<u>आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक</u>

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
SHRI MANISH AGARWAL, ACCOUNTANT MEMBER

आयकर अपील **सं/ITA No.370/CTK/2019**

(**निर्धारण वर्ष /** Assessment Year : 2014-2015)

MGM Green Energy Limited, 5-A, Forest Park, Bhubaneswar	Vs	JCIT, Range Rourkela, Rourkela
PAN No. :AAHCM 8472 C		

(**अपीलार्थी /Appellant**)	..	(**प्रत्यर्थी / Respondent**)

निर्धारिती की ओर से /Assessee by	:	Sh A.K.Sabat & Sh B.K.Mahapatra, CAs
राजस्व की ओर से /Revenue by	:	Shri Sanjay Kumar, CIT-DR
सुनवाई की तारीख **/ Date of Hearing**	:	22/05/2024
घोषणा की तारीख**/Date of Pronouncement**	:	22/05/2024

<u>आदेश / O R D E R</u>

<u>Per Bench</u> :

This appeal is filed by the assessee against the order of the ld. CIT(A)-1. Bhubaneswar, dated 11.06.2019, in I.T.Appeal No.0388/16-17 for the assessment year 2014-2015.

2. The assessee has taken as many as six grounds of appeal, relating to various additions/disallowances made to the income declared by the assessee and also against the adjustments made in the book profit u/s.115JB of the Act. The grounds raised by the assessee are as under :-

i) The ld. CIT(A) is erred in dismissing the appeal of the assessee, which is arbitrary, erroneous and bad, both in the eyes of law.

ii) Disallowance of Interest Expenses u/s.36(iii) of the Act at Rs.1,65,18,400/-;

iii) Disallowance of Expenses u/s.14A of the Act/Rule 8D of IT Rules at Rs.2,44,82,488/-;

iv) Addition of disallowance of Expenses u/s.14A at Rs.2,44,82,488/- in the book profit as computed U/s 115JB;

v) Addition/Disallowance of Expenses u/s.115JB of the Act under the book profits;

vi) Disallowance of differential depreciation of Rs.1,16,63,697/-

3. Brief facts of the case are that the assessee is a limited company engaged in the business of Green Energy. The assessee company was incorporated on 28.03.2012. As per the scheme of arrangement of demerger order of the Hon'ble High Court of Orissa with respect to the demerger of the company M/s MGM Minerals Ltd., the assessee company got certain assets and liability which includes the investments in certain group companies also and bank borrowings as well. The ld. AO by alleging that the interest bearing funds were utilised in making the investments/advances to group companies, invoked the provisions of Section 36(1)(iii) of the Act and made disallowance of Rs.1,65,18,400/-. Further disallowance of Rs.2,44,82,488/- was made u/s.14A of the Act by holding that the borrowed funds were utilised in making investments which yielded exempt income. Also held that such addition made u/s 14A is to be added to the book profit computed in terms of section 115JB of the Act. Further the depreciation claimed by the assessee on wind power project and solar power project in its profit and loss account at Rs.3,18,76,281/- is reduced to Rs.2,02,12,584/- and the differential amount is added to the book profit of the assessee. The AO held that the assessee has claimed higher rate of depreciation as prescribed under the Income Tax Act, 1961 in its profit and loss account which is not permissible under the provisions of Section 115JB of the Act, where the book profit is to be calculated in terms of the Companies Act,2013 by applying the depreciation rate prescribed in schedule II read with sub-section 2 of section 123 of the Companies Act, 2013.

4. Against this, the assessee preferred appeal before the ld. CIT(A), who dismissed the appeal of the assessee. Therefore, the present appeal is preferred by the assessee before us.

Ground No.(i):

5. This ground is general and no submission has been put forth, therefore, the same is dismissed.

Ground No.(ii) :

6. In this ground of appeal, the assessee has challenged the disallowance of Rs.1,65,18,400/- made u/s.36(1)(iii) of the Act out of the interest expenditure claimed.

7. Brief facts of the case are that the assessee company in terms of the order of the Hon'ble Orissa High Court with regard to the scheme of arrangement of demerger dated 06.09.2013 has received the assets related to the Green Energy business, besides this there are certain advances given to sister concern amounting to Rs.92,70,18,394/- (including Rs.3,10,30,000/- paid during the year) were also received and shown under the head "Long Term and Short Term loans and advances" in its Balance Sheet. Besides this, the assessee company was also in receipt of Share Capital & Reserves and Surplus to the tune of Rs.87,24,94,954/- and bank borrowings of Rs.29,61,26,544/- as on 31.03.2014 i.e. the end of the previous year. Against such bank borrowings, the assessee has paid interest of Rs.4,43,62,091/- and claimed the same in the profit and loss account under the head 'financial cost'. The AO in para 3 to 14 of the assessment order has made detailed

discussion on this issue and after analyzing various aspects such as cash-flow position, analyses of rate of interest paid, submissions of the assessee, Financial statements in particular the asset and liabilities as appearing in the Balance Sheet of the assessee company and also after relying upon various judicial pronouncements, concluded that substantial amount of bank borrowings was utilised for making interest free loans and advances to the group entities. As per the AO out of the total bank borrowings of Rs.24,61,26,544/-, Rs.12,82,15,401/- were diverted towards interest free loans and advances to the related parties, therefore, he invoked the provisions of Section 36(1)(iii) of the Act and disallowed the proportionate amount of interest which were not used for the purpose of business and profession and accordingly a sum of Rs.1,65,18,400/- being the interest pertaining to such interest free loans and advances to the related party was disallowed.

8. Before us, the ld. AR of the assessee submitted that the assessee company was in receipts of various loans as well as assets in terms of order of the Hon'ble High Court of Orissa under the approval of Scheme demerger and entire balances were carried forward from the erstwhile company namely M/s MGM Minerals Pvt. Ltd. from where the assessee got such assets and liabilities. Since all the loans taken were in the nature of term loan and were specifically taken and utilised for the purpose of acquisition of business assets, therefore, no amount out of such borrowings were utilised in making interest free loans and advances to the related parties. Further the loans taken from SBI and Axis Bank were fully

utilised for purchasing wind power and solar power units, therefore, there are no diversion of bank borrowings for any other purpose including advances to the related parties. Ld. AR also submitted that average rate of interest was computed by the AO is not correct and the detailed calculation on the chart was submitted by the ld. AR are is under:-

BEFORE THE HON'BLE INCOME TAX APPELLATE TRIBUNAL, CUTTACK BENCH, CUTTACK

In the matter of MGM Green Energy Ltd. Vs. DCIT, Circle 1(1), Bhubaneswar

ITA No. 370/CTK/2019

(Assessment Year 2014-15)

ANNEXURE-1

Statement of details of Bank's Term Loans outstandings, interest expenses , interest rate etc. *(taking into account the corrected facts)*

Term Loan Details	Balance Outstanding as on 31/03/2013 (Rs.)			Balance Outstanding as on 31/03/2014 (Rs.)			Interest Expesnes for F.Y. 2013-14 (as per Audited Statement of Profit & Loss) (Rs.)	Annualized Average Interest rate (in %) (As computed by Appellant)	Avg int rate (As per Order incorrectly computed by AO) in the Table - Para 3)	Rate of interest (Floating) as per Sanction Letter of Bank	Interest Rate as per Term Loan Agreement (As mentioned in Order of AO in the Table - Para 3)
	Long Term Borrowings under Non Current Liabilities	Current maturities of long-term debt included in "Current Liabilities" and not considered by AO	Total Outstanding	Long Term Borrowings under Non Current Liabilities	Current maturities of long-term debt included in "Current Liabilities" and not considered by AO	Total Outstanding					
(1)	(2)	(3)	(4 = 2+3)	(5)	(6)	(7 =5+6)	(8)	[9 =8/[(4+6)/2]	(10)	(11)	(12)
Term Loan with Axis Bank (A/c No. 911060031158456 in respect of Solar Power Project, Tangi, Orissa	68,789,619	14,100,000	82,889,619	51,800,000	15,000,000	67,593,375	10,171,611	13.67	16.87	11.75	11.75
Sub Total (A)	***68,789,619***	***14,100,000***	***82,889,619***	***51,800,000***	***15,000,000***	***66,800,000***	***10,171,611***	-	-	-	-
Term Loan with SBI A/c No. 31984787280 in respect of Wind Power Project, Tamil Nadu	171,072,933	40,000,000	211,072,933	118,833,935	40,000,000	158,833,935	23,469,111	13.02	23.27	13.75	15.00
Term Loan with SBI A/c No. 31659653235 in respect of Wind Power Project, Rajasthan	76,985,767	21,600,000	98,585,767	48,892,609	21,600,000	70,492,609	10,721,369	12.77		15	
Sub Total (B)	***248,058,700***	***61,600,000***	***309,658,700***	***167,726,544***	***61,600,000***	***229,326,544***	***34,190,480***	***12.90***	-	-	-
Grand Total (A+B)	***316,848,319***	***75,700,000***	***392,548,319***	***219,526,544***	***76,600,000***	***296,126,544***	***44,362,091***	-	-	-	-

9. He further submits that the assessee is having interest free funds available in the shape of Share capital, Reserve and Surplus, business creditors etc., utilization of which elsewhere was not the case of the AO and thus it must be presumed that the same were used to advance interest free funds to the related parties. He further submit that loans

taken for acquisition of assets thus has direct nexus with the business of the assessee company. He thus prayed that the disallowance made by the ld. AO is not correct which is purely based on wrong appreciation of facts and therefore liable to be deleted.

10. On the other hand, ld. CIT-DR supported the orders of the lower authorities and submitted that the assessee company is engaged in the business of wind power and solar power whereas the advances were made to sister concern whose nature of business is altogether different. Thus assessee's claim that the amount borrowed were invested in acquisition of assets, is not correct. He further submit that assessee company paid the interest on such borrowings and at the same time decided not to charge interest on the loans advanced out of such borrowings which is a clear case of avoidance of tax. Since the business of the assessee company is different from the business of the group companies whose assets were acquired out of such bank loan which tantamount to diversion of interest bearing funds for non business purposes and therefore consequent interest paid is not an allowable expenditure. He, therefore, prayed that the AO has rightly made the disallowance and he requested for confirmation of the disallowance so made and confirmed by the lower authorities.

11. We have heard the rival contentions and perused the material available on record. Ld. AO has discussed this issue in detail in the assessment order where he has tried to make out a case that the funds borrowed for the purpose of acquisition of business assets, were used for

making loans and advances to the related parties which are engaged in separate line of business and, therefore, borrowed funds have been diverted and claim of interest on such funds needs to be disallowed. On the other hand, assessee's claim is that the entire borrowings as well as the advances to related parties were received by it in terms of scheme of demerger as approved by the Hon'ble jurisdictional High Court and all the balances are opening balance where the borrowings were utilised for acquiring various assets of the assessee company as well as by other group companies i.e. related parties by the erstwhile company namely MGM Minerals Ltd. from which the assessee company came into existence as a result of demerger. From the perusal of the extracts of the Balance Sheet as reproduced at page five of the assessment order, it is seen that as a result of demerger, total assets worth of Rs.92,70,18,394/- were received in the shape of investments and loans and advances to the related parties. Against this, immediate source was in the shape of share capital and reserves and surplus of Rs.87,24,94,954/-. The AO further compared the amount of bank borrowings of Rs. 29,61,26,544/- and the amount of assets Rs.16,23,92,894/- (fixed assets Rs.14,96,61,567 plus other assets Rs.1,27,31,327/-) and concluded that net amount of Rs.12,8215,401/- was diverted out of bank borrowings towards interest free loans and advances to the related parties. After going through these details, we find that the assessee company has received such assets including loans and advances and investments in terms of Scheme of Demerger, immediate source of which are Share Capital, Reserves &

Surplus and bank borrowings. It is also a matter of fact that the assessee company neither borrowed nor made investments but all the amounts are brought forward from the parent company i.e. M/s MGM Minerals. Ltd., however, when the assessee company gets all these funds and investments/advances, it is its duty to analyse the same and if it is found that certain interest bearing funds were involved in making interest free advances to related parties, necessary interest must be charged from such related parties to compute the correct profit of the business activity of the assessee company. We are in agreement with the AO that the activities of the related parties are totally separate and distinct from the activities of the assessee company and, therefore, the interest paid on the assets acquired/used by related parties out of borrowed funds attributed to assessee, are not used in the business of the assessee company and, therefore, interest paid on the capital borrowed to acquire such assets cannot be allowed as expenses for the purpose of business of profession in the hands of the assessee company.

12. However, from the perusal of the computation made by AO of the amount utilised out of the borrowed funds towards interest free loans and advances for making disallowance u/s 36(1)(iii), we find that the AO has not considered the fact that the assessee company had availability of interest free funds in the shape of share capital and reserves to the extent of Rs.87,24,94,954/- which were utilised for making investments in interest free advances to the related parties since their utilization elsewhere is not brought on record and also the assets acquired out of

borrowed funds by the related parties are not appearing in the Balance sheet of the assessee. The Hon'ble supreme Court in the case of Hero Cycles, reported in [2015] 379 ITR 347 (SC), has considered this issue and held as under :-

> *Section 36(1)(iii) of the Income-tax Act, 1961 - Interest on borrowed capital (Interest free loans) - Assessment year 1988-89 - Whether once it is established that there is nexus between expenditure and purpose of business (which need not necessarily be business of assessee itself), revenue cannot justifiably claim to put itself in arm-chair of businessman or in position of Board of Directors and assume role to decide how much is reasonable expenditure having regard to circumstances of case - Held, yes - Assessee filed its return claiming deduction of interest paid on borrowed sums from Bank under section 36(1)(iii) - Assessing Officer finding that assessee had used borrowed funds for giving interest free loans to its subsidiary company and directors, rejected assessee's claim - High Court upheld order of Assessing Officer - It was noted that advance to subsidiary company became imperative as a business expediency in view of undertaking given to financial institutions by assessee to effect that it would provide additional margin to subsidiary company to meet working capital for meeting any cash losses - Insofar as loans to directors were concerned, said loans were granted out of assessee's own surplus funds - Whether in view of aforesaid, impugned order passed by High Court was to be set aside - Held, yes [In favour of assessee]*

13. Further the Hon'ble Supreme Court in the case of Reliance Utilities & Power Ltd., reported in [2009] 313 ITR 340 (Bombay), has held the expression as under :-

> *Section 36(1)(iii) of the Income-tax Act, 1961 - Interest on borrowed capital - Assessee-company was engaged in business of generation of power - It had made investments in its sister concern from January, 2000 to March, 2000 - Assessing Officer was of view that sum of Rs. 213 crores was invested out of assessee's own funds and Rs. 147 crores was invested out of borrowed funds - Accordingly, Assessing Officer disallowed a part of interest claimed - On appeal, assessee-company contended that it had interest-free funds worth Rs. 398 crores comprising of share capital, reserves and surplus and depreciation reserves and, thus, entire investment had been made in sister concern out of interest-free funds - Commissioner (Appeals) accepted assessee's contention and directed Assessing Officer to allow entire amount of interest under section 36(1)(iii) - Tribunal upheld order of Commissioner (Appeals) - On instant appeal, it was seen that Commissioner (Appeals) as*

also Tribunal had recorded a clear finding that assessee had interest-free funds of its own which had been generated in course of year commencing from 1-4-1999 - Further, in terms of balance-sheet there was an availability of Rs. 398.19 crores including Rs. 180 crores of share capital - Whether if there are funds available, both, interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of interest-free funds generated or available with company, provided said funds are sufficient to meet investments - Held, yes - Whether since, in instant case, said presumption was clearly established in view of findings recorded by Commissioner (Appeals) and Tribunal, impugned order passed by said authorities was to be affirmed - Held, yes

14. In view of the above facts and circumstances of the case and by respectfully following the judgments of the Hon'ble Apex Court, we are of the view that no disallowance u/s.36(1)(iii) of the Act could be made to the extent the non-interest bearing funds available with the assessee which were utilised for making investment and giving advances to the related parties more particularly when application of such funds elsewhere has not been established. This being so, we direct the AO to restrict the amount utilised out of bank borrowings, if any, which seem to have been diverted to the interest free loans and advances to the related parties should not exceed Rs.5,45,23,440/- (92,70,18,394 – 87,24,94,954) and compute the amount of disallowance of interest paid on this amount. Needless to say, at the time of making such computation and disallowance, an opportunity of being heard be allowed to the assessee. This ground of appeal is partly allowed.

Ground No.(iii) : Disallowance of Expenses u/s.14A r.w.Rule 8D

15. Brief facts of the case are that the ld.AO has observed that assessee has made investments in equity shares to the tune of Rs.27,28,00,000/- in group companies and also made investments in

preference shares of Rs.32,55,37,000/- totalling to Rs.59,83,37,000/-. According to AO the said investment was not made by assessee during the course of business activities but is a consequence of the arrangement pursuant to the scheme of demerger and since the investment was made in sister concerns, the yielding of dividend income on such investment is fully at the will of the promoters and directors of these companies. Assessee has filed the return of income declaring Loss and by making investment in the sister concerns, assessee has diverted the business funds to earn exempt income. Accordingly, he invoked the provisions of section 14A and by applying Rule 8D has made the addition of Rs.2,44,82,488/-. In first appeal, ld. CIT(A) has dismissed the appeal of the assessee.

16. Before us, Ld. AR submitted that the AO apart from the interest disallowance, has also made addition u/s.14A r.w.Rule 8D, which amounts to double taxation. Further it was submitted that as neither any exempted income has been received/receivable during the year nor any claim of exempted income is made, Therefore, Section 14A of the Act is not applicable and hence no disallowance under Rule 8D can be made. To support his contentions, ld. AR relied on the decision of coordinate bench of the Tribunal in the case of Smt. B.Sujata Subudhi, dated 14.06.2022, passed in ITA No.69/CTK/2020, wherein in paras 11 to 13, the Tribunal dealt with the issue holding therein that, admittedly, the provisions of section 14A apply to a case where investments have been made and exempt income has been received by the assessee. In the

present case, the assessee has not received any exempt income and consequently provisions of section 14A would not apply to the facts of the assessee's case. Accordingly, the Tribunal held that in the event it is found that the investments are made in shares of sister concern and such investment has not earned any exempt income, then no disallowance u/s.14A of the Act is to be done. Thus, the ld. AR prayed that the issue being similar to the issue decided by the coordinate bench of the Tribunal in the case cited supra, the addition u/s.14A of the Act made by the AO and confirmed by the ld. CIT(A) deserves to be deleted. Ld. AR drew our attention to the relevant observations of the coordinate bench of the Tribunal, which read as under:-

> *11. In respect of second Ground, it was submitted by ld Sr DR that the assessee had taken loan and had invested Rs.3,29,07,371/- in the assessee's sister concern. It was the submission that as the assessee had invested in the shares of sister concern, the AO had estimated the disallowance u/s.14A of the Act. It was the submission that the ld CIT(A) had deleted the said addition on the ground that no exempt income has been earned by the assessee.*
>
> *12. Ld AR submitted that the assessee has not made any investment in the shares of sister concern. The assessee has given loan in the formation of the sister concern. It was the submission that as the issue is not one of share application but one of the granting loan, the provisions of section 14A does not apply.*
>
> *13. We have considered the rival submissions. Admittedly, the provisions of section 14A apply to a case where investments have been made and exempt income has been received by the assessee. In the present case, the assessee has not received any exempt income and consequently provisions of section 14A would not apply to the facts of the assessee's case. We are also perturbed by the fact that the fact as brought on record by the AO is that the assessee has invested in the shares of the sister concern M/s. Ananta Automobiles Pvt Ltd., The balance sheet as on 31.3.2014 shows an investment in M/s. Ajanta Automobiles Pvt Ltd., of Rs.3.29 crores. Similarly, the balance sheet as on 31.3.2013 also shows Page4|7 Assessment Year : 2014-15 such investments. The balance sheet is showing the investment and the assessee is claiming that it has only given the loan out of interest bearing funds*

to the sister concern and the AO is saying that it is actually investment in the shares of sister concern, therefore, this issue is restored to the file of the AO for verification and ascertainment of the actual fact whether this is actually an investment in the shares of sister concern by the assessee or whether it is actually loan given by the assessee out of its interest bearing funds to sister concern. In the event it is found that the investments are made in shares of sister concern and such investment has not earned any exempt income, then no disallowance u/s.14A of the Act is to be done. Consequently, Ground No.2 is partly allowed for statistical purposes.

17. Ld. AR also relied placed reliance on the following case laws :-

i) Oil Industry Development Board [2019] 103 taxmann.com 326 (SC);
ii) Chettinad Logistics (P.) Ltd. [2018] 95 taxmann.com 250 (SC);
iii) State Bank of Patiala [2018] 99 taxmann.com 286 (SC);
iv) Cheminvest Ltd., [2015] 61 taxmann.com 118 (Delhi); and
v) GVK Projects & Technical Services Ltd. [2019] 106 taxamnn.com 180 (Delhi)

18. *Per Contra*, ld. CIT-DR relied on the orders of the lower authorities and submitted that the assessee has a sizable investment portfolio which certainly requires being managed. The administrative expenses, staff cost and other associated cost cannot be brushed aside for the aforesaid activity. The assessee is an entity undertaking both business yielding taxable income and investments yielding tax free income. Thus, it was submitted that the computation made by the AO u/s.14A of the Act is just and proper to which the ld. CIT(A) has already confirmed it, therefore, this ground of appeal deserves to be dismissed.

19. We have heard the rival submissions and perused the material available on record. A perusal of assessment order shows that the AO has considered the amount of investment made in sister entity for making addition u/s.14A of the Act. He further alleged that such investments were made to earn exempt income and since both the entities were under

same managements, payment of no dividend income is a device developed to use the plea that in absence of any exempt income, in the form of dividend income from the investee company, should not attract disallowance u/s.14A.

20. Further the provisions of Sections 14A of the Act, reads as under :-

> *[**Expenditure incurred in relation to income not includible in total income.***
>
> ***14A.** [(1)] [Notwithstanding anything to the contrary contained in this Act, for the purposes of] computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.]*
>
> *[(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.*
>
> *(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act :]*
>
> *[**Provided** that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001.]*
>
> *[Explanation.—For the removal of doubts, it is hereby clarified that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where the income, not forming part of the total income under this Act, has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such income not forming part of the total income.]*

21. The title of 14A, i.e. “Expenditure incurred in relation to income not includible in total income” itself speaks about the existence of exempt

income and then only a particular expenditure can be treated as incurred "in relation to" such income. Under Income Tax Act, expenses incurred can be allowed only to the extent they are relatable to the earning of taxable income. Thus Section 14A is applicable if the assessee has income which is not includible in its total income and further assessee has incurred certain expenditure to earn such income. In the instant case, the assessee has not earned any exempt income on such investments thus the provisions of section 14A are not attracted as well as applicable. The language of section 14A is not at all ambiguous and in fact very clear and by virtue of the same, only expenditure actually incurred in relation to income not includible in total income shall be disallowed. In no way, it could be interpreted that it seeks to disallow expenses incurred in the year in relation to exempt income in future years, as it would be completely against the well recognized "matching concept." Therefore, disallowance u/s 14A can be made only when assessee has actually earned exempt income. Further the Hon'ble Delhi High Court in the case of Cheminvest Ltd. Vs. CIT reported in 378 ITR 33, has held that no disallowance u/s 14A can be made in a year in which no exempt income has been earned or received by the appellant. We also note that similar view has been taken by the Hon'ble Delhi High Court in its subsequent decision in case of PCIT vs OIL Industries Development Board [2019] 103 taxmann.com 325 (Delhi) wherein it was held as under:

> *"3. The ITAT relied upon the ruling of this Court in Cheminvest Ltd. v. CIT [2015] 378 ITR 33 which ruled in the absence of any exempt income, disallowance under Section 14-A of the Act of any amount was not permissible. Since the decision in Cheminvest Ltd. (supra)*

was followed, there is no substantial question of law that requires consideration."

22. It is also a matter of fact that the SLP filed by the Revenue against the said decision of the Hon'ble Delhi High Court in case of OIL Industries Development Board (supra) has been dismissed by the Hon'ble Supreme Court as reported in (2019) 262 Taxman 102(SC). Further hon'ble Apex court in the case of CIT Vs. Chettiand Logistics (P) Ltd. (supra) and in the case PCIT Vs. State Bank of Patiala (supra) has again expressed this view. Similar view has also been taken by the Hon'ble Delhi High Court in case of PCIT vs GVK Projects & Technical Services Ltd. (supra) and SLP filed by revenue was also dismissed by hon'ble Apex court. Likewise this co-ordinate bench of ITAT in the case of Smt. B. Sujata Subudhi (supra) also expressed the same view.

23. We, therefore, following the aforesaid decisions of the Hon'ble Supreme court and various High Courts, as well including of Cuttack Bench in case of Smt. B. Sujata Subudhi (supra) are of the considered view that no disallowance can be made u/s 14A in a year where no exempt income has been earned or received by the assessee. In the instant case there was no dividend income which has accrued and claimed exempt therefore, the provisions of section 14A cannot be invoked. In the result, the findings, of the Assessing officer as well as of the ld.CIT(A), in so far as invocation of section 14A is concerned, are set-aside and addition of Rs. 2,44,82,488/- is hereby deleted.

24. As a result this ground of appeal is allowed in favour of the assessee.

25. Ground of appeal No. (iv) being not pressed by the ld. A/R during the course of hearing thus the same is hereby dismissed.

26. **Ground of appeal No. (v) : Adjustment in book profit of Rs. 2,44,82,488/- u/s 115JB which was disallowed u/s 14A of the Act.**

27. Brief facts leading to this ground are that AO has invoked the provisions of section 14A and made the addition/ disallowance of Rs. 2,44,82,488/- to the total income of the assessee and further held that the same is also includible in the book profit in terms of computation made under clause (f) of Explanation 1 to section 115JB(2). He accordingly for charging the MAT u/s 115JB has included the amount disallowed us/ 14A in the book profit.

28. In support of this ground, the ld. A/R of the assessee submits that the same does not form part of the profits for the purpose of MAT, for which reliance is placed on the decision of Special Bench of the Tribunal in the case of ACIT vs. Vireet Investment Pvt. Ltd 165 ITD 27 (Delhi). It is submitted by ld. A/R that as the matter is settled by the Special Bench in the case of Vireet Investments Pvt. Ltd., therefore, the action of ld. CIT(A) is fully justified and the same deserves to be upheld. In support, reliance is further placed on the following judicial pronouncements:

- PCIT Vs. J.J. Glastronics (P.) Ltd. (2022) 139 Taxmann.com 375 (Karnataka)
- Integrated Coal Mining Ltd. Vs. DCIT (2016) 67 Taxmann.com 260 (Kolkata-Tribunal)
- ACIT Vs Geometric Software Solutions Co. Ltd. (2022) 140 Taxmann.con 647 (Mumbai-Tribunal)

29. Accordingly ld. A/R requests that the disallowance made u/s 14A is not includible in the book profit as computed u/s 115JB for charging MAT.

30. Per contra ld.CIT D/R relied upon the orders of lower authorities and submits that AO has not made any error and the adjustment was made in terms of clause (f) of Explanation 1 to section 115JB(2) which provides as under:

> *[**Special provision for payment of tax by certain companies.***
> ***115JB.** (1) xxxxxxx*
> *(2)xxxxxx*
> *Explanation [1].—For the purposes of this section, "book profit" means the [profit] as shown in the [statement of profit and loss] for the relevant previous year prepared under sub-section (2), as increased by—*
> *(a) xxxxxxx or*
> *(b) xxxxxxx; or*
> *(c) xxxxxxx; or*
> *(d) xxxxxxx; or*
> *(e) xxxxxxx; or*
> *(f) the amount or amounts of expenditure relatable to any income to which [section 10 (other than the provisions contained in clause (38) thereof) or [***] section 11 or section 12 apply; or]*

31. He thus prayed that the adjustment so made liable to be uphold and he prayed accordingly.

32. We have heard the rival contentions. In the instant case, as we have already held that provisions of section 14A cannot be invoked for the assessment year before us and thus, no disallowance can be made u/s 14A of the Act, the question of making addition of the disallowances made u/s 14A doesn't arise while computing the books profits u/s 115JB of the Act. Further this issue is squarely covered in favour of the assessee by the decision of the Special Bench of the Tribunal in case of Vireet Investments Pvt Ltd (supra) wherein it was held that computation under

clause (f) of Explanation 1 to section 115JB(2) is to be made without resorting to the computation as contemplated u/s 14A read with Rule 8D. The said view is further fortified by the decision of Hon'ble Bombay High Court in case of CIT vs. M/s Bengal Finance & Investment Pvt. Ltd. reported in ITA No. 337 of 2013 wherein the Hon'ble High Court held as under:-

> *"4. So far as Question (b) is concerned, the impugned order of the Tribunal followed its decision in M/s Essar Teleholdings Ltd. vs. DCIT in ITA No. 3850/Mum/2010 to held that an amount disallowed under Section 14-A of the Act cannot be added to arrive at book profit for purposes of Section 115JB of the Act. The Revenue's Appeal against the order of the Tribunal in M/s Essar Teleholdings (supra) was dismissed by this Court in Income Tax Appeal No. 438 of 2012 rendered on 7 th August, 2014. In view of the above, question (b) does not raise any substantial question of law."*

33. The Hon'ble Kolkata High Court in case of CIT vs Jayshree Tea Industries Ltd (ITA No 47 of 2014 order dt. 19.11.2014) also expressed the similar view and that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act. Special Bench of Hon'ble Delhi Tribunal in the case of Asstt. CIT v. Vireet Investment (P.) Ltd. (supra) by following the decision of hon'ble Kolkata High court in the case of Jayshree Tea Industries Ltdd. (supra) has held that the disallowances made u/s 14A r.w.r. 8D cannot be the subject matter of disallowances while determining the net profit u/s 115JB of the Act.

34. In view of above discussion and by respectfully following the decisions of various high courts and also of the special bench of Tribunal in case of Vireet Investments (supra) and also by considering the fact that there is no income which is claimed exempt, also no disallowance of the

expense is warranted in terms of clause (f) to Explanation-1 of Sec. 115JB of the Act for the purpose of MAT.

35. In the result, this ground of appeal taken by the assessee is allowed.

Ground of appeal No.(vi) : Disallowance of differential depreciation :

36. Brief facts pertaining to this issue are that assessee generates income from three Wind power projects and One Solar Power Project. In the Profit & Loss account assessee has claimed depreciation of Rs. 3,18,76,281/- which includes depreciation on Wind Power projects and Solar Power Project at Rs. 3,12,07,465/-. The AO observed that in its books of account assessee has charges depreciation as per Income Tax Act.

37. Ld. AR of the assessee submitted that the assessee has charged depreciation in its profit and loss account as per the Companies Act, 1956, which was applicable for the preceding year relevant assessment year under appeal and the accounts have been accepted/adopted by the shareholders in the AGM. The AO has failed to appreciate the fact that the provisions of the Companies Act, 2013 were become applicable w.e.f. 01.04.2014 and onwards in terms of the notification issued by the Ministry of Corporate Affairs dated 26.03.2014 and the relevant items is at Sl.No.56 & 57 pertaining to Section 126, 128 & 129 of the Companies Act, 2013. The copies of the said notification is available in the paper book pages 171 & 172 filed by the assessee. He, therefore, submitted that the depreciation as per rate prescribed under schedule II of The Companies

Act, 2013 for computing the profit as per books of account is become effective w.e.f. 01.04.2014 and are applicable from F.Y. 2014-15 relevant to A.Y. 2015-2016. Therefore, the AO has wrongly observed that the assessee has charged excess depreciation in the profit and loss account by charging the same as per the rate prescribed under the Income Tax Act. He also placed reliance on the judgement of hon'ble Supreme court in the case of Appollo Tyres Limited, reported in [2002] 122 taxmann.com 562, wherein it has been held that the AO is not allowed to make any adjustments in the profit and loss account u/s.115JB of the Act. He, therefore, prayed for the deletion of the disallowance made on account of excess depreciation made to the total income as well as book profits of the assessee company.

38. On the other hand, ld. CIT-Dr supported the order of the lower authorities and submitted that the depreciation should be claimed at the rate of prescribed under the Companies Act, which has not been done in the present case, however, he fairly admitted that the provisions of Companies Act, 2013 are applicable from Financial Year 2014-2015 and onwards.

39. We have heard the rival submissions and perused the material available on record. The AO has disallowed the depreciation of Rs.1,16,63,697/- by alleging that the assessee company has charged depreciation in the books of accounts on the wind power project and solar power project at the rate prescribed under the Income Tax Act which are higher than the rate prescribed under the Companies Act, 2013. As per

the AO MAT is to be computed as per Section 115JB of the Act, which provides as under :-

> *6.1 MAT is to be computed as per section 115JB, which reads as :*
>
> ***115JB.*** *(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, [2012], is less than [eighteen and one-half per cent] of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of [eighteen and one-half per cent]]:*
>
> *(2) [Every assessee,—*
>
> *(a) being a company, other than a company referred to in clause (b), shall, for the purposes of this section, prepare its [statement of profit and loss] for the relevant previous year in accordance with the provisions of [Schedule III] to the [Companies Act, 2013 (18 of 2013)]; or*
>
> *(b) being a company, to which the [second proviso to sub-section (1) of section 129] of the [Companies Act, 2013 (18 of 2013)] is applicable, shall, for the purposes of this section, prepare its [statement of profit and loss] for the relevant previous year in accordance with the provisions of the Act governing such company:]*

40. The AO merely held that the profit and loss account to be used in determining MAT has to adhere to the provisions of the Companies Act, 2013 and since the depreciation has not been computed in terms of rates prescribed under the Companies Act, 2013, necessary adjustments were made in this regard. A perusal of the notification issued by the Ministry of Corporate Affairs, dated 26.03.2014, the Central Government has fixed 1st April, 2014 as the appointed date for application of various provision of The Companies Act, 2013 i.e. the date on which certain provisions of the Companies Act, 2013 shall come into force, which includes application of

Section 126, 128 & 129 at Sl.No.56 & 57 relating to the charging of depreciation under the Companies Act. Further the AO referred to sub-section(2) to Section 123 of the Companies Act, according to which requires depreciation to be charged as per the Schedule II of the Companies Act, 2013. From the perusal of the Notification issued by the Ministry of Corporate Affairs (supra), we find that Section 123 of the Act was also come into operation w.e.f. 01.04.2014, therefore, is applicable for the Financial Year 2014-2015 relevant to A.Y.2015-2016 and not applicable for the assessment year of the present appeal i.e. for A.Y.2014-2015. During the course of hearing a specific query was made by the Bench to the ld. AR of the assessee to show as to whether the necessary charges were made in subsequent assessment year for charging the deprecation as per the Companies Act, 2013. In reply the ld. AR of the assessee stated that the company has changed the method of charging depreciation in its books of account by following the rates prescribed in Schedule II of the Companies Act, 2013 as provided in sub-section 2 to Section 123 of the Companies Act, 2013 w.e.f. 01.04.2014. A Copy of the financial statements for the year ended on 31.03.2015 were also submitted in support of this claim.

41. In view of the above facts and after considering that the provisions of the Companies Act, 2013 relating to depreciation etc. have been made applicable from 01.04.2014 relating to A.Y.2015-2016, we are of the view that the AO has wrongly invoked the provisions of Section 123 of The Companies Act, 2013 in the year under appeal. Therefore, the

disallowance made on account of excess depreciation at Rs.1,16,63,697/- is hereby deleted. Since the disallowance of excess of depreciation has been deleted, there is no question of adding back the same in the profits computed as per Section 115JB of the Act. As a result, this ground of appeal of the assessee is allowed.

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

Order dictated and pronounced in the open court on 22/05/2024.

Sd/-	**Sd/-**
(GEORGE MATHAN)	**(MANISH AGARWAL)**
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य/ **ACCOUNTANT MEMBER**

कटक Cuttack; दिनांक Dated 22/05/2024

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
   MGM Green Energy Limited,
   5-A, Forest Park, Bhubaneswar
2. प्रत्यर्थी / The Respondent-
   JCIT, Range Rourkela, Rourkela
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(**Assistant Registrar**)
आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack