed and the appeals of the Revenue for AY 2013-14 and 2014-15 are dismissed.

Order pronounced in the open court on 29th November, 2023.

Sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER

Dated: 29/11/2023
Veena

Copy forwarded to -
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	17.11.2023
Date on which the typed draft is placed before the dictating Member	17.11.2023
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	

Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	