**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"B" BENCH, AHMEDABAD**

**BEFORE SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER &**
**SHRI MAKARAND V. MAHADEOKAR, ACCOUNTANT MEMBER**

I.T.A. No. 2004/Ahd/2014
(Assessment Year: 2010-11)

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| National Dairy Development Board,<br>P.O. Box No. 40, Anand,<br>Gujarat-388001 | Vs. | The Assistant Commissioner of Income Tax,<br>Anand Circle,<br>Anand |
| [PAN No.AABCN2029C] | | |
| (**Appellant**) | .. | (**Respondent**) |

I.T.A. No. 1873/Ahd/2014
(Assessment Year: 2010-11)

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| The Assistant Commissioner of Income Tax,<br>Anand Circle,<br>Anand | Vs. | National Dairy Development Board,<br>P.O. Box No. 40, Anand,<br>Gujarat-388001 |
| [PAN No.AABCN2029C] | | |
| (**Appellant**) | .. | (**Respondent**) |

I.T.A. No. 2994/Ahd/2016
(Assessment Year: 2011-12)

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| National Dairy Development Board,<br>P.O. Box No. 40, Anand,<br>Gujarat-388001 | Vs. | The Assistant Commissioner of Income Tax,<br>Anand Circle,<br>Anand |
| [PAN No.AABCN2029C] | | |
| (**Appellant**) | .. | (**Respondent**) |

I.T.A. No. 2954/Ahd/2016
(Assessment Year: 2011-12)

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| The Deputy Commissioner of Income Tax,<br>Anand Circle,<br>Anand | Vs. | National Dairy Development Board,<br>P.O. Box No. 40, Anand,<br>Gujarat-388001 |
| [PAN No.AABCN2029C] | | |
| (**Appellant**) | .. | (**Respondent**) |

C.O. No. 14/Ahd/2017
(in ITA No. 2954/Ahd/2016)
(Assessment Year: 2011-12)

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| National Dairy Development Board,<br>P.O. Box No. 40, Anand,<br>Gujarat-388001 | Vs. | The Assistant Commissioner of Income Tax,<br>Anand Circle,<br>Anand |
| [PAN No.AABCN2029C] | | |
| (**Appellant**) | .. | (**Respondent**) |

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| **Appellant by :** | Shri Yogesh Shah & Ms. Aparna Parlekr A.Rs. |
| **Respondent by :** | Shri Sudhendu Das, CIT DR |

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| **Date of Hearing** | 22.04.2024 |
| **Date of Pronouncement** | 17.05.2024 |

O R D E R

**PER SIDDHARTHA NAUTIYAL, JM:**

These cross appeals have been filed by the Assessee and the Revenue against the order passed by the Ld. Commissioner of Income Tax (Appeals)-IV & 4, (in short "Ld. CIT(A)"), Baroda / Vadodara vide orders dated 24.03.2014 & 14.06.2016 and the Cross Objection filed by the assessee against the order passed by the Ld. CIT(A)-4, Vadodara passed for A.Ys. 2010-11 & 2011-12. Since common facts and issues for consideration are involved for both the years under consideration before us, the aforesaid appeals are being disposed by way of a common order.

**We shall first take up the assessee's appeal for A.Y. 2010-11 (ITA No. 2004/Ahd/2014)**

2. The assessee has raised the following grounds of appeal:-

*"1. The order passed by the Hon'ble Commissioner of Income Tax (Appeals) [CIT(A)] is erroneous and contrary to the provisions of law and facts and therefore requires to be suitably modified. It is submitted that it be so done now.*

*2. The Hon'ble CIT(A) has erred in disallowing the appellant's claim of Rs. 5,76,58,995/- for deduction u/s. 36(1)(viii) following ITAT's order for A.Y. 2003-04. It is submitted that appellant has satisfied necessary conditions and Hon'ble Commissioner of Income Tax (Appeals) ought to have allowed the deduction as claimed. It is submitted that it be so held now.*

*3. The Hon'ble CIT(A) has erred in setting aside the matter to the Assessing Officer regarding disallowance of grant of Rs. 54,71,000/- to various Unions and federations claimed as deductible expenditure u/s. 36(1)(xii) of the Income Tax Act after relying on the order of the ITAT in the appellant's own case for AY 2003-04.*

*3.1 Without prejudice to the above, the CIT(A) erred in not giving the opportunity of being heard to the appellant after the remand report. It is submitted that it be so held now.*

*4. The Hon'ble CIT(A) has erred in confirming the disallowance Rs. 2,30,15,007/- under section 14A following the appellate order for Asst. Year 2008-09. In the facts and circumstances of the case it is submitted that no disallowance under section 14A is required to be made. It is submitted that it be so held now.*

*4.1. The Hon'ble CIT(A) has erred in not appreciating the fact that section 14A is not applicable to the appellant as the investments in securities yielding tax free income were made from own funds of the appellant and no expenses are incurred in relation to earn the exempt income.*

*4.2. The Hon'ble CIT(A) has erred in law in confirming the application of Rule 8D, where the AO has not brought on record his dissatisfaction in respect of the appellant's claim of expenditure incurred for earning tax free income.*

*4.3. Alternatively, the disallowance should be restricted to Rs. 27,000/- which may be considered to be attributable to earn exempt income. It is submitted that it be so held now.*

*5. The Hon'ble CIT(A) has erred in directing the AO to tax the rental income from buildings given on lease as income under the head 'Income from House Property' instead of 'Profits and Gains from Business and Profession' and thereby denying depreciation and other expenditure on the said buildings. It is submitted that it be so held now.*

*5.1 The Hon'ble CIT(A) erred in not appreciating the fact that the buildings were given on lease in the ordinary course as a part of its business of Dairy Development and therefore eligible for depreciation. It be so held now.*

*5.2 The Hon'ble CIT(A) erred in not appreciating the fact that the assets given on lease have lost their identity when they entered the block of assets and no new building has been acquired during the year. Hence there cannot be disallowance of deprecation under the Act.*

*5.3 The Hon'ble CIT(A) while holding that rental income be taxed as Income from House Property ought to have directed to grant standard deduction u/s 24 of the Act.*

*6. The Hon'ble CIT(A) erred in not adjudicating on the ground of appeal that the interest earned on North Kerala Project Development Fund, amounting to Rs 2,15,66,141 /- is taxed as income in the hands of the appellant ignoring the fact that the appellant is acting as nodal agency and income is diverted at source and does not belong to the appellant.*

*6.1 Without prejudice to above, if the interest is considered as income of the assessee, direction be given to allow the expenditure in the same year in which they are incurred as deduction. It be so done now.*

*7. The Hon'ble CIT (A) has erred in not granting the deduction in respect of contribution made 1 to Employee's Recreation of Rs. 3,14,675/- following the decision by the IT AT, Ahmedabad in its decision for AY 2003-04. It is submitted that in the facts and circumstances of the case, no disallowance was required to be made.*

*8. The Hon'ble CIT (A) erred in confirming the interest charged under section 234B and 234D under the Act.*

*Your appellant prays for leave to add to alter and/or to amend any of the grounds before the final hearing of the appeal."*

3. Ground No. 1 is general in nature and does not require any specific adjudication.

**Ground No. 2, 6, 6.1 and Ground No.7 for A.Y. 2010-11 and Ground Nos. 2, 5 & 6 for A.Y. 2011-12:-**

4. Before us, the Counsel for the assessee submitted that similar issue as contained in Ground No. 2 of assessee's appeal is pending before Hon'ble Supreme Court for A.Y. 2003-04. Further, the Counsel for the assessee also submitted that the issue contained under Ground No. 6, 6.1 and 7 of the assessee's appeal are pending adjudication before Gujarat High Court in assessee's own case for A.Y. 2004-05 in Tax Appeal No. 337 of 2012. Accordingly, in order to avoid repetitive appeals in respect of the aforesaid issues, the assessee filed application under Section 158A of the Act and submitted that if the Hon'ble Tribunal agrees to apply the aforesaid decisions referred to above, then the assessee shall not raise the said questions contained in Ground Nos. 2, 6, 6.1 and 7 before any appellate authority or before Hon'ble

High Court and Supreme Court, with respect to the aforesaid issues. The Counsel for the assessee also produced before us the report of the ACIT, Anand Circle, in response to application filed by the assessee. The relevant extracts of the Report are reproduced below for ready reference:-

> *"Appeal before the Tribunal in ITA no. 2004/Ahd/2014 (Assessee) & ITA no. 1873/Ahd/2014 (Department)*
>
> *The assessee in its appeal no.2004/Ahd/2014 has raised following, grounds of appeal:*
>
> *2. The Hon'ble CIT(A) has erred in disallowing the appellant's claim of Rs. 5,76,58,995/- for deduction u/s. 36(l)(viii) following ITAT's order for A.Y. 2003-04. It is submitted that appellant has satisfied necessary conditions and Hon'ble Commissioner of Income Tax (Appeals) ought to have allowed the deduction as claimed. It is submitted that it be so held now.*
>
> *6. The Hon'ble CIT(A) erred in not adjudicating on the ground of appeal that the interest earned on North Kerala Development Fund, amounting to Rs. 2,30,90,542/- is taxed as income in the hands of the appellant ignoring the fact that the appellant is acting as nodal agency and. income is diverted at source and does not belong to the appellant.*
>
> *6.1 Without prejudice to above, if the interest is considered as income of the assessee, direction be given to allow the expenditure in the same year in which they are incurred as deduction. It be so done now.*
>
> *7. The Hon'ble CIT (A) has erred in not granting the deduction in respect of contribution made to Employee's Recreation of Rs.3,14,675/- following the decision by the ITAT, Ahmedabad in its decision for A.Y. 2003-04. It is submitted that in the facts and circumstances of the case, no disallowance was required to be made.*
>
> *AO's observations:*
>
> *I. The substantial question of law as raised in ground no.2 reproduced above is identical to question of law arising in assessee's case in respect of assessment year 2003-04 (reproduced below) which is pending before the Supreme Court in vide no.2760 of 2023*
>
> *a) Whether, on the facts and in the circumstances of the case, the Hon'ble High Court erred in confirming disallowance of deduction u/s. 36(1)(viii) for Rs.79,90,00,000?*
>
> *b) Whether, on the facts and in the circumstances of the case, the Hon'ble High Court erred, in holding that 'dairying' is not industry or agricultural, development or development, of industrial facility for the purpose of Section 36(1)(viii) of the income Tax Act, 1961?*

*c) Whether, on the facts and in the circumstances of the case, the assessee is justified in its belief that Hon'ble High Court has impliedly agreed, that in absence of share capital, deduction u/s. 36(l)(viii) is permissible?*

*II. The substantial question of law as raised above in ground no. 6 & 7 reproduced above is identical to question of law arising in assessee's case in respect of assessment year 2004-05 (reproduced below) which is pending before the Hon'ble Gujarat High Court vide Tax Appeal no. 337 of 2012*

*"(i) Whether, on the .facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that interest earned on Project Funds, amounting to Rs.l,22,05,405/- is income of the appellant?*

*(iii) Whether, on the facts and circumstances of the case, tine Income Tax Appellate Tribunal was right in law in holding that confirming disallowance of Rs.2,39,924/- being contribution made to employees recreation Trust by invoking provision of Sec 40A(9) of the Act?"*

*<u>AO's Remarks</u>*

*Ground no. 2 of the appeal before tribunal is identical with grounds a to c for AY 2003-04 and the appeal before the Supreme Court is yet to be finalized. Hence 158A is applicable.*

*2. Ground no.6, 6.1 & 7 of the appeal before the tribunal is identical with grounds (i) & (ii) for AY 2004-05 and the appeal before the Gujarat High Court is yet to be finalized. Hence 158A is applicable.*

*Appeal before the Tribunal in ITA no. 2994/Ahd/2016 (Assessee) & ITA no. 2954/Ahd/2016 (Department)*

*The assessee in its appeal no.2994/Ahd/2016 has raised following grounds of appeal:*

*2. The Hon'ble CIT(A) has erred in disallowing the appellant's claim of Rs. 10,70,26,221/- for deduction u/s. 36(1)(viii). It is submitted that appellant has satisfied necessary conditions and Hon'ble Commissioner of Income Tax (Appeals) ought to have allowed the deduction as claimed. It is submitted that it be so held now.*

*5. The Hon'ble CIT (A) erred in not appreciating that the interest earned on North Kerala Project Development Fund, amounting to Rs. 1,80,08,753/- is taxed as income in the hands of the appellant ignoring the fact that the appellant is acting as nodal agency and income is diverted at source and does not belong to the appellant.*
*5.1. Without prejudice to above, if the interest is considered as income of the assessee, direction be given to allow the expenditure in the same year in which they are incurred as deduction. It be so done now.*

*6. The Hon'ble CIT (A) has erred in not granting the deduction in respect of contribution made to Employee's Recreation of Rs. 1,75,395/-. It is submitted that, in the facts and circumstances of the case, no disallowance was required to be made.*

*AO's observation:*

*I. The substantial question of law as raised in ground no.2 reproduced above is identical to question of law arising in assessee's case in respect of assessment year 2003-04 (reproduced below) which is pending before the Supreme Court in vide no.2760 of 2023*

*a) Whether, on the facts and in the circumstances of the case, the Hon'ble High Court erred in confirming disallowance of deduction u/s 36.(l)(viii) for Rs. 9,90,00,000?*

*b) Whether, on the facts and in the circumstances of the case, the Hon'ble Court erred in holding that 'dairying' is not industry or agricultural development or development of industrial facility for the purpose of Section 36(1)(viii) of the Income Tax Act, 1961?*

*c) Whether, on the facts and in the circumstances of the case, the assessee is justified in its belief that Hon'ble High Court has impliedly agreed, that in absence of share capital, deduction u/s. 36(1)(viii) is permissible?*

*II. The substantial question of law as raised above in ground no. 5 & 6 reproduced above is identical to question of law arising in assessee's case in respect of assessment year 2004-05 (reproduced below) which is pending before the Hon'ble Gujarat High Court vide Tax Appeal no. 337 of 2012*

*"(i) Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law, in holding that interest earned on Project Funds, amounting to Rs. 1,22,05,405/- is income of the appellant?*

*(iii) Whether, on the, facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that confirming disallowance of Rs.2,39,924/- being contribution made to employees recreation Trust by invoking provision of See 40A(9) of the Act?"*

*AO's Remark*

*1. Ground no. 2.of the appeal before tribunal is identical with grounds a to c for AY 2003-04 and the appeal before the Supreme Court is yet to be finalized. Hence 158A is applicable.*

*2. Ground no.5, 5.1 & 6 of the appeal before the tribunal is identical with grounds (i) & (ii) for AY. 2004-05 and the appeal before the Gujarat High Court is yet to be finalized. Hence 158A is applicable."*

5. In view of the admission of question of law on disallowance of assessee's claim for deduction under Section 36(1)(viii) of the Act, following orders for A.Y. 2003-04, by the Hon'ble Supreme Court in A.Y. 2003-04 (Ground No. 2 for A.Y. 2010-11) and also regarding pendency on the ground relating to interest earned on North Kerala Diary Project Development Fund

(Ground No. 6 for A.Y. 2010-11), and ground relating to non-granting of deduction in respect of contribution made to employees recreation (Ground No. 7 for A.Y. 2010-11), and pendency of such grounds before the Hon'ble Gujarat High Court the assessee filed application under Section 158A(1) of the Act and submitted that the assessee would not raise any question of law before the Hon'ble Gujarat High Court and / or Hon'ble Supreme Court of India, in the captioned assessment year. The application made by the assessee in Form No. 8 is available on record and copies of the same were forwarded to the Department. The Assessing Officer vide letter dated 18.04.2024 has on verification of records, admitted that the question of law involved in the appeal before the Hon'ble Gujarat High Court for A.Y. 2004-05 and before Hon'ble Supreme Court in A.Y. 2003-04, were pending for decision and the assessee's claim was found to be corrected.

6. In view thereof, the issues raised by the assessee vide Ground Nos. 2, 6 & 7 for A.Y. 2010-11 (and similarly in respect of 2, 5 & 6 relating to A.Y. 2011-12) are decided against the assessee, following the decision of Ahmedabad Tribunal which have held against assessee from A.Ys. 2003-04 to 2008-09, in respect of all the three grounds of appeal for which application under Section 158A of the Act has been submitted by the assessee, since there is no change in the facts and circumstances. However, in view of the declaration made by the assessee in prescribed Form No. 8 in terms of Section 158A(1) of the Act, the Assessing Officer is directed to apply the decision of Hon'ble Supreme Court and / or Hon'ble Gujarat High Court, once the said issues are decided in assessee's own case, relating to A.Y. 2003-04 (in relation to claim of deduction under Section 36(1)(viii) of the Act before Hon'ble Supreme Court) and A.Y. 2004-05 (in relation to grounds relating to interest

earned on North Kerala Dairy Project Development Fund and in relation to ground relating to deduction in respect of contribution made to employees recreation ) before Hon'ble Gujarat High Court, on the said issues being decided in assessee's own case. Accordingly, Ground of Appeal Nos. 2, 6 & 7 raised by the assessee is accordingly dismissed for A.Y. 2010-11 and Ground of Appeal Nos. 2, 5 & 6 in relation to A.Y. 2011-12 are dismissed accordingly.

**Ground No. 3 & 3.1:- CIT(A) erred in setting-aside the matter regarding grant of disallowance of Rs. 54,71,000/- under Section 36(1)(xii) of the Act.**

7. The brief facts in relation to this ground of appeal are that the assessee claimed expenditure of Rs. 50.70 crores in the Profit & Loss Account under Section 36(1)(xii) of the Act.

8. During the course of assessment proceedings, the Assessing officer asked the assessee to provide a break-up of the expenses and on analysis of the details provided by the assessee, the Assessing Officer observed that the assessee had given a sum of Rs. 54,71,000/- to unions / federations under perspective plan. The assessee submitted that it provides financial assistance by way of loans / grants to cooperative unions / federations and subsidiaries of NDDB (assessee) for fulfilling the objectives. The assessee submitted that Section 36(1)(xii) of the Act provides that any expenditure incurred by a cooperation or body corporate established by Central or State Provincial Act for the objects and purposes authorised by the Act is admissible as deduction while computing taxable income. The assessee submitted that it provides financial support either in the form of loan or grant and while the loan is repayable back to the assessee, the amount of grant is not recoverable by the assessee and deduction under Section 36(1)(xii) has been claimed only in

respect of grant disbursed and not in respect of loan, which is irrecoverable. The grants are given by the assessee in the form of reimbursement of expenditure incurred by unions and federations. The assessee further provides support / assistance to it's subsidiaries / managed units in the form of grants for meeting various objectives under the NDBB Act. The grants disbursed by the assessee to it's subsidiaries are irrecoverable and the expenditure incurred by the assessee is allowable under Section 36(1)(xii) of the Act. However, the Assessing Officer observed that perspective plan expenses were claimed by the assessee in A.Y. 2003-04, A.Y. 2006-07, A.Y. 2007-08, A.Y. 2008-09 and A.Y. 2009-10 as well. For the earlier years, the Assessing Officer observed that there was an in built condition at the time of making grants by the assessee that if the utilisation of disbursement was made by the assessee is not as per objectives / terms laid down in the agreement, then such grant / disbursement could be converted either into interest free loans or interest bearing loans. Accordingly, for the earlier years, the Assessing Officer was of the view that there was a possibility of money coming back to the assessee and therefore, such disbursements to various cooperative unions were not an expenditure. The issue was agitated by the assessee before the ITAT which has upheld the view taken by the Assessing Officer on the said disallowance. The assessee is in appeal before the Hon'ble High Court on this issue. Accordingly, the Assessing Officer disallowed the expenses of 54,71,000/- claimed by the assessee under Section 36(1)(xii) of the Act.

9. In appeal, the Ld. CIT(A) observed that the ITAT vide order dated 21.04.2011 observed that there is force in the argument of the assessee that non-refundable grants sanctioned are claimed as deduction only when the funds are already utilised / Fund Utilisation Report (FUR) has been received

by the assessee. Accordingly, the issue was set-aside to the file of the Assessing Officer for necessary verification after giving due opportunity of being heard to the assessee. Accordingly, the Ld. CIT(A), in light of the above observations of the ITAT, restored the matter to the file of the Assessing Officer for verification of details furnished by the assessee and to allow only such claims which are found allowable as per directions of ITAT.

10. The assessee is in appeal before us against the aforesaid order passed by Ld. CIT(A), restoring the matter back to the Assessing Officer.

11. Before us, the Counsel for the assessee placed reliance on the order of ITAT in assessee's own case for A.Y. 2003-04 and submitted that this expenditure should be allowed to the assessee and Ld. CIT(A) erred in directing the Assessing Officer to carry out the necessary verification. Further, the Counsel for the assessee submitted that complete details of expenditure as well as fund utilisation report is available with the assessee and if required, these details can be furnished before the Assessing Officer as well for carrying out the necessary verification. Before deciding the issue, it would be useful to refer to the order passed by the Ld. CIT(A) on this issue:-

> *"7. Vide the ground no. '4', the appellant has challenged the action of the A.O. of disallowing the grant of Rs. 54,71,000/- given by the appellant to Co-operative Union / Federation and its subsidiaries and claimed as a deduction u/s. 36(1)(xii) of the Act. The AO has made this disallowance by relying upon the decision of ITAT, Ahmedabad in appellant's own case for A.Y. 2003-04. During the course of current appellate proceedings, it was submitted by the appellant that it filed a miscellaneous application against the order of the ITAT for A.Y. 2003-04 in ITA No. 454/Ahd/2006. This miscellaneous application was disposed off by the ITAT vide its order dated 21/04/2011. This miscellaneous application was related to adjudication of the disallowance made by the A.O. u/s. 36(1)(xii) of the Act. In this order, the ITAT held as follows:*
>
> > *"7. Having heard both the sides, we have carefully gone through the orders of authorities below. We find considerable force in justification of the lad. Counsel of the assessee whether the alleged non-refundable grants given in, the previous year,*

*relevant to the assessment year under appeal are from grants received or not needs verification at the end of the Assessing Officer. In this context, we may point out that as per decision of the ITAT, Delhi 'E' Bench in the case of Oil Industry Development Board (Supra), relied on by the ld. Counsel of the assessee, expenditure incurred by way of disbursement of grants for objects and purposes authorized by the Act is allowable as deduction under section 36(1)(xii) of the I.T. Act, 1961. The plea of the ld. Counsel of the assessee that non-refundable grants sanctioned, are claimed as deduction only when funds are already utilized/Fund Utilisation Report (FUR) are received, also needs verification at the end of the Assessing Officer. We, therefore, set aside the order the Learned commission of Income Tax (Appeals) on this issue and restore the verify both the aforesaid contentions and re-adjudicate the disallowance of Rs. 10,31,34,920/- afresh, after giving opportunity of being heard to the assessee. The assessee is also directed to furnish complete details to Assessing Officer, in this regard, for verification."*

*7.1 In view of this decision of ITAT, a letter dated 13/03/2013 was written to the A.O. which is reproduced below:*

> *"Please refer to the above. Vide ground No. 4, the appellant has challenged the action of the AO of disallowing claim of grant of Rs. 54,71,000/- being given to Cooperative Units/Federation and other organizations u/s. 36(1)(xii) of the IT Act, 1961. Similar issue was involved in earlier years. Appeal is pending in this respect for AY 2009-10 also. Vide letter dated 13/03/2013 and 23/05/2013 of this office, you were directed to carry on required verifications and submit your remand report on expenses of similar nature for AY 2009-10. You are { directed to make similar verifications for this appeal also in the light of the directions given by ITAT, Ahmedabad in AY 2003-04 as discussed in the letter dated 13/03/2013 for AY 2009-10."*

*7.2 In response to this, the A.O. submitted following remand report vide letter dated 20/03/2014.*

> *"During the course of assessment proceedings for , A.Y. 2010-11, it was noticed by the AO that the assessee has claimed deduction u/s. 36(1)(XII) on account of reimbursements made to the unions, federation etc. as perspective grant for the activities in terms of objects specified under NDDB Act. The AO made the addition of Rs. 5471000/- on account of disallowance of said expenses deduction u/s. 36(1)(XII) in respect of said expenditure.*

*4. In the case of assessee, Hon'ble ITAT, Ahmedabad has set aside the addition on similar ground and matter was restored to the file of the AO in A.Y. 2003-04 to 2006-07 for necessary verification.*

*5. During set-aside proceedings, in respect of aforesaid assessment years, fund utilization report (FUR) evidences as to satisfaction of spent of grant, director's report of recommendation and auditor certificate in support of the claim of perspective plan expenditure were called for from the assessee.*

*After due verification with the details / documents & evidences, furnished by the assessee, substantial expenditure was allowed & balance addition, as given hereunder, was made.*

| *Asst. Year* | *Disallowance of grant expenditure during assessment proceedings* | *Disallowance made out of grant during set aside proceedings* |
|---|---|---|
| *2003-04* | *10,31,34,920/-* | *61,08,550/-* |
| *2004-05* | *4,99,82,283/-* | *28,85,137/-* |
| *2005-06* | *16,21,47,646/-* | *Nil* |
| *2006-07* | *2,29,25,823/-* | *10,77,728/-* |

*5. In this case notice has been issued to the assessee for furnishing of details, documents'&. evidences in respect of said perspective grant expenditure. The said expenditure on account of grant would be allowable only if the assessee is able to furnish the aforesaid documents in respect of each grants given to the respective unions."*

*7.3 The AO is directed to verify the details furnished by the appellant and to allow such claims which are found allowable as per the directions of ITAT in its order for AY 2003-04 (supra)."*

12. On going through the contents of the order of Ld. CIT(A), we find no infirmity in the order of Ld. CIT(A), so as to call for any interference.

13. Further, the Counsel for the assessee also submitted that complete details regarding Fund Utilisation Report is available with the assessee and the assessee would be able to furnish all details in respect to the expenditure and also the necessary proof that no part of the grant has come back to the assessee, if allowed the opportunity of being heard. Accordingly, looking into the instant facts, the matter is hereby set-aside to the file of the Ld. Assessing Officer to carry out the necessary verification and the assessee is also directed to furnish the Fund Utilisation Report / other evidences to substantiate that no part of such grants given by the assessee by way of reimbursement etc. has in fact come back to the assessee in any form whatsoever.

14. In the result, Ground No. 3 of the assessee's appeal is allowed for statistical purposes.

**Ground Nos. 5, 5.1, 5.2 & 5.3:- CIT(A) erred in directing AO to tax rental income from buildings given on lease as income from 'Income from house property' instead of 'Income from business or profession'.**

15. The brief facts of the case are that during the course of assessment, the Assessing Officer observed that the assessee company had leased various assets like building and rooms, electric installations, plant and machinery, rail milk tankers on long term lease. The above assets were given by the assessee on "operating lease" with an option to renew the agreement. The Assessing Officer observed that the assets which were given on lease by the assessee were not used by the assessee for it's own business of procurement and sale of milk products and the assets were utilized by the lessee for the "major portion of the economic life of the assets" and thus the lease qualified as a "finance lease". Under the Income Tax Law, the lessor does not get the benefit of depreciation in case of "finance lease" or "hire purchase lease agreement". As per Section 32 of the Income Tax Act, in order to claim depreciation on any asset, the asset must be owned by the assessee and further it should be used for the purpose of the assessee's business or profession. The leased assets though owned by the assessee were not used for the purpose of business or provision of the assessee and further the lease being in the nature of "finance lease" does not qualify for depreciation. During the course of assessment proceedings, the assessee submitted that the lease was operating lease, and hence the assessee is eligible for claim of depreciation on such assets. The assessee submitted that as per Accounting Standard 19, "operating lease" is a short term lease where there is no intention to transfer the risk and rewards incidental to ownership of the asset. In the case of buildings, though the lease is on a long term basis, but the lessor / assessee retains significant risks and rewards incidental to

ownership of such buildings. However, the Assessing Officer held that the assessee is not in the leasing business and therefore, the depreciation is not allowable on lease assets as held in the case of K.M. Sugar Mills vs. CIT 262 ITR 70 (Allahabad). Further, the Assessing Officer held that the assets acquired by the assessee were given on lease and were not used by the assessee itself and the lessee utilised the assets for major portion of economic life of the asset, thus qualifying it as "finance lease". Accordingly, the Assessing Officer disallowed an amount of Rs. 3,68,94,820/- being the proportionate depreciation on leased assets.

16. In appeal, CIT(A) partly allowed the appeal of the assessee, by following the order of his predecessor CIT(A) for A.Y. 2006-07, in which Ld. CIT(A) had held that assessee is eligible for depreciation on all such assets except buildings given on rent. Accordingly, the Ld. CIT(A), directing the Assessing Officer to restrict the disallowance of depreciation only in respect of buildings given on rent, in which the rental income was directed to be taxed as "income from house property" and the standard deduction was allowed under Section 24 of the Act was directed to be allowed. While passing the order, Ld. CIT(A) made the following observations:-

> *"10. Vide the ground no. 7, the appellant has challenged the action of the AO of disallowing of depreciation on leased assets of Rs. 3,68,94,820/-. In this regard, it is seen from the assessment order that the AO found on verification of the case records that the appellant company has leased various assets like building and roads, electric installations, plant & machinery and rail milk tankers gross value of all totalling to Rs. 3070.50 millions. The above assets have been given on "operating lease" with an option to renew the agreement. The appellant company is not in the leasing business as per Chapter IV of the NDDB Act and it has started procurement and sale of milk only in the current A.Y. Therefore, the assets acquired by it were given on lease were not used by NDDB itself and the lessee were utilized the assets for the major portion of economic life of the assets thus qualifying it as a finance lease. The lessor does not get the benefit of depreciation in the case of finance lease or hire purchase lease agreement. As per the provisions of section 32(1) of the I.T. Act, 1961, the depreciation can be claimed in respect of the assets which are (i) owned by the assessee (ii) and used for the purpose of his business or profession. The leased assets though*

*owned by the appellant were not used for the purpose of business or profession of the appellant and also the lease in the nature of finance lease which does not qualify the appellant for claim of proportionate depreciation of Rs. 3,68,94,820/-. On this issue, it was proposed to withdraw the amount of depreciation and added the same to its total income by the AO.*

*10.1. This issue is identical to the issue involved in appellant's own case for A.Y. 2006-07. In appellate order dated 18/03/2014 in appeal no. CAB/IV-A-393/2011-12, I have held that the appellant is eligible for depreciation on all such assets except the buildings given on rent. In that order, the AO has been directed to tax the rents received from the buildings given by the appellant on rent to other parties as income from house property and not to allow depreciation on such buildings. The AO is directed to follow the directions given in the appellate order for A.Y. 2006-07 in the current year also."*

17. Before us, the Counsel for the assessee submitted that in the instant case, the long term lease was in the nature of "operating lease" and accordingly, the assessee should be allowed depreciation on such buildings given on lease to the lessee for earning rental income.

18. On the other hand, the Ld. D.R. has challenged the order of Ld. CIT(A) in which he held that the disallowance of depreciation must be restricted only building and further Ld. CIT(A) has erred in holding that the lease qualifies ad "operating lease", and in the order Ld. CIT(A) has not given any sound reason or basis as to why such long term lease for the effective economic life of the assets, should qualify as "operating lease" and not as "finance lease".

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

20. On going through the facts of the instant case, we observe that admittedly the assessee had given buildings of long term lease basis since 1999-2000 onwards. Further, during the course of hearing before us, the Counsel for the assessee admitted that as per directions of Ld. CIT(A), deduction under Section 24 of the Act has also been allowed to the assessee in respect to the building given on rent. The contention of the assessee is that as

per the Object Clause of Memorandum of Association of Indian Dairy Corporation, the assessee was engaged in the business of leasing. Further, as per Section 16(ZA) of the NDDB Act assessee can carry other business activities for dairy development, which would include lease. Further, even in past assessment years, rental income was taxed as "business income" and this was never disputed by the Department during the assessment years for all years till A.Y. 2005-06. Accordingly, the Counsel for the assessee submitted that the income from leasing business should be taxed as business income, since the lease qualifies as "operating lease".

21. From the facts placed on record, we observe that the primary business of the assessee is to promote and organize programmes for the purpose of development of dairy and other agricultural based and allied industries. Therefore, we are of the considered view that leasing of buildings, though permitted by the objects of the assessee, are not incidental to the primary business of the assessee. It has been held in the large number of decisions that where as per the assessee's Memorandum of Association, the main object was different from letting out of property without providing any amenities, the tenant was liable to be assessed as income from house property.

22. In the case of **Raj Dadarkar & Associates vs. ACIT 81 taxmann.com 193 (SC)**, the Supreme Court held that where assessee having obtained a property on lease, constructed various shops and stalls on it and gave the same to various persons on sub-licencing basis, since assessee was not engaged in systematic or organized activity of providing service to occupiers of shops/stalls, income from sub-licensing was to be taxed as income from house property and not as business income.

23. In the case of **Effective Teleservices Pvt. Ltd. vs. PCIT 160 taxmann.com 689 (Ahmedabad – Tribunal)**, the ITAT held that where assessee, engaged in IT services, earned rental income from a property which was not its business asset but an investment, such rental income would be chargeable to tax under head 'Income from house property' and not as 'business income'.

24. In the case of **Meeraj Estate & Developers vs. CIT 113 taxmann.com 231 (Allahabad)**, the High Court held that where assessee entered into an agreement to let out a premises with various amenities, as also for maintenance and up keeping of said premises, since assessee did not indulge in any kind of recurring, systematic and organized business activity and, moreover, in respect of maintenance and up keeping of let out premises, it appointed only one person, Assessing Officer was justified in treating rental income assessable as 'income from house property' and services receipts as 'income from other sources'.

25. Accordingly, in view of the facts of the case, we find no infirmity in the order of Ld. CIT(A) in holding that the income earned from letting out buildings on rent qualifies as "rental income" and does not qualify as "business income of the assessee".

26. The next issue for consideration is that whether the assessee is eligible for depreciation on such building. We are of the considered view that once the income is held to be taxable as income from "house property" and not as "business income", and further, admittedly the assessee has given the building on rent on long term basis, with an option of renewal of agreement as well, then in our considered view, Ld. CIT(A) has not erred in facts and in law

holding that the assessee is not eligible for depreciation on such building, since firstly, the building has been given on a long term lease basis to the lessee, secondly, such business are not utilized for the business of the assessee and thirdly, the income from leasing of such building on a long term basis has been held to be taxable as income from "house property", on which appropriate standard deduction in terms of Section 24 of the Act has also been allowed to the assessee. Accordingly, looking into the instant facts, we are of the considered view that the Ld. CIT(A) has not erred in facts and in law in holding that the assessee is not eligible for claiming depreciation on such buildings given on long term lease basis, the income of which qualifies as "income from house property".

27. The next issue for consideration is before us whether the Ld. CIT(A) has erred in facts and in law in allowing the claim of depreciation in respect of other assets leased out by the assessee. Before us, the Ld. D.R. submitted that firstly, the Ld. CIT(A) has not disputed the fact that the assets have been given out on long term lease basis over the effective economic life of the assets. Further, the Ld. CIT(A) has not given any basis or reasoning for holding that the lease qualifies as "operating lease" and does not qualify as "finance lease", and thereby allowing the assessee's depreciation on such assets leased out for long term basis, over the effective economic life of the asset. Under the Income tax Act, 1961, a tax payer is eligible to claim depreciation on an asset provided the asset is owned by such person and is being used for the purpose of his business. We observe that there are plethora of precedents where the claim of depreciation has been denied by tax authorities in case either or both of these tests are not met. The twin tests of 'ownership' and 'use' for claiming depreciation become even more critical in lease transactions, wherein the

owner of the assets foregoes the possession and use of the asset; whilst the assets is used by lessee for his business. The principles governing eligibility of lessor to claim tax depreciation under the lease arrangement is enunciated by administrative guidance issued by the CBDT in Circulars 9/1943 and 2/2001. These Circulars do not distinguish between the two kinds of lease arrangements and provides that in a lease, other than a hire purchase, the lessor is eligible to claim depreciation, provided the tests of 'ownership' and 'use of the asset' are satisfied. However, in the instant facts, we observed that while allowing the claim of depreciation in respect of other assets, Ld. CIT(A) has not given a categorical findings as to why the lease of assets qualifies as "operating lease" and not as "finance lease", especially in light of the fact that the Assessing Officer has given a categorical finding that the assets have been given on a long term lease basis, there is a specific clause which allows / permits the lessee to renew the lease agreement for further period and further the lessee is in possession of and is using the asset for the effective economic life of the assessee. Though, the Ld. CIT(A) has held that the lease qualifies as "operating lease", however, the Ld. CIT(A) has not given any basis by coming into conclusion that the lease qualifying as "operating lease" and not "finance lease". Further, we also observe that Ld. CIT(A) has not given any specific observation to controvert the finding given by the Assessing Officer that the assets so leased out remained with the lessee over the effective economic life of the asset and therefore, such lease should qualify a "finance lease". Accordingly, looking into the instant facts, the matter is restored to the file of the Ld. CIT(A) to give a finding as to whether lease of assets "operating building" qualify as "operating lease" or "finance lease" looking into the instant facts.

28. In the result, these issue is restored to the file of the Ld. CIT(A). In the result, Ground No. 5 of the assessee's appeal is dismissed and Ground No. 2 of the Department's appeal allowed for statistical purposes.

**Ground No. 4:- Ld. CIT(A) erred in confirming disallowance of Rs. 2,30,15,007/- under Section 14A of the Act.**

29. The brief facts of the case are that during the course of assessment proceedings, the Assessing Officer observed that the assessee had claimed exempt tax free income from Exim Bank, PFC, RIFC etc. amounting to Rs. 11,86,18,238/- and dividend amounting to Rs. 3,80,60,179/- as exempt income. The assessee submitted that it had substantial interest free funds available and if any disallowance can be made, that can be only be disallowance towards administrative expenses amounting to Rs. 27,000/-. However, the Assessing Officer disregarded the contention of the assessee and was of the view that the assessee has not made correct disallowance under Section 14A of the Act in the return of income. Hence, expenses disallowable under Section 14A of the Act are required to be calculated as per formula prescribed in Rule 8D. Further, the Assessing Officer held that the claim of the assessee of having incurred only Rs. 27,000/- for earning exempt income of Rs. 11,86,18,238/- and Rs. 3,80,60,179/- is not justified since the overall infrastructure of the assessee, the management, office, the funds and other facility were used for earning interest free income and proper allocation of expenses has not been made by the assessee. Accordingly, the Assessing Officer computed disallowance as per Rule 8D amounting to Rs. 2,32,10,571/-.

30. In appeal Ld. CIT(A) confirmed the addition with the following observations:-

> *"9. Vide the ground no. '6', the appellant has challenged the action of the A.O. of disallowing Rs. 2,30,15,007/- u/s. 14A by applying Rule 8D. It is seen that the disallowance on identical facts have been upheld by my predecessor in appellate order for A.Y. 200809 in appeal No. CAB/IV-A-237/2010-11 dated 19/03/2012. Following this decision, the disallowances made in the current year is also upheld and this ground of appeal is dismissed."*

31. The assessee is in appeal before us against the aforesaid order passed by the Assessing Officer. Before us, the Counsel for the assessee submitted that the assessee had substantial interest free fund available with it and therefore, there is no scope for disallowance under Section 14A of the Act. Further, the Counsel for the assessee submitted that it has correctly made the disallowance of Rs. 27,000/- towards administrative expenses. Further, the Counsel for the assessee submitted that while rejecting the case of the assessee the Assessing Officer has not pointed out any specific infirmity in the quantum of disallowance of Rs. 27,000/- made by the assessee in the return of income.

32. In response, the Ld. D.R. argued that the assessee has given no justification or basis to substantiate why such and on what basis a meagre amount of Rs. 27,000/- only was incurred by the assessee for earning such substantial amount of exempt income. The assessee has not given any calculation / basis for arriving at the figure of Rs. 27,000/- towards administrative expenses incurred for earning exempt income.

33. On going through the facts of the instant case, we are of the considered view that the assessee has not placed on record any justification or basis as to how and in what manner he has computed a sum of Rs. 27,000/- for earning substantial amount of exempt income earned during the impugned year under consideration. Further, while the Assessing Officer has recorded his satisfaction that no sound basis has been given by the assessee for arriving at

the figure of Rs. 27,000/-, however, at the same time, the Assessing Officer has not also pointed out any specific infirmity / fault in the quantum of Rs. 27,000/- which has been offered to tax towards administrative expenses. This is also for the reason that the assessee has not given any basis / computation as to how he has arrived at the figure of Rs. 27,000/- towards administrative expenses. Accordingly, looking into the instant facts, in the interest of justice, the matter is restored to the file of the Assessing Officer to examine the issue afresh after giving due opportunity of hearing to the assessee to give the basis / computation for arriving at the figure of Rs. 27,000/- as expenses incurred from earning exempt income, and thereafter, pass order in accordance with law.

34. In the result, Ground No. 4 of the assessee's appeal is allowed for statistical purposes.

**Additional Ground:- Allowability of education cess**

35. Before us, the Counsel for the assessee submitted that the assessee shall not be pressing for the additional ground of appeal relating to allowability of education cess.

36. In the result, the addition ground raised by the assessee is dismissed as not pressed.

37. The other grounds of appeal raised by the assessee for the impugned year under consideration are general in nature and do not require any specific adjudication.

**Now we shall come to Department's appeal for A.Y. 2010-11 (ITA No. 1873/Ahd/2014)**

38. The Revenue has raised the following grounds of appeal:-

> *"1. On the facts and in the circumstances of the cased and in law the learned CIT(A) erred in deleting the addition to the extent of Rs. 35,22,31,080/- being write back provision, without appreciating that the entire entity was exempt from tax up to A.Y. 2002-03, therefore claiming such deduction by way of excess provision written back of earlier years amounts to double deduction.*
>
> *2. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in holding that the agreement entered for leasing of assets by the assessee are in the nature of operating lease without appreciating the fact that the assessee is not engaged in the business of providing of lease.*
>
> *3. The appellant craves leave to add, to amend or alter the above grounds as may be deemed necessary."*

**Ground No.1:- CIT(A) erred in deleting addition of Rs. 35,22,31,080/- being write back provision.**

39. The brief facts in relation to this ground of appeal are that the assessee has been making provision for contingencies in respect of Non-Performing Assets, the recovery of which is doubtful. The assessee follows the said procedure to work out the required provision in respect of bad and doubtful debts. The provision required at the end of the year is compared with the provision existing in the books and the differential provision is charged to or written back to the income and expenditure account, with the approval of the Board. The provisions were made in the years when the assessee was not liable to income tax. Following this method during the year under consideration, the assessee had written back provisions amounting to Rs. 35.22 crores and had not offered the tax same to tax on the ground that deduction of the said amount was never granted to the assessee, and hence, write back of the

amount does not amount to taxable income. However, the Assessing Officer disallowed the sum of Rs. 35.22 crores on the ground that write back of the provision can only be claimed as a deduction if it is proved by the assessee that the provision made in the earlier year was disallowed and subjected to tax. In the instant case, the assessee has not placed any evidence to prove that the provision made in the earlier years was subjected to tax. In fact, the income of the entire entity was exempt from tax. Therefore, the reversal of the provision during the year definitely results into income.

40. In appeal, Ld. CIT(A) allowed the appeal of the assessee by relying on the decision of his predecessor for A.Y. 2007-08 and 2008-09, and decided the issue in favour of the assessee with the following observation:-

> *"5. Vide the ground no. '2', the appellant has challenged the action of the A.O. of disallowing the write back of excess provisions of Rs. 35,22,31,080/-. The A.O. has made this disallowance by holding that these provisions had been allowed as deduction in the years in which these were debited in accounts by the appellant. The appellant's contentions that it was not liable to tax in those years when provisions were initially made and accordingly, the write back of the same cannot be taxed was not accepted by the A.O. For making such disallowance, the A.O. has also relied upon the discussions made in the order u/s.143(3) for A.Y. 2007-08 in appellant's own case. During the course of current appellate proceedings, it was submitted by the appellant that such disallowance has been deleted by CIT(A) in the A.Y. 2007-08 & 208-09. On perusal of appellate order passed by my predecessor for A.Y. 2008-09 on 19/03/2012 in appeal no. CAB/IV-A-237/2010-11, it is seen that he has deleted similar addition by relying upon the appellate order for A.Y. 2007-08 in Appeal No. CAB/IV-A-148/2009-10 dated 18/01/2010. Following these two orders, the addition made in the current year is also directed to be deleted and accordingly, the second ground of appeal is allowed."*

41. The Department is in appeal before us against the order passed by the Ld. CIT(A).

42. We observe that this issue has been decided in favour of the assessee for A.Y. 2007-08 in assessee's own case in ITA No. 3205 & 3206/Ahd/2010, wherein the ITAT while adjudicating this were in favour of the assessee observed as under:-

> *"**34.** We have considered rival submissions. We find that the addition made by the AO is not sustainable for two reasons. The first reason is that when provision was made, the assessee was not liable to tax, hence, if the provision is reversed in the year of making the provision, it is not resulting into any tax liability, because the assessee was not taxable in that year, and therefore, reversal of such a liability cannot give rise to tax in the year of reversal, when it is not giving any benefit to the assessee, in the year of making the provision. The second reason is that even if it is held that income has to be assessed in the year of making the provision, then this deduction on account of provision under section 36(1) (viii) is not allowable deduction in that year, because under this section, actual write off is allowable and not the provision. This is a pre-requirement of section 41(1) that where the allowance or deduction has been made in the assessment for any year, in respect of loss, expenditure or trade liability incurred by the assessee, and the same is subsequently ceased or has been remitted, then there is income under section 41(1) of the Act. Since in the present case, no deduction has been allowed to the assessee, in the year of making the provision, and it cannot be allowed because provision is not allowable under section 36(1)(vii), write back of such provision cannot give rise to an income under section 41(1) of the Act. We therefore decline to interfere in the order of the learned CIT(A) on this issue. This ground is rejected."*

43. Accordingly, respectfully following the decision of ITAT Ahmedabad in assessee's own case, Ground No. 1 of the Department appeal is dismissed.

**Ground No.2:- Ld. CIT(A) erred in holding that agreement for leasing of assets by the assessee are in the nature of operating lease.**

44. In view of our discussion in the earlier paragraphs, Ground No. 2 of the Department's appeal is allowed for statistical purposes and the matter is restored to the file of Ld. CIT(A) for giving necessary findings.

45. In the result, Ground No. 2 of the Department's appeal is allowed for statistical purposes.

**Now we shall take up assessee's and the Department's appeal for A.Y. 2011-12**

**We shall first deal with the assessee's appeal for A.Y. 2011-12 (ITA No. 2994/Ahd/2016)**

46. The assessee has raised the following grounds of appeal:-

*"1. The order passed by the Hon'ble Commissioner of Income Tax (Appeals) [CIT(A)] is erroneous and contrary to the provisions of law and facts and therefore requires to be suitably modified. It is submitted that it be so done now.*

*2. The Hon'ble CIT(A) has erred in disallowing the appellant's claim of Rs. 10,70,26,221/- for deduction u/s. 36(1)(viii). It is submitted that appellant has satisfied necessary conditions and Hon'ble Commissioner of Income Tax (Appeals) ought to have allowed the deduction as claimed. It is submitted that it be so held now.*

*3. The Hon'ble CIT(A) has erred in confirming the disallowance of Rs. 2,36,90,077/- under section 14A following the appellate order for AY 2010-11. In the facts and circumstances of the case it is submitted that no disallowance under section 14A is required to be made. It is submitted that it be so held now.*

*3.1 The Hon'ble CIT(A) has erred in not appreciating that section 14A is not applicable to the appellant as the investments in securities yielding tax free income were made from own funds and no expenses are incurred in relation to exempt income.*

*3.2. The Hon'ble CIT (A) has erred in law in confirming the application of Rule 8D, even when AO has not recorded his dissatisfaction of the appellant's claim of expenditure incurred in relation to tax free income.*

*3.3. Without prejudice to the above, the Hon'ble CIT(A) has erred in not appreciating that interest expenses were of specific borrowings and cannot be considered for application of Rule 8D(ii). It is submitted that it be so held now.*

*3.4. Without prejudice to the above, the Hon'ble CIT (A) has erred in not appreciating that disallowance u/s 14Aread with Rule 8D(iii) cannot be made in respect of strategic investments. It is submitted that it be so held now.*

*3.5. Without prejudice to the above, while confirming the disallowance the Hon'ble CIT (A) ought to have directed the AO to exclude investments on which no exempt income is earned during the year. It is submitted that it be so given now.*

*3.6. Without prejudice to the above, the disallowance should be restricted to Rs.2,28,741/- attributable for earning exempt income. It is submitted that it be so held now.*

*4. The Hon'ble CIT (A) has erred in directing the AO to tax the rental income from buildings given on lease as income under the head 'Income from House Property' instead of 'Profits and Gains from Business and Profession' and thereby denying deduction of depreciation and other expenditure on buildings. It is submitted that it be so held now.*

*4.1 The Hon'ble CIT (A) erred in not appreciating the fact that the buildings were given on lease under composite agreement in the ordinary course as a part of its business of Dairy Development and therefore eligible for depreciation. It be so held now.*

*4.2 The Hon'ble CIT(A) erred in not appreciating the fact that the assets given on lease have lost their identity when they entered the block of assets and no new building has been*

*acquired during the year. Hence there cannot be disallowance of deprecation under the Act. It is submitted that it be so held now.*

*4.3 The Hon'ble CIT(A) erred in not following decision of Apex Court in case of Chennai Properties in Civil appeal no. 4494 of 2004 by adjudicating that the decision do not apply since appellant's main objective is not leasing business without appreciating that as per Section 6 of NDDB Act, 1987 appellant is into leasing business from inception. It is submitted it be so held now.*

*5. The Hon'ble CIT(A) erred in not appreciating that the interest earned on North Kerala Project Development Fund, amounting to Rs. 1,,08,753/- is taxed as income in the hands of the appellant ignoring the fact that the appellant is acting as nodal agency and income is diverted at source and does not belong to the appellant.*

*5.1 Without prejudice to above, if the interest is considered as income of the assessee, direction be given to allow the expenditure in the same year in which they are incurred as deduction. It be so done now.*

*6. The Hon'ble CIT (A) has erred in not granting the deduction in respect of contribution made to Employee's Recreation of Rs. 1,75,395/-. It is submitted that in the facts and circumstances of the case, no disallowance was required to be made.*

*7. The Hon'ble CIT (A) has erred in not granting deduction of provision of Rs. 18,00,29,457/- made for the payment to be made to the employees under VRS scheme. It be so granted now.*

*8. The Hon'ble CIT(A) erred in confirming the interest charged under section 234B and 234D and withdrawing interest u/s 244A under the Act.*

*You appellant prays for leave to add to alter and/or to amend any of the grounds before the final hearing of the appeal."*

47. The Department has raised the following grounds of appeal:-

*"1. On the facts and circumstances of the case and law, the Ld. CIT(A) erred in holding that lease agreement entered by the assessee was in the nature of operating lease, without appreciating that the A.O. clearly established that the lease agreement entered into by the assessee was in the nature of finance lease.*

*2. On the facts and circumstances of the case and in law, the Ld. C.I.T. erred not appreciating that since the asset were utilized by the lessee, and not by the lessor (assessee), the assessee was not entitled to claim depreciation in accordance with the provision of section 32(1) of the Act.*

*3. The appellant craves leave to add, to amend or alter the above grounds as may be deemed necessary."*

**Ground Nos. 2, 5 & 6 of assessee's appeal:-**

48. We have already dealt with Ground Nos. 2, 5 & 6 for A.Y. 2011-12 while dealing with similar grounds for A.Y. 2010-11. In respect of which the assessee has preferred Application under Section 158A of the Act.

49. Accordingly, Ground Nos. 2, 5 & 6 for A.Y. 2011-12 are disposed of accordingly.

50. Ground No.3 of the assessee's appeal (disallowance under Section 14A of the Act) and Ground No. 4 of the assessee's appeal (taxability of rental income) have been dealt with in the earlier part of the order while dealing the similar grounds for A.Y. 2010-11. Accordingly, Ground Nos. 3 & 4 of the assessee's appeal are disposed of in light of our observations relating to similar grounds raised by the assessee for A.Y. 2010-11.

**Ground No.7:- CIT(A) erred in not granting deduction of provision of Rs. 18,00,29,457/- for payments made to employees under VRS scheme.**

51. The brief facts in relation to this ground of appeal are that certain employees of the assessee were transferred to it's subsidiaries, Mother Diary, in respect of which the assessee introduced of VRS Scheme. During A.Y. 2011-12, the assessee offered VRS to it's eligible employees for which payment of Rs. 39,02,99,507/- was paid. 1/5$^{th}$ of VRS benefit amounting to Rs. 7,80,59,901/- was claimed as deduction under Section 35DDA of the Act. The aforesaid deduction is not under dispute. In addition to the VRS benefits referred to above, the employees were also paid monthly benefits after retirement. The assessee had made provision of Rs. 21,12,16,597/- for monthly benefit payments in A.Y. 2011-12 in terms of VRS Scheme out of

which monthly benefits to employees of Rs. 3,11,87,140/- were paid during the year. Accordingly, provision of Rs. 18,00,29,457/- (net of Rs. 21,12,16,597/- less 3,11,87,140/-) has been disallowed in the impugned order since the liability to pay the same has not accrued. In the A.Y. 2012-13, the assessee has made actual payment of Rs. 3,68,11,434/- out of the provision of Rs. 18,00,29,457/- as monthly benefits paid as per the terms and conditions of VRS to these employees out of the provisions made in earlier year. The assessee submitted that since the provision was not claimed as deduction in A.Y. 2011-12, the assessee has claimed the actual payment made to the employees as a deduction in A.Y. 2012-13. However, the Assessing Officer in A.Y. 2012-13 has disallowed payment of Rs. 3,68,11,434/- towards monthly benefits, leading to double addition of the same amount both in A.Y. 2011-12 and in A.Y. 2012-13. The assessee is of the view that the aforesaid amount was allowable to the assessee under Section 37 of the Act and further, disallowance of the same amount in A.Y. 2012-13 would lead to double deduction, since the assessee has already disallowed the aforesaid amount for the impugned year under consideration (i.e. A.Y. 2011-12).

52. In appeal before Ld. CIT(A), Ld. CIT(A) directed the Assessing Officer to verify the contentions of the assessee, particularly in view of the claim of double addition as stated by the assessee and the Ld. CIT(A) further directed the Assessing Officer to allow the requisite relief to the assessee, on payment basis after due verification.

53. The assessee is in appeal before us, and submitted that the claim of the assessee on payment basis has been disallowed by the Assessing Officer for A.Y. 2012-13, 2013-14 and 2014-15, however, the Department has allowed the

claim of the assessee for subsequent assessment years under Section 37 of the Act. The Counsel for the assessee has requested that the Assessing Officer may be directed to comply with the order of Ld. CIT(A) and to give a clear findings with regards to the liability of the claim of the assessee towards monthly payment of VRS benefit to it's employees.

54. We observe that the claim of deduction has been allowed to the assessee for A.Y. 2016-17. While for the earlier Assessment Years 2011-12 to 2014-15 similar claim of the assessee has not been allowed. Accordingly, the Assessing Officer is directed to comply with the direction issued by Ld. CIT(A) and to give a clear findings on the allowability of the claim of the assessee with regards to deduction of the aforesaid expenditure under Section 37 of the Act, more specifically with regards to the contention of the assessee that there has been double disallowance of deduction of the aforesaid amount in the hands of the assessee and also to give a clear cut findings as regards to the allowability of such claim in terms of Section 37 of the Income Tax Act.

55. In the result, Ground No. 7 of the assessee's appeal is allowed for statistical purposes.

56. The other grounds of appeal raised by the assessee for the impugned year under consideration are general in nature and do not require any specific adjudication.

**Additional Ground of Appeal:- Allowability of education cess**

57. The Counsel for the assessee has submitted that he shall not pressing for additional grounds of appeal relating to alowability of education cess, and

accordingly, the additional ground raised by the assessee is dismissed as not pressed.

**C.O. No. 14/Ahd/2017 (A.Y. 2011-12):-**

58. We further observe that the Cross Objection raised by the assessee for A.Y. 2011-2 (C.O. No. 14/Ahd/2017) is only supporting the order of Ld. CIT(A) and further, since the grounds raised by the assessee in the C.O. has been set-aside to the file of Ld. CIT(A) for de-novo consideration, the C.O. of the assessee is accordingly, allowed for statistical purposes.

59. In the combined result, the appeal filed by the assessee in ITA No. 2004/Ahd/2014 & 2994/Ahd/2016 are partly allowed for statistical purposes and the appeal filed by the Department in ITA No. 1873/Ahd/2014 & 2954/Ahd/2016 are partly allowed for statistical purposes and the Cross Objection filed by the assessee is allowed for statistical purposes.

| **This Order pronounced in Open Court on** | **17/05/2024** |
|---|---|

Sd/-
**(MAKARAND V. MAHADEOKAR)**
**ACCOUNTANT MEMBER**

Sd/-
**(SIDDHARTHA NAUTIYAL)**
**JUDICIAL MEMBER**

Ahmedabad; Dated 17/05/2024
*TANMAY, Sr. PS* ***TRUE COPY***

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

**आदेशानुसार/** BY ORDER,

**उप/सहायक पंजीकार** (Dy./Asstt. Registrar)
**आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad**