IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI

SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 821/MUM/2023	**ITA No. 822/MUM/2023**
(Assessment Year: 2018-19)	**(Assessment Year: 2019-20)**

Indiabulls Housing Finance Limited,
5th Floor, Building No. 27, K G Marg,
Connaught Place, New Delhi - 110001
[PAN: AABCI3612A]

..... **Appellant**

Deputy Commissioner of Income Tax,
Circle 6(4), Mumbai,
Room No. 1925, 19th Floor,
Air India Building, Nariman Point,
Mumbai - 400021

Vs

..... **Respondent**

&

ITA No. 2146/MUM/2023	**ITA No. 1033/MUM/2023**
(Assessment Year: 2018-19)	**(Assessment Year: 2019-20)**

Deputy Commissioner of Income Tax,
Circle 6(4), Mumbai,
Room No. 1925, 19th Floor,
Air India Building, Nariman Point,
Mumbai – 400021

..... **Appellant**

Vs

Indiabulls Housing Finance Limited,
M-62 & 63, 1st Floor, Connaught Place,
New Delhi - 110001
[PAN: AABCI3612A]

..... **Respondent**

Appearance

For the Appellant/Assessee	**:**	Shri K. Gopal & Shri Om Kandalkar
For the Respondent/Department	**:**	Shri Rakesh Garg

Date

Conclusion of hearing	**:**	02.11.2023
Pronouncement of order	**:**	18.12.2023

O R D E R

Per Bench

1. These are 2 set of cross-appeals pertaining to Assessment Years 2018-19 and 2019-20, which were heard together as the same involved identical issues and are being disposed by way of a common order.

Assessment Year 2018-19

2. We would first take up cross-appeals for the Assessment Year 2018-19.

2.1. These cross-appeals arise from the common order, dated 02/03/2023, passed by the Commissioner of Income Tax (Appeals)-54, Mumbai [hereinafter referred to as 'the CIT(A)'] whereby the CIT(A) had partly allowed the appeal preferred by the Assessee against the Assessment Order, dated 26/07/2021, for the Assessment Year 2018-19, passed under Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'].

2.2. The Assessee has raised following grounds of appeal in ITA No. : 821/Mum/2023

1. That the Learned Commissioner of Income Tax (Appeals)-54, Mumbai erred, on facts and in law, in confirming the disallowance made by the AO u/s 14A r.w.r. 8D(2)(ii) amounting to Rs. 27,87,56,385/- (net of self-disallowance).

2. That the Learned Commissioner of Income Tax (Appeals)-54, Mumbai erred, on facts and in law, in upholding the order of the AO w.r.t. the disallowance of additional claim of Education Cess amounting to Rs. 68,95,27,242/-, which was claimed by the assessee during the assessment proceeding."

2.3. The Revenue has raised the following grounds of appeal in ITA No 2146/Mum/2023:

" *i. Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in holding that since the interest-free funds available with the assessee are far more than the investment yielding tax- exempt income, no disallowance for the purpose of Rule 8D of the Income tax Rules, 1962, in computing the disallowance u/s.14A of the Income tax Act, 1961, is warranted in respect of interest cost attributable to earning the exempt income?*

ii Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in deleting the disallowance u/s.14A of the Income tax Act, 1961, without considering that only amount of Rs. 1355,19,82,325/- are free funds available for investment as per the asssessee's submission?

iii Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing the claim of ESOP expenses without appreciating that by issuing shares at below the market price, the assessee company has not incurred any revenue expenditure, rather it resulted in short receipt of share premium which the assessee was otherwise entitled to, on capital account?

iv Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing the claim of ESOP expenses without appreciating that as the receipt of share premium is not taxable, any short receipt of such premium will only be a notional loss and not actual loss requiring any deduction, hence, incurring of such notional loss cannot be considered as expenditure within the meaning of section 37(1) of the Income tax Act, 1961, as there was no "spending" or "paying out or away ?"

v. The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal if need be".

3. The relevant facts in brief are that the Assessee filed its return of income on 30/10/2018, which was revised on 29/03/2019, declaring total income at INR 2150,25,25,040/- after claiming deduction of INR 24,40,70,966/- under Chapter VIA of the Act. The returns were duly processed under Section 143(1) of the Act. Further, the case of the Assessee was selected for complete scrutiny and accordingly the Assessment Order under Section 143(3) of the Act was passed on 26/07/2021, assessing total income of INR 2695,97,16,260/- after making (a) addition on account of disallowance of INR

255,34,60,901/- under Section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 (hereinafter referred to as 'the Rules') (b) addition of INR 226,48,84,020/- on account of disallowance of ESOP Expenses and (c) addition of INR 63,88,46,299/- on account of disallowance of excess claim of bad debts.

4. Being aggrieved, the Assessee preferred appeal before CIT(A) against the Assessment Order, dated 26/07/2021. Before the CIT(A), the Assessee made an additional claim for deduction of Education and Secondary & Higher Education Cess (for short 'Education Cess') amounting to INR 68,95,27,242/- which according to the Assessee was also made by the Assessee during the course of assessment proceedings but not granted by the Assessing Officer. The Assessee made detailed submissions before the CIT(A) and after considering the same the CIT(A), vide order dated 02/03/2023, partially allowed the appeal preferred by the Assessee. The CIT(A) deleted the addition of INR 226,48,84,020/- on account of disallowance of ESOP Expenses as well as the addition of INR 227,47,04,516/- made by the Assessing Officer under Section 14A of the Act read with Rules 8D(2)(i) in respect of interest cost. However, the CIT(A) confirmed the addition made by the Assessing Officer under Section 14A of the Act read with Rule 8D(2)(ii). The CIT(A) also rejected the additional claim for deduction of Education Cess made by the Assessee.

5. Being aggrieved by the relief granted by the CIT(A), the Revenue has preferred appeal before the Tribunal on the grounds reproduced in paragraph 2.3. above. On the other hand, the Assessee, not being satisfied by the relief granted by the CIT(A), has preferred appeal before the Tribunal on the grounds reproduced in paragraph 2.2. above. We would first take up ground raised in appeal preferred by

the Revenue along with the connected grounds raised by the Assessee followed by the balance grounds raised by the Assessee in appeal.

Ground No. i. & ii. of appeal by Revenue, along with Ground No. 1 of appeal by Assessee

6. Ground No. i. & ii. raised by the Revenue and Ground 1 raised by the Assessee pertains to disallowance under Section 14A of the Act.

6.1. The facts relevant to the adjudication of the issues for consideration are that during the assessment proceedings, the Assessing Officer noted that the Assessee has shown substantial investments in shares & mutual funds for the purpose of earning dividend income, long term capital gains and interest income which has been claimed exempt under the provisions of the Act. Therefore, the Assessing Officer asked the Assessee to show cause as to why disallowance under Section 14A of the Act should not be made by invoking the provisions contained in Rule 8D of the Rules. In response, the Assessee filed its reply wherein it was stated that the Assessee had already made disallowance under Section 14A of the Act amounting to INR 92,05,638/- being the expenses attributable to the exempt income. It was further claimed that the Assessee had sufficient interest free own funds to make investment and therefore, no other disallowance under section 14A of the Act was warranted in addition to the suo motu disallowance made by the Assessee. However, the Assessing Officer, not being convinced, rejected the explanation/submissions of the Assessee and computed the disallowance under Section 14A of the Act as per the provisions of Rule 8D of the Rules at INR 256,26,66,539/- *[INR 227,47,04,516/- as per Rule 8D(2)(i) Plus INR 28,79,62,023/- as per Rule 8D(2)(ii)],* and

made addition of INR 255,34,60,901/- *[Aggregate Disallowance of INR 256,26,66,539/- under Section 14A of the Act read with Rule 8D(2) Less INR 92,05,638/- being suo motu disallowance made by the Assessee]* to the total income of the Assessee.

6.2. Being aggrieved, the Assessee carried the issue in appeal before the CIT(A). Vide order, dated 02/03/2023, the CIT(A) partly allowed the appeal preferred by the Assessee. The Assessing Officer had calculated the amount of interest expenditure directly attributable to earning exempt income at INR 227,47,04,516/- under Section 14A Act read with Rule 8D(2)(i) of the Rules. The CIT(A) deleted the same by placing reliance on the judgment of the Hon'ble Supreme Court in the case of South Indian Bank Vs. CIT : [2021] 130 taxmann.com 178(SC) and CIT Vs. UTI Bank Ltd. (2022): 142 taxmann.com 136 (SC). According to the CIT(A), the interest free funds available with the Assessee were INR 12881,44,70,595/- which were far more than the investment yielding tax-exempt income of INR 3845,57,00,000/- and therefore, no disallowance was warranted in respect of interest cost attributable to earning the exempt income in terms of Section 14A of the Act read with Rule 8D(2)(i) of the Rules. As regards the disallowance of INR 28,79,62,023/-, computed at the rate of 1% of the average value of monthly investment, made by the Assessing Officer in respect of the indirect expenditure as per the provisions of Section 14A read with Rule 8D, the CIT(A) agreed with the Assessing Officer. Since the Assessee had suo moto worked out the disallowance at INR 92,05,638/-, the disallowance under Section 14A read with Rule 8D was restricted to INR 27,87,56,385/- (INR 28,79,62,023/- Less INR 92,05,638/-).

6.3. Now, both, the Assessee and the Revenue are in appeal before us.

6.4. The contention of the Assessee is that the CIT(A) erred in sustaining the addition of INR 27,87,56,385/- in respect of disallowance of indirect administrative expenses under Section 14A of the Act read with Rule 8D(2)(ii), whereas the contention of the Revenue is that the CIT(A) erred in deleting the addition of INR 227,47,04,516/- made by the Assessing Officer in respect of disallowance of interest cost under Section 14A of the Act read with Rule 8D(2)(i) since the own funds of the Assessee were only INR 1355,19,82,325/- *[as opposed to INR 12806,13,99,023/- computed by the CIT(A)]* and therefore, the CIT(A) erred in arriving at the conclusion that the Assessee had sufficient interest free own funds to make investment and in deleting the addition of INR 227,47,04,516/- in respect of interest cost related to earning exempt income.

6.5. We have considered the rival submission; perused the material on record and analyzed the position in law.

6.6. As regards deletion of disallowance of INR 227,47,04,516/- in respect of interest cost is concerned, we note that the during the assessment proceedings the Assessee had given the following break-up of the interest free own fund available:

Particulars	***Amount (in INR)***
Share Capital	*85,30,71,575*
Reserve and surplus	*12806,13,99,023*
Deferred tax liabilities (net)	*122,96,68,955*
Other long-term liabilities	*401,84,52,130*
Long-term provisions	*1052,12,25,604*
Sundry Creditors	*28,51,89,092*
Other current liabilities	*22057,45,79,245*
Short-term provisions	*222,57,17,135*
Total	***36776,93,02,756***

6.7. However, the Assessing Officer computed the interest free own

funds available with the Assessee at INR 1355,19,82,325/- after taking into consideration the following:

Particulars	***Amount (in INR)***
Share capital	*85,30,71,572*
General Reserves	*745,98,89,000*
Surplus in P&L A/c.	*523,90,20,953*
Total	***1355,19,82,325***

6.8. In paragraph 3.9. l) of the Assessment Order, the Assessing Officer computed the proportionate amount of interest directly attributable towards the investment as under:

Particulars	***Amount (in INR)***
Total Amount of Finance Cost	*7354,80,89,712*
Amount of Investments – Income from which is or shall not be forming part of total income	*3842,57,00,000*
Amount of total assets appearing in Balance Sheet as on 31/03/2018	*124241,93,16,872*
Proportionate Amount of interest directly attributable towards investments	***227,47,04,516***

6.9. From the above, it is clear that the Assessing Officer took computed the aggregate amount of Investment (income from which is or shall not be forming part of total income) at INR 3842,57,00,000/- (as against total Investments of INR 15601,56,57,946/-. After comparing the aforesaid Investments of INR 3842,57,00,000/- with the aggregate interest free own funds available with the Assessee computed at INR 1355,19,82,325/- *(as computed by the Assessing Officer)*, the Assessing Officer concluded that the Assessee did not have sufficient own funds to make the aforesaid investments.

6.10. Before the CIT(A), it was contended on behalf of the Assessee that the Assessing Officer erred in not including aggregate Reserve & Surplus of INR 12806,13,99,023/- consisting of the following:

Particulars	***Amount (in INR)***
Capital Reserves	*13,75,00,000*

Capital Redemption Reserves	*36,27,392*
Security Premium	*6974,45,62,831*
Debentures Premium	*1,27,37,862*
Staff Compensation Adjustment	*1,11,69,562*
General Reserves	*745,98,89,800*
Special Reserve u/s 36(1)(viii)	*89,00,00,000*
Reserve u/s 29C of HB Act	*1209,21,35,083*
Reserves u/s 29C of the HB Act	*505,47,95,194*
Special Reserves u/s 36(1)(viii)	*1571,00,00,000*
Additional Reserves u/s 29C	*664,71,12,909*
Debentures Redemption Reserves	*502,43,44,975*
Cash Flow Hedge Reserves	*3,45,02,462*
Surplus in P&L A/c.	*523,90,20,953*
Total	***12806,13,99,023***

6.11. The CIT(A) accepted the above contention of the Assessee and concluded that the interest free own funds available with the Assessee were INR 12891,44,70,595/- *(Share Capital INR 85,30,71,572/- Plus Reserve & Surplus INR 12806,13,99,023/-)* which were much more than the Investments of INR 3842,57,00,000/- and therefore, no addition in respect of disallowance of interest cost was warranted under Section 14A of the Act in view of the judgment of the Hon'ble Supreme Court in the case of South Indian Bank Vs. CIT [2021] 130 taxmann.com 178 (SC) and the judgment of the Hon'ble Bombay High Court in the case of HDFC bank Limited Vs. DCIT [2016] 67 taxmann.com 42 (Bom).

6.12. The contention of the Revenue before us is that while computing the interest free own funds the CIT(A) erred in including item clubbed under the head Reserve & Surplus which did not represent the interest free own funds available with the Assessee. On perusal of various items clubbed under the head Reserve & Surplus we note that even if Share Capital (INR 85,30,71,572), is increased by Security Premium (INR 6974,45,62,831), General Reserve (INR 745,98,89,000) and Surplus in Profit & Loss Account (INR *523,90,20,953/-)* clubbed under the head Reserve & Surplus, the

aggregate thereof comes to INR 8329,65,44,356/- which is more than the investments yielding exempt income of INR 3842,57,00,000/- taken into consideration by the Assessing Officer. Accordingly, we hold that given the facts of the present case the interest free own funds of the Assessee were more than the investments yielding exempt income during the relevant previous year and therefore, it would be presumed that the investments were made out of interest free own funds of the Assessee Accordingly, no disallowance under Section 14A of the Act read with Rules 8D(2)(i) was warranted in terms the judgment of the Hon'ble Supreme Court in the case of South Indian Bank : [2021] 130 taxmann.com 178 (SC) and the judgment of the Hon'ble Bombay High Court in the case of HDFC Bank Ltd. Vs. Deputy Commissioner of Income Tax 2(3), Mumbai : [2016] 383 ITR 529 (Bombay). Accordingly, we decline to interfere with the conclusion drawn by the CIT(A) and the order of CIT(A) deleting the addition of INR 227,47,04,516/- made by the Assessing Officer in respect of disallowance of interest cost by invoking provisions of Section 14A of the Act read with Rules 8D(2)(i). In terms of the aforesaid, Ground No. i. & ii. raised by the Revenue are dismissed.

7. As regards, Ground No. 1 raised by the Assessee is concerned, it was contended by the Assessee that Assessing Officer has failed to point out any infirmity in the suo motu disallowance of INR 92,05,638/- offered by the Assessee before invoking the provisions contained in Rule 8D. In response, it was submitted by the Learned Departmental Representative that the Assessee had merely provided break-up of the suo motu disallowance made by the Assessee, and had never furnished the basis on which suo-motu disallowance was computed despite specific notice issued by the Assessing Officer.

7.1. On perusal of the record, we find that vide notice dated 15/10/2020 and 19/12/2020, the Assessee was asked to substantiate the claim that no further disallowance, in addition to the suo-motu disallowance of INR 92,05,638/- made by the Assessee, was warranted under Section 14A of the Act. In reply the Assessee submitted the following break-up:

Nature of Administrative Expense	***Amount (in INR)***
Salary cost of employees engaged in the activity of co-ordination for investments from where dividend income has been earned by the assessee	*90,01,159/-*
Other Administrative expenses incurred by the assessee	*2,04,480/-*
Total	*92,05,638/-*

7.2. However, the Assessee did not furnish any further details or explanation regarding the basis of computation of disallowance of INR 92,05,638/- made by the Assessee under Section 14A of the Act read with Rule 8D(2)(ii) of the Rules during the assessment proceedings or the proceedings before the CIT(A). On the other hand, we also note that the Assessing Officer has not referred to any expenses debited to Profit & Loss Account by the Assessee while rejecting the computation given by the Assessee as not satisfactory. Therefore, taking in view of the totality of the facts and circumstances of the case, we are of the view, that it would be interest of justice to remit back to the file of the Assessing Officer the issue pertaining to disallowance under Section 14A Act read with Rule 8D(2)(ii) of the Rules for adjudication afresh. Accordingly, the Assessee is directed to furnish the details/explanation of the break-up of the suo-motu disallowance of INR 92,05,638/- made by the Assessee in respect of administrative expenses. The Assessing Officer is directed adjudicate the issue afresh as per law after

granting the Assessee a reasonable opportunity of being heard. All rights and contentions of the parties are left open.

7.3. In view of the above, Ground No. 1 raised by the Assessee is allowed for statistical purposes.

Ground No. iii. & iv. appeal by Revenue

8. Ground No. iii. & iv. raised by the Revenue is directed against the order of CIT(A) deleting the disallowance of INR 226,48,84,020/- made by the Assessing Officer in respect of Employee Stock Option Plan (ESOP) Expenses.

8.1. The relevant facts in brief are that the Assessing Officer disallowed the ESOP Expenses of INR 226,48,84,020/- claimed by the Assessee. In appeal by the Assessee, the CIT(A) accepted the claim of the Assessee and deleted the disallowance. Therefore, the Revenue is now in appeal before us on this issue.

8.2. We have heard the rival contentions and perused the material on record.

8.3. This issue of deductibility of ESOP Expenses under Section 37(1) of the Act stands decided in favour of the assessee and against the Revenue by the decision of the Special Bench of the Tribunal in the case of Biocon Limited Vs Deputy Commissioner of Income Tax (LTU), Bangalore : [2013] 35 taxmann.com 335 (Bangalore - Trib.) (SB)/[2013] 25 ITR(T) 602 (Bangalore - Trib.) (SB) has been confirmed by the Hon'ble High Court of Karnataka vide judgment dated 11/11/2020 passed in IT Appeal No. 653 of 2013 reported in [2020] 121 taxmann.com 351 (Karnataka)/[2021]. The relevant extract of the aforesaid judgment of the Hon'ble Karnataka High

Court read as under:

" 4. On the other hand, learned counsel for the assessee submitted that discount on the issue of ESOPs is not a contingent liability but is an ascertained one. It is further submitted that ESOPs vest over a period of 4 years at the rate of 24%, which means that at the end of first year the employee has a definite right of 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. In this connection, our attention has been invited to paragraphs 9.3.1 to 9.3.6 of the order passed by the tribunal and reliance has been placed on decision of the Supreme Court in Bharat Earth Movers v. CIT [2000] 112 Taxman 61/245 ITR 428 (SC), Rotork Controls India (P.) Ltd v. CIT [2009]180 Taxman 422/314 ITR 62 (SC). It is also argued that for the purposes of section 37(1) of the Act, it is sufficient if the expenditure has been incurred and therefore, issuance of shares at a discount were the assessee absorbs the difference between price at which it is issued and the market value of the shares would also be an expenditure incurred for the purpose of section 37 of the Act. Our attention has been invited to the findings recorded by the tribunal in paragraphs 9.2.7 to 9.2.8 of the tribunal and reliance has been placed on decisions in 'Madras Industrial Investment Corpn. Ltd. v. CIT [1997] 91 Taxman 340/225 ITR 802 (SC), CIT v. Woodward Governor (India) (P.) Ltd., [2009] 179 Taxman 326/312 ITR 254 (SC). It is also urged that discount on issue of ESOPs is only a form of compensation paid to the employee and if not a short capital receipt. It is also urged that deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of account, which were prepared in Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999. In support of aforesaid submission reliance has been placed on decision in CIT v. UP State Industrial Development Corpn. [1997] 92 Taxman 45/225 ITR 703 (SC), Challapalli Sugars Ltd. v. CIT [1975] 98 ITR 167 (SC). It is also urged that the decision relied on by the revenue does not support its case and the issue with regard to deduction of ESOP has been decided by different High Courts. In this connection, reference has been made to CIT v. PVP Ventures Ltd. [2012] 23 taxmann.com 286/211 Taxman 554 (Mad.), CIT v. Lemon Tree Hotels Ltd. IT Appeal No.107/2015 dated 18-8-2015, Pr. CIT v. Lemon Tree Hotels Ltd., [2019] 104 taxmann.com 26 (Delhi). It is also pointed out that from the Assessment Year 2009-10, the Assessing Officer has accepted the claim of the assessee and has permitted ESOP expenses as deduction. Therefore, the revenue

cannot be now permitted to alter its stand.

5. By way of rejoinder reply, learned counsel for the revenue submitted that judgment of the Supreme Court in Bharat Earth Movers is no applicable to the fact situation of the case as in the aforesaid decision the Supreme Court was dealing with statutory liability pending fixation of liability, whereas, in the instant case, the assessee has a liability, therefore, the aforesaid decision of the Supreme Court does not apply. It is also pointed out that in Rotork Controls India, the Supreme Court was dealing with allowability of provision as deduction and it has been held that subject to compliance of certain conditions on matching principle, the deduction is permissible. It has further been held in the aforesaid decision that income from sale of goods is subjected to tax, therefore, the corresponding expenditure is to be allowed in the same year. The aforesaid decision is also of no assistance to the assessee as the assessee has not incurred any expenditure.

6. We have considered the submissions made by learned counsel for the parties and have perused the record. The singular issue, which arises for consideration in this appeal is whether the tribunal is correct in holding that discount on the issue of ESOPs i.e., difference between the grant price and the market price on the shares as on the date of grant of options is allowable as a deduction under section 37 of the Act. Before proceeding further, it is apposite to take note of section 37(1) of the Act, which reads as under:

Section 37(1) says that 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), laid 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".

7. Thus, from perusal of section 37(1) of the Act, it is evident that the aforesaid provision permits deduction for the expenditure laid out or expended and does not contain a requirement that there has to be a pay out. If an expenditure has been incurred, provision of section 37(1) of the Act would be attracted. It is also pertinent to note that section 37 does not envisage incurrence of expenditure in cash.

8. Section 2(15A) of the Companies Act, 1956 defines 'employees stock option' to mean option given to the whole time directors, officers or the employees of the company, which gives such directors,

officers or employees, the benefit or right to purchase or subscribe at a future rate the securities offered by a company at a free determined price. In an ESOP a company undertakes to issue shares to its employees at a future date at a price lower than the current market price. The employees are given stock options at discount and the same amount of discount represents the difference between market price of shares at the time of grant of option and the offer price. In order to be eligible for acquiring shares under the scheme, the employees are under an obligation to render their services to the company during the vesting period as provided in the scheme. On completion of the vesting period in the service of the company, the option vest with the employees.

9. In the instant case, the ESOPs vest in an employee over a period of four years i.e., at the rate of 25%, which means at the end of first year, the employee has a definite right to 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. It is well settled in law that if a business liability has arisen in the accounting year, the same is permissible as deduction, even though, liability may have to quantify and discharged at a future date. On exercise of option by an employee, the actual amount of benefit has to be determined is only a quantification of liability, which takes place at a future date. The tribunal has therefore, rightly placed reliance on decisions of the Supreme Court in Bharat Movers supra and Rotork Controls India P. Ltd., supra and has recorded a finding that discount on issue of ESOPs is not a contingent liability but is an ascertained liability.

10. From perusal of section 37(1), which has been referred to supra, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the expenditure has been incurred. The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of section 37(1) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal therefore, in paragraphs 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under section 37(1) of the Act subject to fulfilment of the condition.

11. The deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of account, which has been prepared in accordance with Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.

12. So far as reliance place by the revenue in the case of Infosys Technologies Ltd.(supra) is concerned, it is noteworthy that in the aforesaid decision, the Supreme Court was dealing with a proceeding under section 201 of the Act for non-deduction of tax at source and it was held that there was no cash inflow to the employees. The aforesaid decision is of no assistance to decide the issue of allowability of expenses in the hands of the employer. It is also pertinent to mention here that in the decision rendered by the Supreme Court in the aforesaid case, the Assessment Years in question was 1997-98 to 1999-2000 and at that time, the Act did not contain any specific provisions to tax the benefits on ESOPs. Section 17(2)(iiia) was inserted by Finance Act, 1999 with effect from 1-4-2000. Therefore, it is evident that law recognizes a real benefit in the hands of the employees. For the aforementioned reasons, the decision rendered in the case of Infosys Technologies is of no assistance to the revenue. The decisions relied upon by the revenue in A. Gajapathy Naidu,Morvi Industries Ltd. and Keshav Mills Ltd.(supra) support the case of assessee as the assessee has incurred a definite legal liability and on following the mercantile system of accounting, the discount on ESOPs has rightly been debited as expenditure in the books of account. We are in respectful agreement with the view taken in PVP Ventures Ltd. And Lemon Tree Hotels Ltd.'case (supra).

13. It is also pertinent to mention here that for Assessment Year 2009-10 onwards the Assessing Officer has permitted the deduction of ESOP expenses and in view of law laid down by Supreme Court in Radhasoami Satsang v. CIT, [1992] 60 Taxman 248/193 ITR 321, the revenue cannot be permitted to take a different stand with regard to the Assessment Year in question.

In view of preceding analysis, the substantial questions of law framed by a bench of this court are answered against the revenue and in favour of the assessee. In the result, we do not find any merit in this appeal, the same fails and is hereby dismissed." (Emphasis Supplied)

8.4. In view of the above, we do not find any infirmity in the order

passed by the CIT(A) allowing the claim for deduction of ESOP Expenses of INR 226,48,84,020/- under Section 37 of the Act. Accordingly, Ground No. iii. & iv. raised by the Revenue are dismissed.

Ground No. 2 of Appeal by Assessee

9. Ground No. 2 raised by the Assessee is directed against the order of CIT(A) rejecting the claim for deduction for Education and Secondary & Higher Education Cess amounting to INR 68,95,27,242/-.

9.1. According to the Assessee, during the course of assessment proceedings the Assessee had made an additional claim of deduction of Education and Secondary & Higher Education Cess of INR 68,95,27,242/- The additional claim was not allowed by the Assessing Officer.

9.2. In appeal preferred by the Assessee on this issue, the CIT(A) decline to grant any relief holding as under:

> *"8.4 After the amendment made in the Income Tax Act in the year 2022 in section 40(a)(ii) with retrospective effect, it is clear that education cess is a part of tax and hence not allowable as a deduction while computing income under the head Income from business and profession. Accordingly, it is held that there is no merit in the argument of the appellant. Hence, this ground of appeal is dismissed."*

9.3. Being aggrieved the Assessee carried the issue in appeal before us.

9.4. The Learned Authorised Representative for Assessee appearing before us, relied upon the Note on the 'Issue of Disallowance of Education Cess' submitted during the course of the hearing, while the Learned Departmental Representative relied upon the decision of the Mumbai Bench of the Tribunal in the case of the Deputy Commissioner of

Income Tax Vs. Indiabulls Housing Finance Limited : [ITA No. 496/Mum/2022, dated 22/06/2022].

9.5. We have considered the rival submissions and perused the material on record.

9.6. We note that Section 40(a)(ii) of the Act was amended by Finance Act, 2022 by way of insertion of Explanation 3 with retrospective effect from 01/04/2005, according to which term 'tax' shall include and shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax. In view of the aforesaid retrospective amendment in Section 40(a)(ii) of the Act and the judgment of Hon'ble Supreme Court in the case of Joint Commissioner of Income Tax Vs. Chambal Fertilizers & Chemicals Ltd. : [2023] 450 ITR 164 (SC), we are not inclined to accept the submissions of the Assessee. Accordingly, Ground No. 2 raised by the Assessee is dismissed.

Assessment Year 2019-2020

10. We would now take up cross-appeals for the Assessment Year 2019-20.

10.1. These cross-appeals arise from the common order, dated 30/01/2023, passed by the Commissioner of Income Tax (Appeals)-54, Mumbai [hereinafter referred to as 'the CIT(A)'] whereby the CIT(A) had partly allowed the appeal preferred by the Assessee against the Assessment Order, dated 30/09/2021, for the Assessment Year 2019-20, passed under Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'].

10.2. The Assessee has raised following grounds of appeal in ITA No. :

822/Mum/2023

1. *"That the Learned Commissioner of Income Tax (Appeals)-54, Mumbai erred, on facts and in law, in directing to the AO to compute disallowance u/s 14A taking average investments that have yielded the exempt income, which comes to Rs. 417,461,206/- (net of self-disallowance.)*

2. *That the Learned Commissioner of Income Tax (Appeals)-54, Mumbai erred, on facts and in law, in sustaining the disallowance of Education Cess amounting to Rs. 766,798,760/-, as made by the Assessing Officer."*

10.3. The Revenue has raised the following grounds of appeal in ITA No 1033/Mum/2023:

i. *Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made u/s 14A by holding that the disallowance u/s 14A cannot exceed the exempt income by ignoring the CBDT circular no 5/2014 which is clarificatory in nature ?"*

ii. *Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the explanation to the section 14A introduced w.e.f. 01.04.2022 which clearly states that the provisions of the section 14A shall apply and shall be deemed to have always applied in a case where the income, not forming part of the total income under this Act, has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such income not forming part of the total income.?*

iii. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance u/s.14A of the Income tax Act, 1961, from the Book Profit u/s.115JB of the Income tax Act, 1961, without considering that clause (f) of Explanation-1 to sub-Section 2 of Section 11538 of the Income tax Act, 1961, allows for addition of expenditure relatable to earning of exempt income u/s.10 of the Income tax Act, 1961.*

iv. *On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing the claim of ESOP expenses without appreciating that by issuing shares at below the market price, the assessee company has not incurred any revenue expenditure, rather it resulted in short receipt of share premium which the assessee was otherwise entitled to, on capital account.*

v. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing the claim of ESOP expenses without appreciating that as the receipt of share premium is not taxable, any short receipt of such premium will only be a notional loss and not actual loss requiring any deduction, hence, incurring of such notional loss cannot be considered as expenditure within the meaning of section 37(1) of the Income tax Act, 1961, as there was no "spending" or "paying out or away.

vi. "On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in deleting the disallowance of deduction of Corporate Guarantee Fees without considering that the assessee has undertaken the risk and as such on failure of its subsidiary, Indiabulls Commercial Credit Limited, the assessee is liable to pay off its debts to NABARD as the assessee has undertaken the risk by way of submitting corporate guarantee."

11. The relevant facts in brief are that the Assessee filed its return of income on 30/10/2019, declaring total income at INR 3393,13,22,480/- which was revised on 29/11/2020, declaring total income at INR 3480,32,56,290/-. The returns were duly processed under Section 143(1) of the Act. Further, the case of the Assessee was selected for complete scrutiny and accordingly the Assessment Order under Section 143(3) of the Act was passed on 30/09/2021, assessing total income of INR 3644,12,46,610/- under normal provisions of the Act after making (a) addition on account of disallowance of INR 44,56,22,625/- under Section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 (hereinafter referred to as 'the Rules') (b) addition of INR 41,08,22,141/- on account of disallowance of ESOP Expenses (c) addition of INR 76,67,98,760/- on account of Educations Cess and (d) addition of INR 1,47,46,791/- on account of Corporate Guarantee Fee. Further, while computing Book Profits for the purpose of Section 115JB of the

Act, in the computation of income the Assessing Officer computed book profit at INR 4045,93,66,680/- after making addition of INR 44,56,22,625/- to the Book Profit of INR 4001,37,44,055/- computed by the Assessee under Section 115JB of the Act.

11.1. Being aggrieved, the Assessee preferred appeal before CIT(A) against the Assessment Order, dated 30/09/2021. Vide order, dated 30/01/2023, the CIT(A) partly allowed the appeal preferred by the Assessee deleting the (a) addition of INR 41,08,22,141/- on account of disallowance of ESOP Expenses and (b) addition of INR 1,47,46,791/- on account of Corporate Guarantee Fee. However, the CIT(A) confirmed the order of CIT(A) rejecting the claim for deduction of Education Cess of INR 76,67,98,760/-. As addition on account of disallowance of INR 44,56,22,625/- under Section 14A of the Act read with Rule 8D(2)(i) of the Tax Rules, the CIT(A) partly allowed the grounds raised by the Assessee and directed the Assessing Officer to re-compute the disallowance under Section 14A of the Act by taking into account the average value of investments yielding exempt income.

11.2. Being aggrieved by the relief granted by the CIT(A), the Revenue has preferred appeal before the Tribunal on the grounds reproduced in paragraph 10.3 above. On the other hand, the Assessee, not being satisfied by the relief granted by the CIT(A), has preferred appeal before the Tribunal on the grounds reproduced in paragraph 10.2 above. We would first take up ground raised in appeal preferred by the Revenue along with the connected grounds raised by the Assessee followed by the balance grounds raised by the Assessee.

Ground No. i. & ii. of appeal by Revenue, along with Ground No. 1 of appeal by Assessee

12. Ground No. i. & ii. raised by the Revenue and Ground 1 raised by the Assessee pertains to disallowance under Section 14A of the Act.

12.1. As was the case for the Assessment Year 2018-19, during the assessment proceedings for the Assessment Year 2019-2020, the Assessing Officer noted that the Assessee has shown substantial investments in shares & mutual funds for the purpose of earning dividend income, long term capital gains and interest income which has been claimed exempt under the provisions of the Act. Therefore, the Assessing Officer asked the Assessee to show cause as to why disallowance under Section 14A of the Act should not be made by invoking the provisions contained in Rule 8D of the Rules. In response, the Assessee filed its reply wherein it was stated that the Assessee had already made disallowance under Section 14A of the Act amounting to INR 1,08,48,309/- being the expenses attributable to the exempt income. The Assessee further claimed that the Assessee had sufficient interest free own funds to make investment and therefore, no other disallowance under section 14A of the Act was warranted in addition to the suo motu disallowance made by the Assessee. However, the Assessing Officer, not being convinced, rejected the explanation/submissions of the Assessee and computed the disallowance under Section 14A of the Act as per the provisions of Rule 8D(2)(ii) of the Rules at INR 45,64,70,934/- being 1% of the average value of monthly investment computed at INR 4564,70,93,399/- and made addition of INR 44,56,22,625/- (INR 45,64,70,934/- Less INR 1,08,48,309/-) to the total income of the Assessee. It is pertinent to note that no disallowance was made by the Assessing Officer under Section 14A read with Rule 8D(2)(i) of

the Act.

12.2. Being aggrieved, the Assessee carried the issue in appeal before the CIT(A). The CIT(A) partly allowed the ground raised by the Assessee challenging addition made under Section 14A of the Act read Rule 8D(2)(ii). The CIT(A) held that the Assessing Officer was justified in invoking the provisions of Rule 8D. However, the CIT(A) granted relief to the Assessee by directing the Assessing Officer to compute the amount of disallowance as per Section 14A read with Rule 8D(2)(ii) of the Rules by taking into account the judgment of the Hon'ble Delhi High Court in the case of ACB India Ltd. Vs. Assistant Commissioner of Income Tax : [2015] 374 ITR 108 (Delhi)[24-03-2015] and the decision of the Special Bench of the Tribunal in the case of ACIT Vs. Vireet Investments Pvt. Ltd. : 58 ITR (T) 313 (Del Trib.) (SB).

12.3. Both the Revenue and the Assessee are in appeal before us against the above order of the CIT(A).

12.4. In Ground No. i. raised by the Revenue, the Revenue has contended that the CIT(A) has erred in deleting the addition made under Section 14A of the Act by holding that disallowance under Section 14A of the Act cannot exceed the amount of amount exempt income. On perusal of findings returned by the CIT(A) in paragraph 6.3 of the order impugned we find that the CIT(A) has noted that the disallowance made by the Assessing Officer is less than the exempt income and therefore, the CIT(A) has rejected the argument that the amount of disallowance should be restricted to the amount of exempt income. In view of the aforesaid, Ground No. i. raised by the Revenue is dismissed as being misconceived.

12.5. In Ground No. ii. it has been contended by the Revenue that the

CIT(A) has granted relief to the Assessee without taking into consideration explanation inserted in Section 14 by the Finance Act, 2022 which states as under:

> *[Explanation.—For the removal of doubts, it is hereby clarified that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where the income, not forming part of the total income under this Act, has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such income not forming part of the total income.*

12.6. The contention of the Revenue is that the above Explanation, though introduced with effect from 01/04/2022, would also apply to Assessment Year 2019-2020.

12.7. During the course of hearing, the Ld. Authorised Representative for the Assessee had placed reliance upon the decision of the Mumbai Bench of the Tribunal in the case of Deputy Commissioner of Income Tax Vs. Lodha Developers : [ITA No. 1539 & 1594/Mum/2019, dated 30/08/2022] reported in [2022] 143 taxmann.com 442 (Mumbai – Trib). On perusal of the same, we find that the Tribunal has, following the decision of Hon'ble Delhi High Court in the case of Principal Commission of Income Tax (Central) Vs. Era Infrastructure Pvt. Ltd. : 448 ITR 674 held that the explanation inserted in Section 14A vide Finance Act 2022 shall have prospective application. In view of the aforesaid, we hold that the Explanation inserted in Section 14A by Finance Act, 2022 shall not apply to Assessment Year 2019-2020. Accordingly, Ground No. ii. raised by the Revenue is dismissed as being without merit.

12.8. Next we would take up Ground No. 1 raised by the Assessee which is directed against the order of CIT(A) directing the Assessing Officer to re-compute the amount of disallowance under Section 14A of the

Act by taking into consideration the average value of investments yielding exempt income.

12.9. The Ld. Authorised Representative for the Assessee appearing before us placed reliance upon the submissions advanced before CIT(A) and contended that the Assessing Officer had failed to record proper dissatisfaction about the disallowance offered by the Assessee. It was also contended that the Assessing Officer had made reference any of the expenditure debited to the Profit & Loss Account. It is the case of the Assessee that the entire disallowance made under Section 14A of the Act should have been deleted and therefore, the CIT(A) erred in directing the Assessing Officer to re-compute disallowance under Section 14A of the Act by taking into consideration investments yielding exempt income during the relevant previous year. Per contra, the Ld. Departmental Representative pointed out that the CIT(A) has incorrectly placed reliance the decision of the Mumbai Bench of the Tribunal in the case of Excel Industries Limited [ITA No. 5472/Mum/2017, dated 09/01/2023] and placed reliance upon the order passed by the Assessing Officer. The Ld. Departmental Representative reiterated that the Assessing Officer was correct in computing disallowance under Section 14A of the Act read with Rule 8D(2)(ii) at INR 45,64,70,934/- and making a disallowance of INR 44,56,22,625/-.

12.10. We have considered the rival submissions and perused the material on record. We find that, as was the case for the Assessment Year 2018-19, during the assessment proceedings for the Assessment Year 2019-2020 also the Assessee only furnished the break-up of the suo motu disallowance of INR 1,08,48,309/- offered by the Assessee under Section 14A of the Act. The Assessee did not furnish any further details or explanation regarding the basis of computation

of disallowance at INR 1,08,48,309/- under Section 14A of the Act during the assessment proceedings or the proceedings before the CIT(A). On the other hand, we also note that the Assessing Officer has not referred to any expenses debited to Profit & Loss Account by the Assessee while rejecting the computation given by the Assessee as not satisfactory. Therefore, taking in view of the totality of the facts and circumstances of the case, we are of the view, that it would be interest of justice to remit back to the file of the Assessing Officer the issue pertaining to disallowance under Section 14A Act read with Rule 8D(2)(ii) of the Rules for adjudication afresh. Accordingly, the Assessee is directed to furnish the details/explanation of the break-up of the suo-motu disallowance of INR 1,08,48,309/- made by the Assessee in respect of administrative expenses. The Assessing Officer is directed adjudicate the issue afresh as per law after granting the Assessee a reasonable opportunity of being heard.

12.11. We have perused the decisions of the Hon'ble Delhi High Court in the case of ACB India Ltd. (supra) & Era Infrastructure (India) Ltd. (supra) as well as the decision of the Special Bench of the Tribunal in the case of Vireet Investments Pvt. Ltd. (supra) and are of the considered view that for the Assessment Year 2019-2020 only the investments yielding exempt income during the relevant previous year are required to be taken into consideration while computing disallowance under Section 14A of the Act read with Rule 8D(2)(ii) of the Rules. Therefore, while adjudicating the issue of fresh as aforesaid, in case the Assessing Officer invokes provisions of Rule 8D(2)(ii) of the Rules, the Assessing Officer is directed take into consideration only investments yielding exempt income during the relevant previous year.

12.12. In terms of paragraph 12.10. & 12.11 above, Ground No. 1 raised by the Assessee is allowed for statistical purposes.

Ground No. iii. of appeal by Revenue

13. In Ground No. iii. raised by the Revenue it has been contended that the CIT(A) erred in excluding the amount disallowance computed by the Assessing Officer under Section 14A of the Act read with Rule 8D for the purpose of computing Book Profits under Section 115JB of the Act. However, on perusal of body of the Assessment Order, the appeal filed before CIT(A) in Form 35 and the order, dated 30/01/2023, passed by the CIT(A), we do not find any discussion on this issue. Therefore, Ground No. iii. raised by the Revenue does not arise from the order impugned and is, therefore, dismissed.

Ground No. iv. & v. of appeal by Revenue

14. Ground No. iv. & v. raised by the Revenue is directed against the order of CIT(A) deleting the disallowance of INR 41,08,22,141/- made by the Assessing Officer in respect of Employee Stock Option Plan (ESOP) Expenses.

14.1. The relevant facts in brief are that the Assessing Officer disallowed the ESOP Expenses of INR 41,08,22,141/- claimed by the Assessee. In appeal by the Assessee, the CIT(A) accepted the claim of the Assessee and deleted the disallowance. Therefore, the Revenue is now in appeal before us on this issue.

14.2. We have heard the rival contentions and perused the material on record.

14.3. While deciding Ground No. iii. & iv. raised by the Revenue in appeal

for the Assessment Year 2018-19, we have held that the issue of deductibility of ESOP Expenses under Section 37(1) of the Act stands decided in favour of the assessee and against the Revenue by the decision of the Special Bench of the Tribunal in the case of Biocon Limited Vs Deputy Commissioner of Income Tax (LTU), Bangalore: [2013] 35 taxmann.com 335 (Bangalore - Trib.) (SB)/[2013] 25 ITR(T) 602 (Bangalore - Trib.) (SB) which has been confirmed by the Hon'ble High Court of Karnataka vide judgment dated 11/11/2020, passed in IT Appeal No. 653 of 2013 reported in [2020] 121 taxmann.com 351 (Karnataka)/[2021]. Accordingly, we do not find any infirmity in the order passed by the CIT(A) allowing the claim for deduction of ESOP Expenses of INR 41,08,22,141/- under Section 37 of the Act for the Assessment Year 2019-2020. Accordingly, Ground No. iv. & v. raised by the Revenue are dismissed.

Ground No. vi. of appeal by Revenue

15. Ground No. vi. raised by the Revenue is directed against the order of the CIT(A) deleting the addition of INR 1,47,46,791/- made by the Assessing Officer on account Corporate Guarantee Fees.

15.1. During the assessment proceedings, the Assessing Officer observed that the Assessee has provided Corporate Guarantee to NABARD to enable its subsidiary Indiabulls Commercial Credit Limited avail loan from NABARD. The Assessee credited its Profit & Loss Account by INR 1,47,46,791/- as Guarantee Fees for providing the aforesaid corporate guarantee. However, in the Computation of Income, the aforesaid Guarantee Fee was excluded. In response to the query from the Assessing Officer during the assessment proceeding, the Assessee submitted that the Corporate Guarantee Fee was in the

nature of notional income which neither accrued to the Assessee nor was the same received by the Assessee. It was contended that Assessee was required to make the accounting entry as per the applicable accounting standards. However, the Assessing Officer rejected the explanation/contention of the Assessee and concluded that by providing Corporate Guarantee, the Assessee had undertaken risk of making payment to NABARD in case of a default by its subsidiary for which the Assessee was required to be compensated with fees. Once the Assessee had computed Corporate Guarantee Fee at INR 1,47,46,791/- and credited the same to the Profit & Loss Account the same cannot be regarded as notional in nature. Thus, the Assessing Officer made an addition of INR 1,47,46,791/- towards Corporate Guarantee Fee.

15.2. In appeal preferred by the Assessee on this issue, the CIT(A) deleted the addition holding as under:

> *"9.3 The facts of the case and findings of the AO recorded in the Assessment Order and the written submissions of the appellant have been considered.*
>
> *9.4 The appellant has contended that the reason why such notional income has been credited to the P&L Account is because of the compliance being made to the Indian Accounting standards ('Ind-AS') notified by MCA and the Financial reporting framework under Ind-AS as applicable to the Assessee. This Income has been recognized on the principle of fair value accounting and is just a notional income in accordance with the following relevant paras of Ind-AS 109 and Ind-AS 115. The tax treatment has been given as per ICDS and as per the Act and accordingly, the assessee has later claimed deduction of Rs. 1,47,46,791/- as the same is Notional Income on Bank Guarantee.*
>
> *9.5 It is clear that the assessee was never in receipt of such income. This was a notional income not involving any payment from the other party i.e. Indiabulls Commercial Credit Limited (ICCL) and the assessee has exhibited that ICCL has also disallowed the same in its*

computation of income in accordance with ICDS-1. The Hon'ble Apex Court in the case of CIT v. Excel Industries Ltd 358 ITR 295 (SC) held that Notional/ Hypothetical income which has not been received or has not accrued to the assessee cannot be taxed under the Act. The relevant portion of the said judgment is as under.

> *19. This Court further held, and in our opinion more importantly, that income accrues when there "arises a corresponding liability of the other party from whom the income becomes due to pay that amount."*
>
> *20. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee.*

9.6 Similarly, in the case of CIT v. Shoorji Vallabhdas and Co. 46 ITR 144 (SC) it was held by the Hon'ble Supreme Court that:

> *"Income-tax is a levy on income. No doubt, the income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or Its receipt, but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income, which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."*

9.7 In view of the above, it is clear that accounting entries made in compliance to the prevalent accounting standards will not be the sole criterion for categorising a transaction as income. Income can be said to accrue when there arises a corresponding liability of the other party from whom the income becomes due to pay that amount, which is not the case in the present context. Hence the notional income on corporate guarantee fees s cannot be held to be taxable. The addition made is accordingly deleted and the ground of appeal is allowed."

15.3. Being aggrieved by the relief granted by the CIT(A), the Revenue is now in appeal before us on this issue. Ld. Departmental Representative placed reliance on the order passed by the Assessing Officer while the Ld. Authorised Representative for the Assessee supported the order passed by the CIT(A) and reiterated the stands taken before the Assessing Officer.

15.4. We have considered the rival submissions and perused the material on record. It is not the case of the Revenue that income of INR 1,47,46,791/- was received by the Assessee. Further, there is nothing on record to show that the subsidiary of the Assessee was under in obligation to make payment of Corporate Guarantee Fee to the Assessee. In the case of CIT Vs. Shoorji Vallabhdas and Co. : 46 ITR 144 (SC), the Hon'ble Supreme Court has held as under:

> *"In Chamanlal Mangaldas & Co.'s case (supra), the assessee was also the managing agent of a company, and under the agreement was entitled to receive commission at a certain rate. By another agreement, the commission earned by the managing agent for the calendar year 1950 was reduced by Rs. 1 lakh. That agreement took place during the previous year, and the resolution of the board of directors of the managed company was also in the previous year. It was, however, made final on April 8, 1951, at a meeting of the board of directors, but that was beyond the previous year. The High Court of Bombay held that by reason of the resolution during the currency of the previous year, the right of the assessee to commission ceased to be under the original agreement and depended upon and arose only after the decision of the board of directors to reduce the commission. The assessee was, therefore, not held liable on the larger sum which, it was held, was only a hypothetical income, which it might have earned if the old agreement had continued to subsist. The facts of the present case are almost identical, and the principle applied by the Bombay High Court governs this case. <u>The reason is plain. Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the</u>*

matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a "hypothetical income", which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account. This is exactly what has happened in this case, as it happened in the Bombay case Commissioner of Income-tax v. Chamanlal Mangaldas & Co. [1956] 29 ITR, which was approved by this court. Here too, the agreements within the previous year replaced the earlier agreements, and altered the rate in such a way as to make the income different from what had been entered in the books of account.' A mere book-keeping entry cannot be income, unless income has actually resulted, and in the present case, by the change of the terms the income which accrued and was received consisted of the lesser amounts and not the larger. This was not a gift by the assessee firm to the managed companies. The reduction was a part of the agreement entered into by the assessee firm to secure a long-term managing agency arrangement for the two companies which it had floated.

In our opinion, the High Court was right in coming to the conclusion that on the facts of this case the larger income neither accrued nor was received by the assessee firm." (Emphasis Supplied)

15.5. Keeping in view the above judgment, the CIT(A) concluded that income can be said to accrue when their arises a corresponding liability of the other party from the income become due or payable. Since in the present case, this is not the case, mere accounting entries cannot be the sole criteria of making addition of income in the hands of the Assessee. We concur with the CIT(A) and decline to interfere in the order passed by the CIT(A) deleting the addition of INR 1,47,46,791/- made by the Assessing Officer on account of Corporate Guarantee Fee. Accordingly, Ground No. vi. raised by the

Revenue is dismissed.

Ground No. 2 of appeal by Assessee

16. Ground No. 2 raised by the Assessee is directed against the order of CIT(A) rejecting the claim for deduction for Education and Secondary & Higher Education Cess amounting to INR 766,798,760/-.

16.1. Both the sides adopted the arguments made in relation to Ground No. 2 raised by the Assessee in appeal for the Assessment Year 2018-19 and agreed that our findings/adjudication in relation to the aforesaid Ground No. 2 shall apply mutatis mutandis to Ground No. 2 raised in appeal for the Assessment Year 2019-2020. Accordingly, in view of our findings/adjudication in paragraph 9 to 9.6 above, Ground No. 2 raised by the Assessee is dismissed.

17. Thus, in result (a) For Assessment Year 2018-19 - the Appeal by the Assessee (ITA No. 821/Mum/2023) is partly allowed, while cross appeal preferred by Revenue (ITA No. 2146/Mum/2023 is dismissed; (b) For Assessment Year 2019-2020 the Appeal by the Assessee (ITA No. 822/Mum/2023) is partly allowed while cross appeal preferred by Revenue (ITA No. 1033/Mum/2023) is dismissed.

Order pronounced on 18.12.2023.

Sd/-	***Sd/-***
(Om Prakash Kant)	**(Rahul Chaudhary)**
Accountant Member	**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 18.12.2023
Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai