आयकर अपीलीय अधिकरण
मुंबई पीठ "एच",मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री अमरजीत सिंह, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " H ", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER&
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आअसं. 932 /मुं/2017 (नि.व. 2012-13)
ITA NO.932/MUM/2017(A.Y.2012-13)

Strides Pharma Science Limited
[Formerly known as Strides Arcolab Limited/
Strides Shasun Limited]
201, Devavrata, Sector -17,
Vashi, Navi Mumbai – 400 703
PAN: AADCS-8104-P ..... अपीलार्थी/Appellant

बनाम Vs.

The Deputy Commissioner of Income Tax
Circle – 15(3)(2), Mumbai
Room No.451, 4th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai – 400 020 ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by	:	Shri Nitesh Joshi, Advocate with Shri Ninand Patade
प्रतिवादी द्वारा/Respondent by	:	Shri Anoop Hiwase
सुनवाई की तिथि/ Date of hearing	:	26/10/2023
घोषणा की तिथि/ Date of pronouncement	:	15 /01/2024

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the final assessment order dated 23/01/2017 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 [in short 'the Act'], for the Assessment Year 2012-13.

2. The assessee in appeal has raised as many as 12 grounds. Shri Nitesh Joshi, Advocate appearing on behalf of the assessee submitted at the outset

that he is not pressing ground No.4, 5 & 9 of the appeal. In respect of other grounds ld.Counsel for the assessee submitted that the issues are squarely covered by the decision of Co-ordinate Bench in assessee's own case in the preceding Assessment Years. The facts germane to the issues raised in different grounds of appeal for Assessment Year 2012-13 are identical to the facts in appeals for Assessment Year 2010-11 and 2011-12. The ld.Counsel for the assessee placed on record copy of the Tribunal order in assessee's own case in ITA No.1903/Mum/2015 for Assessment Year 2010-11 decided on 23/05/2023 and copy of Tribunal order in ITA No.1992/Mum/2016 for Assessment Year 2011-12 decided on 28/06/2023.

3. Per contra, Shri Anoop Hiwase representing the Department strongly supported the findings of the Assessing Officer and Dispute Resolution Panel (DRP) in the impugned assessment year. However, he fairly stated that the issues raised in the present appeal by the assessee have been considered by the Tribunal in assessee's own case in the preceding Assessment Year.

4. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have also considered the decisions on which the assessee has placed reliance to contend that the issues raised in appeal have been decided by the Tribunal in preceding Assessment Years. Our findings on the grounds of appeal are as under:

Ground No.1 is general, hence, require no separate adjudication.

Ground No.2 : Interest on delayed realization of export proceeds from AEs - Rs.22,91,372/-:

5. The ld.Counsel for the assessee submitted that the assessee is not charging interest on delayed realization either from the Associated Enterprises (AEs) or Non-AEs. He pointed that in case of some of the AEs, average realization period is 311 days, on which no interest was charged. Similarly, in case of some of the Non-AEs there has been delay of over 300 days on which no interest has been charged. The ld.Counsel for the assessee referred to details of invoice wise realization during Financial Year 2011-12 in respect of AEs at pages 67 to 84 and in case of Non-AEs at pages 85 to128 of the Paper Book. The ld.Counsel for the assessee submitted that similar adjustments were made by the Transfer Pricing Officer (TPO) in Assessment Year 2011-12,2013-14 and 2014-15 and the same were deleted by the DRP in the respective Assessment Years. The ld.Counsel for the assessee referred to the directions of the DRP for Assessment Year 2011-12 at page 315, for Assessment Year 2013-14 at page 348 and for Assessment Year 2014-15 at page 418 of the compilation of Case Laws Paper book. The ld.Counsel for the assessee further submitted that the average period of realization of sale proceeds is 29 days. Except 2 AEs, there is no delay in realization of sale proceeds. Since, the assessee had not charged interest on delayed payment of invoices from AEs as well as Non-AEs, no notional interest can be imputed on the proceeds received by the assessee belatedly from AEs. To further buttress his submissions he placed reliance on the following decisions:

(i) CIT vs. Indo American Jewellery Ltd., 223 Taxman 8 (Bom)

(ii) Det Norske Veritas A/S vs. ADIT, 67 taxmann.com 16 (Mum-Trib)

(iii)Sophos Technologies Pvt. Ltd.vs.DCIT,100 taxmann.com 374(Ahd- Trib)

6. Per contra, the Ld. Departmental Representative submitted that average realization period from AEs is far greater than average realization period from Non-AEs. There are stray incidence of delay in recovery from Non-AEs. He asserted that where there is disparity in period of recovery of receivables from AEs and Non-AEs, notional interest can be charged. In support of his submissions he placed reliance on the decision in the case of Parle Biscuits Pvt. Ltd. vs. Assessment Unit Income Tax Department, NFAC in ITA No.2484/Mum/2022 for Assessment Year 2018-19 decided on 30/06/2023.

7. We have heard the submissions made by rival sides. The assessee has furnished a chart giving average realization period from AEs. The same is as under:

Particulars	Int Amount (in Rs.)	Rate used	Average realisation
Ascent Pharma Pty Ltd.	179	3.21%	-24
Ascent Pharmahealth Asia Pte Lt	8,211	2.71	-22
Co Pharma Limited	19,48,888	2.90%	58
Drug House of Australia (Asia) Pte Limited	1,203	2.71%	-26
Farma Plus AS			-86
Strides Inc	2,86,747	2.7%	311
Strides Vital Nigeria Limited	46,143	3.91%	-9
Total	22,91,372		29

Except from one AE i.e. Stride Inc. where there is substantial delay of 311 days in respect of transactions on single day i.e. 29/06/2011, realization of the receivable is within the period. Apart from above, there is nominal delay of 58 days in recovery from Co Pharma Ltd., another AE of the

assessee. A perusal of the details from Non-AE at page 85 to 125 shows that there is a delay of 398 days and 219 days in respect of the transactions with Non-AEs on different dates. Thus, it is evident from documents on record that in some of the transactions with AEs and Non-AE, there is delay in recovery of receivables. The assessee has been following uniform policy of not charging interest on delayed realization from AEs and Non-AEs. The Hon'ble Jurisdictional High Court in the case of Indo American Jewellery (supra) has held that where there is complete uniformity in not charging interest from AEs and Non-AEs for delay in realization of export proceeds, the Assessing Officer was not justified in making addition of notional interest in respect of transactions with AEs in the course of transfer pricing proceedings.

7.1 The DRP while disposing of objections of the assessee in Assessment Year 2011-12 vide directions dated 14/12/2015 deleted the adjustment made by TPO for similar reasons by following the decision of Hon'ble Jurisdictional High Court rendered in the case Indo-American Jewellery (supra). We further find that the TPO in Assessment Year 2010-11 had made adjustment in respect of delayed receivables. The Co-ordinate Bench in assessee's appeal ITA No.1903/Mum/2015 decided on 23/05/2023 held that there is no requirement to charge any interest towards receivable, albeit in the said Assessment Year there was only two instances of marginal delay of 60 days and 26 days. Taking into consideration the facts on record and the decision by Hon'ble Jurisdictional High Court we hold that imputing of interest on delayed payment of receivables from AEs is unwarranted. The ground No.2 of the appeal is thus, allowed.

8. The assessee without prejudice to the primary contention has raised an alternate contention of charging interest on net basis i.e. interest on delayed realization less interest on early realization (i.e. before due date). Since, we have allowed assessee's primary contention, the alternate contentions raised by the assessee in ground No.2 are not deliberated upon.

Ground No.3: Interest on share application money pending allotment – Rs.13,03,61,705/-.

9. The ld.Counsel for the assessee submitted that the assessee had invested in Share Application Money of Agila Specialization Ltd. and Stride Acrolab International UK during the period relevant to the assessment year under appeal. The TPO, pending allotment of shares recharacterized the nature of investment as loan. The ld.Counsel for the assessee submitted that this issue is perennial, similar investments were made by the assessee in preceding and succeeding Assessment Years. The issue travelled to the Tribunal in all the Assessment Years. The Tribunal has been taking consistent view and deleted the adjustment of interest on share application money. The ld.Counsel for the assessee asserted that the facts in the impugned assessment year are identical and the investment has been made in share application of same AEs as was made in the preceding Assessment Years.

10. The ld. Departmental Representative vehemently defended the assessment order and e directions of the DRP. However, he fairly stated that the issue is similar to the one raised in the impugned assessment year has been considered by the Tribunal in the case of assessee in the past.

11. Both sides heard. We find that the issue relating to charging of interest on share application money by recharacterizing it as loan was subject matter

of appeal in the past and subsequent Assessment Years. In immediate preceding Assessment Year the Co-ordinate Bench in turn following the order in assessee's appeal in ITA No.1903/Mum/2015 for Assessment Year 2010-11 decided on 23/05/2023 deleted the addition. For the sake of completeness the findings from Tribunal Order for Assessment Year 2011-12 are extracted herein below:

> *"Ground No.2:*
>
> *8. Undisputedly during the year under consideration the assessee invested its funds to the tune of Rs.498.85 crores and Rs.641.96 crores first in its overseas AEs namely M/s. Strides Acrolab International, UK(SAIL) and M/s. Starsmore Ltd. respectively but shares were not allotted in the year under consideration rather shown as share application money pending allotment. It is also not in dispute that the Ld. TPO has treated these transactions as loan transactions and charged interest @ 8% and thereby proposed the TP adjustment of Rs.17,36,13,067/- towards interest amount on share application money invested by the assessee in its AEs. It is also not in dispute that the Ld. DRP upheld the proposed adjustment made by the Ld. TPO by following its own order passed in A.Y 2009-10 & 2010-11 on the identical issues and facts in assessee's own case. The assessee's objections filed before the Ld. DRP challenging the impugned addition on account of TP adjustment who has upheld the proposed adjustment made by the Ld. TPO and thereafter AO made the addition on the basis of proposed adjustment made by the Ld. TPO.*
>
> *9. In the backdrop of the aforesaid undisputed facts the Ld. A.R. for the assessee contended that this issue has already been decided in favour of the assessee by the Tribunal vide order dated 23.05.2023 in ITA No.1903/M/2015 in A.Y. 2010-11, in ITA No.124/M/2013 vide order dated 02.09.2022 in A.Y.2008-09, in ITA No.7370/M/2018 vide order dated 07.02.2022 in A.Y. 2014-15 & in ITA No.7992/M/2019 vide order dated 06.04.2022 in A.Y. 2015-16 in assessee's own cases available at page 1 to 248 of the case law paper book.*
>
> *10. We have perused the order passed by co-ordinate Bench of the Tribunal in assessee's own case for A.Y. 2010-11, wherein the identical issue as to making investment by the assessee in its overseas AEs but share had not been allotted during the year under consideration, which has been decided in favour of the assessee by returning following findings:*
>
> > *"9.2.5 We heard the parties and perused the materials on record. We notice that the co-ordinate bench bench of the Tibunal in assessee‟s own case for A.Y. 2014- 15 has considered a similar issue and held that–*

14. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below along with case laws cited by the Id. AR for the assesses. At the outset, it needs mention that it has been held by the Hon'ble Bombay High Court in the case of DIT v/s Besix Kier Dabhoi -(2012) 210 Taxman 151 (Bombay) that the Revenue has no power to re-characterize a transaction entered into by the Assessee. Therefore admittedly, the AO or the TPO are not empowered to convert and re-characterize a transaction of share application into a loan transaction. This aspect of the matter and this judgment has been overlooked by the DRP in its order for earlier year. As such, it could not be followed. Secondly, the remittance of the said share application money was approved and supervised by the RBI and the purpose of remittance as approved was investment in share capital. As such, there is no dispute to the fact that the amounts paid were on account of investment in share capital of the associates or subsidiaries. We further note that even otherwise the transaction of issue of shares is a capital account transaction and not a revenue account transaction and therefore could not be said to result in any income per se. We further notice that the co-ordinate benches of the Tribunal have also taken a view that no imputation of interest could be made on a transaction of share application money paid to subsidiaries. The coordinate bench of Mumbai Tribunal in the case Agro Ltd. v/s DCIT - ITA No. 1452 / Mum / 17 (supra) has held as follows:

18. We have heard the rival submissions of both the parties 3nd perused the material on record. The undisputed facts are that the assesses has advanced money as share application money to Golden Harvest a foreign AE to set up a plant in free trade zone in Shafjah. It is also undisputed that the AE could not convert the share application money into share capita/ by issuing shares to the assassee as the permission from the free trade zone authorities with whom the AE was registered was pending and this was the only sole reason for not issuing the shares in favour of the assessee. Now the issue before us is whether the share application money could be treated as loan and could be subjected to the transfer pricing provisions. After perusing the facts on record and going through the decision relied on by the Ld.AR, we find that no income has accrued from the share application money to the assessee and therefore such transactions could not be subjected to transfer pricing provisions. The Hon'ble Jurisdictional Bombay High Court in the case of Shell India Markets Pvt Ltd. vs. ACIT and others has also held that the provisions of chapter 10 of the Act would apply only when income arises from the international transactions. The relevant portion of the said order is reproduced as under:-

"9. We shall now consider the above submissions on behalf of the Revenue. So far as the availability of alternative remedy is concerned, the petitioner has at the beginning of today's hearing itself undertaken to withdraw its objection on the issue of jurisdiction before the Dispute Resolution Panel. This was accepted by us before considering the issue on the merits. Moreover, this petition was filed on April 24, 2013, challenging the impugned orders dated January 30, 2013, of the Transfer Pricing Officer and the draft assessment order dated March 28, 2014, of the Assessing Officer, on the issue of jurisdiction. This issue has been decided in Vodafone IV and would be binding on all authorities within the State till the apex court takes a different view on it. Therefore, in view of the fact that the Revenue does not dispute that the issue on the merits stands covered by the decision of Vodafone IV it would serve no useful purpose by directing the petitioner to prosecute its objections before the Dispute Resolution Panel and the Dispute Resolution Panel disposing of the same in accordance with Vodafone IV. Thus, in the present facts the distinction sought to be made on the ground of alternative remedy is not such as to warrant not entertaining the petition.

10. The second distinguishing feature from that of Vodafone IV, as canvassed by the Revenue, is that Form 3CEB in respect of the transaction of issue of shares to its associated enterprises, is not disclosed as an international transaction. This the petitioner was obliged to do as the transaction is an international transaction. ' This was in fact done by the petitioners in Vodafone IV. This stand by the Revenue is a little curious as in Vodafone IV the Revenue contended that as the petitioners therein had filed Form 3CEB in respect of issue of shares to its associated enterprise, they had submitted to the jurisdiction of Chapter X of the Ac! and cannot now contend that the proceeding to tax such shortfall on capital account is without jurisdiction, in this case, an exactly opposite stand is being taken by the State. The State is expected to be consistent and not change its stand from case to case. Be that as it may, the petitioner herein had not disclosed the transaction in Form 3CEB as, according to the petitioner, it was not an international transaction for the reason that it did not give no rise to any income. The fact that the petitioner chose not to declare issue of shares to its non-resident associated enterprises in Form 3CEB as in its understanding it fell outside the scope of Chapter X of the Act now stands vindicated by the decision of this court in Vodafone IV. If the petitioner did not file a particular transaction in Form SCEB when so required to be filed, the consequences of the same as provided in the Act would follow.

However, the mere not filing of Form 3CEB on the part of the petitioner would not give jurisdiction to the Revenue to tax an amount

which it does not have jurisdiction to tax. Therefore, we do not find any substance in this objection also.

11. The last objection taken by the Revenue was that in view of the variation in the shareholding pattern amongst different shareholders of the petitioner during the year clearly brought the issue of shares within clause (e) of the Explanation to section 92B of the Act. In terms of the above provision an international transaction would include a transaction of restructuring entered into by an enterprise with an associated enterprise. Mr. Pardiwala, learned counsel appearing for the petitioner, points out that there has been no restructuring of the organization but there has been a mere change in the shareholding of different shareholders of the petitioner. However, in the present facts we need not examine this for the reason that even if it is assumed that it is an international transaction, the jurisdictional requirement for Chapter X of the Act to be applicable is that income must arise. In this case, admittedly following Vodafone IV no income has arisen. Thus, the jurisdictional requirement for application of Chapter X of the Act is not satisfied.

12. As held in Vodafone IV, the jurisdiction to apply Chapter X of the Act would occasion only when income arises out of international transaction and such income is chargeable to tax under the Act. The issues raised in the present petition are identical to the issues which arose for consideration before this court in Vodafone IV. Therefore, following the aforesaid decision we set aside the order dated January 30, 2013, of the Transfer Pricing Officer to the extent it holds that the arm's length price of issue of equity shares is Rs. 183.44 per share as against Rs. 10 per share as declared by the petitioner and consequent deemed interest brought to tax on the amount not received when benchmarked to the arm's length price. Accordingly, we set aside the draft assessment order dated March 30, 2013, to the extent it seeks to bring to tax the arm's length price of the share issued by the petitioner to its non-resident associated enterprises and also deemed interest which is sought to be brought to tax on the ground of non- receipt of the consideration equivalent to the arm's length price by the petitioner on issue of equity shares. It is further clarified that the petitioner's objection before the Dispute . Resolution Panel filed on April 25, 2013, on all issues save and except the issue covered by this order would be considered by the Dispute Resolution Panel on its own merits."

19. The Hon'ble Bombay High Court further in the case of Equinox Business Parks (P.) Ltd. vs. Union of India has held as under:

"This has been accepted by the Revenue and is evident from the order of DRP dated 30 October 2014 in Petitioner's case for A.Y. 2010-11. In

the A. Y.2010-11 also the Petitioner had issued CCDs and equity shares and the basis was identical to the present Petition. The Revenue sought to tax the Petitioner in terms of Chapter X of the Act. However, the Petitioner objected to the Draft Assessment order before DRP. On 30 October 2014. DRP issued directions under Section 144C(5) of the Act to the Assessing Officer for the A.Y. 2010-11 and on identical facts qua equity shares and CCDs holding as under:

"3.4 We find that the issue under consideration of applying Transfer Pricing Provisions on 'issue of shares' has been decided in favour of the assesses by the Hon'ble Bombay High Court in the case of M/s Vodafone India Services Private Limited in Writ Petition number 871 of 2014 dated 10th October 2014. The honorable High Court has held that the amounts received on issue of shares is a capital account transaction not separately brought within the definition of 'income' as per the provisions of section 2(24) as well as sections 4 & 5 of the Act. Therefore, such capital account transaction not falling within a statutory exception cannot be brought to tax. Even income arising from international Transaction between AE must satisfy the test of income under the Act and must find its home in one of the above heads i.e. charging provisions. There is no charging section in chapter X of the act. Only if there is income which is chargeable to tax under the normal provisions of the act, then alone Chapter X of the act could be invoked. Further, since there is no income arising from the transaction of issue of shares, the provisions of chapter X would not apply. The Hon'ble Bombay High Court in the said case has quashed and set aside as Being without jurisdiction, null and void, f^g reference made by the TPO, and the order of the TPO making a transfer pricing adjustment on issue of shares. Respectfully following the decision of the jurisdictional Bombay High Court,, the adjustment proposed by the' TPO on account of issue of shares is deleted. Accordingly, ground of objection number 16 of the assessee is allowed."

20. We, therefore, respectfully following the ratio laid down by the Hon'ble Bombay High Court, reverse the direction of DRP and direct the AO to delete the addition on account f notional interest of Rs.2,44,20,173/-.

15. Similar view is also taken in other judgments relied on by the Ld. AR. <u>Since, no contrary judgments have been brought to our notice, relying on the above stated judgments, we direct the AO to delete the impugned adjustment made by the TPO as affirmed by the DRP towards notional interest on share application money for belated allotment of equity shares.|| 9.2.6 We also notice that similar view has been held by the Tribunal in assessee‟s own case for A.Ys 2008-09 & 2015-16.</u> Considering the facts being identical for the year under consideration also, respectfully following the above decision, we hold

that no interest shall be imputed on the share application money. It is ordered accordingly."

11. The Ld. D.R. for the Revenue has not brought on record any fact or law to controvert the argument addressed by the Ld. A.R. for the assessee that the issue is not entirely covered in assessee's favour in A.Y. 2008-09 and 2015-16.

12. In view of the matter we are of the considered view that the addition made by the Ld. TPO/DRP/AO on account of notional interest is not sustainable hence AO is directed to delete the same. Accordingly, ground No.2 is allowed."

Since, no contrary material is placed on record before us in the impugned assessment year as well, we see no reason to take a divergent view. In the result, ground No.3 of appeal is allowed for parity of reasons.

Ground No.4: Disallowance of premium payable on redemption of Foreign Currency Convertible Bonds (FCCB), Ref: FCCBs of 100 million U.S.D:

Ground No.5 : Allowability of premium on FCCBs in the Year of redemption:

12. The ld.Counsel for the assessee stated that the aforesaid grounds have become academic since the entire premium paid on redemption of FCCBs has been allowed by the DRP vide directions dated 25/09/2017 for Assessment Year 2013-14, hence, ground No.4 & 5 are not pressed. In view of the statement made by ld.Counsel for the assessee at Bar, ground No.4 & 5 of appeal are dismissed as not pressed.

Ground No.6: Disallowance of FCCB issue expenses – Rs.1,70,26,884/- :

13. The ld.Counsel for the assessee submitted that the assessee has amortized issue expenses of FCCBs u/s. 35D of the Act. Out of total expenditure, 1/5th was claimed in the impugned assessment year. He pointed that the Tribunal in past i.e in Assessment Year 2008-09, 2010-11 and 2011-12 has considered this issue and has allowed assessee's claim of 1/5th expenditure on issue of FCCBs.

14. The ld. Departmental Representative supported the assessment order and directions of the DRP, however, he fairly admitted that in the past this issue has been considered by the Tribunal in assessee's own case.

15. Both sides heard. We find that the expenditure incurred on issuance of FCCBs has been amortized by the assessee over a period of five years. The assessee had claimed 1/5th expenditure each year in the past, starting from Assessment Year 2008-09. The Co-ordinate Bench in appeal by the assessee ITA No.1992/Mum/2016 for Assessment Year 2011-12 decided on 18/06/2023, following earlier orders of Tribunal for Assessment Year 2009-10 and 2010-11 directed the Assessing Officer to allow 1/5th expenditure. Since, there is no change in facts in the impugned assessment year and no contrary material is brought on record by the Revenue, we see no reason to take a different view on this issue. The assessee succeeds on ground No.6 of appeal.

Ground No.7: Disallowance u/s. 14A of the Act :

16. The ld.Counsel for the assessee submitted that during the period relevant to assessment year under appeal, the assessee has not received any exempt income, nevertheless the assessee has made suo- motu disallowance of Rs.24,25,840/-. The ld.Counsel for the assessee submitted that this fact was brought to the notice of Assessing Officer during the assessment proceedings. The submissions of the assessee are at pages 187 and 188 of the Paper Book. The Assessing Officer disregarding the submissions of the assessee made further disallowance of Rs.4,08,27,039/- u/s. 14A of the Act r.w. Rule 8D.

16.1 It is no more res-integra that no disallowance u/s. 14A of the Act is warranted where the assessee has not earned any exempt income during the

relevant period.[Re. PCIT vs. State Bank of Patiala, 99 taxmann.com 286(SC) & PCIT vs. Ballarpur Industries Ltd. in Income Tax Appeal No.51 of 2016 decided by Hon'ble Bombay High Court on 13/10/2016]. In light of undisputed facts and the settled legal position, ground No.7 of appeal is allowed.

Ground No.8 : Adjustment made to book profits u/s. 115JB of the Act with respect to disallowance u/s.14A of the Act:

17. The ld.Counsel for the assessee submitted that the Assessing Officer while computing Book Profits u/s. 115JB of the Act has made adjustment with regard to disallowance made u/s. 14A of the Act. He submitted that in Assessment Year 2008-09, 2010-11 and 2011-12, similar adjustment was made by the Assessing Officer. The Tribunal deleted the same in the respective Assessment Years.

18. Both sides heard. The Special Bench of Tribunal in the case of Vireet Investment Pvt. Ltd. 82 taxmann.com 415 has held that computation u/s. 115JB of the Act is to be made without considering disallowance made u/s.14A of the Act r.w. Rule 8D. The Hon'ble Gujarat High Court in the case of PCIT vs. Gujarat Flouro Chemicals Ltd., 155 taxmann.com 155 has reiterated the position that no addition in Book Profit is to be made on the basis of calculation worked out u/s.14A of the Act. In light of settled legal position we find merit in ground No.8 of appeal, hence, the same is allowed.

Ground No.9: Disallowance of business promotion expenditure:

19. The ld.Counsel for the assessee stated at Bar that he is not pressing ground No.9 of appeal. In view of the statement made by ld.Counsel for the assessee, ground No.9 of appeal is dismissed as not pressed.

Ground No.10: Levy of interest u/s. 234C of the Act:

20. The ld.Counsel for the assessee submitted that the Assessing Officer has charged interest u/s. 234C of the Act. There is no shortfall in payment of advance tax liability, hence, no interest u/s. 234C of the Act was leviable.

21. We have heard the submissions made by ld.Counsel for the assessee. Charging of interest u/s. 234C of the Act is consequential and mandatory. We deem it appropriate to restore this issue back to the file of Assessing Officer to verify the contentions of the assessee. In the result, ground No.10 of appeal is allowed for statistical purpose.

Ground No.11: Initiation of Penalty proceedings u/s. 271(1)(c) of the Act:

22. Challenge to penalty proceedings at this stage is premature, hence, ground No.11 of appeal is dismissed sans merit.

Additional Ground of Appeal:

23. The assessee vide application dated 23/08/2023 has raised additional grounds of appeal. The same reads as under:

> ***"1 : 0 Re.: Disallowance of Rs. 24,25,8407- made u/s. 14A suo-moto while computing the total income :***
> *1 : 1 The Assessing Officer and the Dispute Resolution Panel have erred in confirming the disallowance made u/s. 14A suo-moto by the Appellant while computing its total income.*
>
> *1 : 2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, no disallowance u/s. 14A is called for including the amount disallowed by it suo-moto while computing its total income and hence the action of the Assessing Officer and the Dispute Resolution Panel in this regard is incorrect, erroneous and not in accordance with the law.*

1 : 3 The Appellant submits that the Assessing Officer be directed to delete even the amount of Rs.24,25,840/- disallowed u/s. 14A suo-moto while computing its total income and to compute its total income and tax thereon accordingly".

24. The ld.Counsel for the assessee submitted that for adjudication of additional ground no fresh documents are required to be placed on record. The additional ground is legal in nature, hence, may be admitted.

25. On the other hand, the ld. Departmental Representative opposed the admission of additional ground of appeal at the belated stage.

26. We have heard the rival contentions. In additional ground of appeal the assessee has claimed that suo-motu disallowance made u/s. 14A of the Act should be deleted. We are of the considered view that for adjudication of aforesaid ground no fresh evidence is required to be adduced and the issue raised in additional ground of appeal by the assessee is legal. Hence, the same is admitted,

27. The ld.Counsel for the assessee submitted that the issue raised in additional ground of appeal has been considered by the Tribunal in assessee's own case in Assessment Year 2011-12 in ITA No.1992/Mum/2016 (supra). The Tribunal has directed to reduce suo-motu disallowance while determining the taxable income as no exempt income has been earned by the assessee during the relevant period.

28. Per contra, the Ld. Departmental Representative vehemently opposed the submissions of the assessee and submitted that if the relief is allowed to the assessee on the additional ground of appeal, it will result in reduction of assessed income below the returned income.

29. Both sides heard. We find that in Assessment Year 2011-12 the assessee had raised similar ground as additional ground of appeal. The Co-ordinate Bench accepted the ground raised by the assessee by observing as under:

> *"20. Undisputedly during the year under consideration the assessee has not earned any exempt income from its investment. By now it is settled principle of law that when there is no exempt income no disallowance under section 14A is required to be made. The co-ordinate Bench of the Tribunal in case of Orix Auto Infrastructure Services Ltd. (supra) decided the identical issue where the assessee has not earned any exempt income but made suo-moto disallowance, come to the conclusion that no disallowance is required to be made in this case. Though the assessee has not earned any exempt income but made suo-moto disallowance of Rs.58,53,114/- as a precautionary measure and requested that the same should be reduced while determining the taxable income as there was no exempt income derived by the assessee. The co-ordinate Bench of the Tribunal after following the decision rendered by Hon'ble Bombay High Court in case of CIT vs. Prithvi Brokers and Shareholders Pvt. Ltd. 349 ITR 336 (Bom.) held that "no disallowance under section 14A of the Act could be made when there is no exempt income." Operative part of the findings returned by the co-ordinate Bench of the Tribunal in case of Orix Auto Infrastructure Services Ltd. (supra) by returning following findings:*
>
> > *"3.2. We find that assessee had made suomoto disallowance under Rule 8D(2)(iii) of Rs.33,62,493/- and had indeed pleaded before the lower authorities that the same should be reduced while determining taxable income as there was no exempt income derived by the assessee. We find that this request was rejected by the lower authorities.*
> >
> > *3.2.1. We find that assessee is entitled to make a claim before the ld. AO or before the ld. CIT(A) even though it had made certain erroneous disallowance in the return of income. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Pruthvi Brokers and Shareholders Pvt Ltd., reported in 349 ITR 336 (Bom). Respectfully following the said decision of the Hon'ble Jurisdictional High Court, we hold that the lower authorities ought to have entertained the claim of the assessee. We also find that the ld. CIT(A) in para 4.14 had categorically agreed to the legal proposition that no disallowance u/s.14A of the Act could be made when there is no exempt income. Having said so, he ought to have entertained the plea of the assessee and directed the ld. AO to reduce even the suomoto disallowance of Rs.33,62,493/- made by the assessee. To this extent, we are inclined to modify the order of the ld. CIT(A) and direct the ld. AO to delete Rs.33,62,493/- being the suomoto disallowance made by the assessee.*

3.3. We are conscious of the fact that this deletion of suomoto disallowance would result in assessed income going below the returned income. In this regard, we find that the Hon'ble Gujarat High Court in the case of Gujarat Gas Company Ltd., vs. JCIT reported in 245 ITR 84 and also in later decision in the case of Milton Laminates Ltd., vs CIT reported in 37 Taxmann.com 249 had categorically held that the assessed income could go below the returned income if assessee had disclosed certain income which is not supposed to be disclosed as per law. Respectfully following the said decision, we direct the ld. AO to delete the voluntary disallowance of Rs.33,62,493/- made by the assessee u/s.14A of the Act even if ultimately the assessed income goes below the returned income."

21. So following the decision rendered by co-ordinate Bench of the Tribunal which is based upon the decision rendered by the Hon'ble jurisdictional Bombay High Court in case of CIT vs. Prithvi Brokers and Shareholders Pvt. Ltd. (supra) and decision rendered by Hon'ble Gujarat High Court in case of Gujarat Gas Company Ltd., vs. JCIT reported in 245 ITR 84, AO is directed to delete the addition made by him as well as suo-moto disallowance of Rs.58,53,114/- made by the assessee and reduce the same while determining the taxable income as no exempt income has been derived by the assessee during the year under consideration".

Since, the facts and submissions of the assessee on the issue raised in impugned assessment year are identical except the amount of disallowance, the additional ground of appeal is allowed, for parity of reasons.

30. In the result, appeal of assessee is partly allowed.

Order pronounced in the open court on Monday the 15th day of January, 2024.

Sd/-	Sd/-
(AMARJIT SINGH)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 15/01/2024
Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar) ITAT, Mumbai