

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

**Before: Shri T.R. SENTHIL KUMAR, Judicial Member And
Shri Makarand Vasant Mahadeokar, Accountant Member**

**ITA Nos. 198 & 199/Ahd/2023
Asst. Year. 2016-17 & 2017-18**

Suzlon Energy Ltd. 5, Shrimali Society, Suzlon House, Nr. Shree Krishna Centre, Navrangpura Ahmedabad-380009, PAN: AADCS0472N	Vs	The DCIT, Circle-4(1)(1), Ahmedabad
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**ITA Nos. 302 & 303/Ahd/2023
Asst. Years. 2016-17 & 2017-18**

The DCIT, Circle-4(1)(1), Ahmedabad (Appellant)	Vs	Suzlon Energy Ltd. 5, Shrimali Society, Suzlon House, Nr. Shree Krishna Centre, Navrangpura Ahmedabad-380009, PAN: AADCS0472N (Respondent)
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Assessee Represented by: **Shri Soumitra Choudhary, A.R.**
Revenue Represented by : **Shri Prithviraj Meena, CIT-DR**

Date of hearing : 25-09-2024
Date of pronouncement : 12-11-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

These cross appeals are filed by the Assessee and the Revenue as against separate appellate orders both dated

28.02.2023 passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, (in short referred to as "CIT(A)"), arising out of the separate assessment orders passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Years 2016-17 and 2017-18. Since common issues are involved in both the years namely disallowance u/s.14A rwr 8D and Depreciation on Goodwill, the same are disposed of by this common order for the sake of convenience. Asst. year 2016-17 is taken as the lead case.

2. Brief facts of the case the assessee is a company engaged in the business of manufacturing Wind Turbine Generators [WTG], Rotor blades, parts of WTG, etc. For the Asst. year 2016-17 assessee filed its Return of Income on 28-11-2016 declaring total loss of Rs.1128 crores, which was revised on 31-10-2017 declaring current year loss as Rs.1128 crores to give effect to the Scheme of Amalgamation of its three subsidiary companies.

2.1. **First issue is disallowance u/s.14A RWR 8D:** The assessee company has made investment in shares of various companies. Since, substantial investments are made in shares, mutual funds etc, the income from which does not form or shall not form part of taxable income and are prima facie exempt from tax and not includible in the taxable income, the provisions of section 14A of the Act are attracted and made suo-moto disallowance of Rs.3,93,211/=. However the AO without recording his dissatisfaction issue a Show Cause Notice to the assessee to

explain as to why provisions of Rule 8D read with section 14A should not be invoked.

2.2. In response the assessee vide letters dated 09-10-2019 and 16-10-2019 submitted that

(a) **No exempt income** i.e. dividend earned during the year under consideration from the subject investments. It is very well settled position that in absence of earning of any exempt income by the assessee, disallowance u/s. 14A is not warranted. Reliance is placed on the judgment of Hon'ble Gujarat High Court in the case of CIT Vs. Corrttech Energy Pvt. Ltd. (2014) (223 taxmann.com 30).

(b) **The Investments are NOT made from borrowed funds**, Ongoing through audited financials for the Asst. year 2016-17 assessee company's share capital and free reserves are at Rs. 2,928.17 Crs. (shareholder fund- Rs. 985.80 Crs. + depreciation reserve of Rs.1,942.37 Crs.) as against investment in domestic companies of Rs.2710.78 Crs. As per the judgment of Hon'ble Gujarat High Court in assessee's own case for A.Y. 2005-06 in ITA No. 223 of 2013 vide order dated 03-04-2013 wherein Hon'ble High Court categorically held that since in assessee's case the share capital and free reserves was far more than the amount of investment in domestic companies and therefore NO disallowance u/s.14A was required to be made as investments are made from own funds.

[c] **No disallowance u/s.14A can be made when investments are strategic in nature for holding controlling interest in the subsidiaries.** The Investment made by Assessee Company are strategic in nature and for the purpose of its business and to hold the same for controlling interest in various subsidiaries. The primary purpose of such investments is commercial expediency i.e. for facilitating the business of Assessee Company for manufacturing and sale of WTG. Assessee relied on the judgment of Hon'ble Delhi High Court in the case of CIT -Vs- Oriental

Structural Engineers P Ltd (ITA 605/2012 dated 15-1-2013) wherein it was held that where investment in subsidiary is for commercial purposes, disallowance u/s.14A cannot be made.

[d] No Disallowance u/s. 14A of the Act while computing income under section 115JB of the Act. Assessee submitted the title itself suggest the section provides for disallowance of expenses to be made while computing TOTAL INCOME. It is pertinent to note that u/s. 115JB, total income is not computed but BOOK PROFIT is computed and comparison is made between tax on total income and tax on book profit. There is no deeming of total income u/s 115JB, hence disallowance u/s. 14A cannot be applied while computing book profit.

Further in opening line of first sub-section it has been clearly mentioned that the subject disallowance is to be made for the purpose of computing income under THIS CHAPTER only i.e. Chapter IV which relates to computation of Total Income as per ITR, whereas section 115JB is forming part of Chapter XII-B to which provisions of section 14A cannot be applied. Thus it may be appreciated that the title itself suggest the section provides for disallowance of expenses to be made while computing TOTAL INCOME. It is pertinent to note that u/s. 115JB total income is not computed but BOOK PROFIT is computed and comparison is made between tax on total income and tax on book profit. There is no deeming of total income u/s 115JB, hence disallowance u/s. 14A cannot be applied while computing book profit. Further Hon'ble ITAT in assessee's own case relating to the A.Y. 2011-12 in ITA No 619/Ahd/2017 dated 25-06-2019 held that amount of disallowance u/s. 14A worked out as per provision of Rule 8D cannot be made to income computed u/s. 115JB of the Act.

3. The Ld AO held that nowhere in the section provides that disallowance u/s.14A is to be made only if assessee has earned exempt income during the year, hence the claim of No exempt income, no disallowance to be made is legally untenable. Further CBDT vide Circular No.5/2014 dated 11-02-2014 has expressly

clarified that Rule 8D rws 14A of the Act provides for disallowance of expenditure even where taxpayer in a particular year has not earned any exempt income. Further Hon'ble Supreme Court in the case of Maxopp Investment Ltd held that disallowance u/s.14A is to be made even in case where investment has been made for strategic purposes. In view of the same, the Ld AO made total disallowance u/s. 14A of the Act and computed in accordance with Rule 8D of the Act which worked out to Rs.35,11,35,800/- (Rs. 35,15,29,011/- Less: Amount already disallowed Rs.3,93,211/-).

3.1. further the Ld AO held in view of the explicit provisions of clause (f) of Explanation to section 115JB(2) of the Act, the disallowance u/s. 14A r.w.r 8D is also made to the book profit u/s. 115JB of the Act and made addition Rs.35,11,35,800/- and demanded tax thereon.

4. **Next issue is claim of "depreciation on Goodwill"**. This issue arising consequent to the Scheme of Amalgamation duly approved by the Competent Authority i.e. National Company Law Tribunal [herein after referred as NCLT]. The assessee company is engaged in the business of manufacturing Wind Turbine Generators ("WTG" for short). The following three companies were the Wholly Owned Subsidiaries ("WOS" for short) of the assessee:

- * Suzlon Wind International Ltd. ("SWIL" for short);
- * SE Blades Ltd. ("SEBL" for short);
- * SE Electricals Ltd. ("SEEL" for short);

The "key components" required for manufacturing WTG are Nacelle, Rotor Blades, Electrical Panel, Electrical Generators, Transformers

and Tower. Originally, the assessee company was engaged in the manufacture of Nacelle & Rotor Blades and its above referred three subsidiaries were having manufacturing facilities namely SWIL manufacturing Nacelle; SEBL manufacturing Rotor Blades and SEEL manufacturing Generator, Electrical Panels & Transformers.

4.1. To reap several commercial benefits in terms of economies of scale, assessee entered into a Scheme of Arrangement in the nature of Amalgamation with the above named SWIL, SEBL and SEEL wholly owned subsidiaries. Thus the Assessee company originally filed an application for approval of the Scheme of Arrangement before the Hon'ble High Court of Gujarat, which was subsequently transferred to the National Company Law Tribunal vide order dated 06.03.2017 in view of Rule-3 of The Companies (Transfer of pending proceedings) Rules, 2016. It is thereafter the Scheme of Amalgamation was duly approved by NCLT vide order dated 31.05.2017. The "appointed date" as per the Scheme of Amalgamation was "01.01.2016". Relevant and operative clauses of the Scheme of Amalgamation as approved by NCLT reads as follows:

Clause 12.2: The "value of investments" in equity shares as well as preference shares of the Transferor companies held by the Transferee company "shall stand cancelled" in the books of the Transferee company, without further act or deed. The "cost of acquisition" of such equity and preference shares in the hands of transferee company, shall be treated as "consideration" paid for acquisition of business of the Transferor Companies.

Clause 12.6: The "difference" arising between the "net asset value" taken over (i.e. assets minus external liabilities) of the Transferor companies and the "value of investments" as

mentioned in Clause 12.2 in the books of the Transferee companies shall be debited to/credited to the "Goodwill account"/"Capital Reserve" respectively in the books of Transferee Company. Such Goodwill, if any, shall be amortized on straight line basis for full five years (60 months) and shall accordingly be amortized proportionately for a part of any financial year, if so required.

4.2. The following table explains the details with respect to the items in relation to the amalgamation and the Goodwill is determined based on the Consideration for acquisition of business of three subsidiaries and "Net assets" of subsidiaries taken over by assessee:

Particulars	SEBL	SWIL	SEEL	Total
	[Amounts are Rupees in Crores]			
Consideration (A)	538.98	203.30	95.90	838.18
Net Assets (B)	3.47	(300.42)	75.33	(221.62)
Goodwill (A-B)	535.51	503.72	20.57	1059.80

4.3. Thus the Assessee company claimed depreciation of Rs.132.48 crores on the aforesaid Goodwill of Rs.1059.80 crores for "half year" only, since the Appointed date was 01.01.2016 and thereby claimed depreciation @ 12.5%.

5. The Ld AO denied depreciation on Goodwill by referring to various sections of the Act and summarized the disallowance as follows:

- * The transferee company is an established listed entity holding entire share capital of the transferor companies.

- All the transferor companies are under control of the transferee company.
- No goodwill exists in books of transferor companies prior to amalgamation.
- A composite scheme of arrangement in the nature of amalgamation was sanctioned by Hon'ble National Company Law Tribunal vide its' order dated 31.05.2017, wherein the three wholly owned subsidiaries viz: SE Electricals Ltd, Suzlon Wind International Ltd, SE Blades Ltd (hereinafter referred to as the transferor companies) were amalgamated with the parent transferee company: Suzion Energy Ltd.
- Goodwill was created as a result of amalgamation being the difference between the net book value of assets of the transferor companies and the value of shares issued. It has accounted for the goodwill arising out of amalgamation as intangible asset for Rs. 503.72 Crore, Rs 535.51 Crore and Rs 20.57 Crore in case of SWIL, SEBL and SEEL respectively. Thus, totalling to Rs 1059.80. It is further seen that the assessee has claimed depreciation of Rs. 132.48 Crores on the goodwill so created. Since, the intangible assets in the form of goodwill was owned/held by the amalgamating companies prior to the amalgamation at NIL cost only, after amalgamation, it has to be taken as NIL cost in the hands of the amalgamated company.
- Besides the case laws relied upon by the assessee are distinguished on facts supra.
- The intricacies of fifth proviso to section 32(1), section 49(1)(iii)(e). Explanation 7 to section 43(1) and/or Explanation 2(b) to section 43(6)(c) and section 55(2)(a)(ii) have already been discussed and established that Depreciation cannot be claimed on goodwill arising out of amalgamation under the existing provisions of the Income-tax Act. 1961 in the present set of circumstances which exists in this case.

5.8. Further, it has been held by no less than Hon'ble Apex Court in the case of Baroda Distributors P Ltd. 155 ITR 120 that:

"To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this we derive comfort and

strength from the wise and inspiring words of Justice Bronson in *Pierce v. A.M.Y. Delameter* at page 18 :

"a Judge ought to be wise enough to know-that he is fallible and therefore ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead : and courageous enough to acknowledge his errors.

In view of the above factual and legal position, the claim of depreciation on Goodwill of Rs 132,47,53,370 /- is disallowed under u/s 32(1) r.w.s 43(1) r.w.s. 43(6)(e) r.w.s 49(1)(iii)(e) r.w.s. 55(2)(a)ii of the I.T. Act, 1961. "

5.1. Thus the AO denied Depreciation on Goodwill as claimed by the assessee and demanded tax thereon.

6. Aggrieved against the assessment order the Assessee filed appeal before Commissioner [Appeals]. The Ld CIT(A) on the first issue of disallowance made u/s.14A rwr 8D confirmed the addition made by the Ld AO, however deleted similar disallowance also made to the book profit u/s. 115JB of the Act. On the second issue of denying the claim of depreciation on goodwill, the Ld CIT[A] confirmed the addition. Hence, both the Assessee and Revenue are in Cross Appeal before us.

7. The **Grounds of Appeal filed by the Assessee** in ITA No. 198/Ahd/2023 for A.Y. 2016-17 reads as under:

1. The Ld. CITI(A) has erred in law and facts of the case in confirming the action of AO in invoking the provisions of Rule RD without appreciating fact of the case and further erred in law in rejecting the calculation of the assessee without any justifiable reason.

2. The Ld. CIT(A) has erred in law and facts of the case in confirming the action of AO in disallowing Rs.35,11,35,800/- u/s.14A r.w.r 8D without there being any exempt income earned by the assessee.
 3. The Ld. CIT(A) has erred in law and facts of the case in confirming the action of AO in disallowing Rs.35,11,35,800/- u/s.14A r.w.r 8D without appreciating that the appellant has more its own interest funds which are far in excess of investment made.
 4. Without prejudice to the above, quantification of disallowance is excessive and erroneous.
 5. The Ld. CIT(A) has erred in law and facts of the case in confirming the action of AO in confirming the disallowance of depreciation on goodwill arising out of amalgamation of Rs.132,47,53,370/- u/s.32 of the Act.
 6. The Ld. CIT(A) has erred in law and facts of the case in confirming the action of AO in holding that the goodwill has to be taken at NIL cost in the hands of the appellant.
 7. Both the lower authorities have erred in law and on facts in not properly appreciating and considering various submissions, evidences and supporting documents placed on record during the course of the assessment proceedings and not properly appreciating various facts and law in its proper perspective.
 8. The Ld. CIT(A) has erred in law and on facts of the case in confirming action of the Ld. AO in levying interest u/s. 234A/B/C of the Act.
 9. The Ld. CIT(A) has erred in law and on facts of the case in confirming action of the Ld. AO in initiating penalty u/s. 271(1)(c) of the Act.
 10. The Ld. CIT(A) has erred in not considering various facts and in not appreciating the facts and law in their proper perspective.
 11. The Appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.
8. The solitary **Ground of Appeal filed by the Revenue** in ITA No. 302/Ahd/2023 for A.Y. 2016-17 reads as under:

"Whether the Ld. CIT(A) has erred in law and on facts in deleting the Addition of Rs. 35,11,35,800/u/s.14A of the Act to the book profit calculated u/s.115JB of the Act particularly when it has confirmed the disallowance made Rs. 35,11,35,800/-u/s.14A r.w. Rule 8D?"

9. First we deal with the **Revenue's Appeal in ITA No.302/Ahd/2023 for A.Y. 2016-17**. We have heard rival submissions at length and also considered the materials placed on record. The assessee contended that even if any disallowances are made u/s.14A r.w.r. 8D, such disallowances cannot be added back to the book profits calculated. The provisions of section 14A prescribes disallowances while computing total income as per the normal provisions of the Act, whereas provisions of sec.115JB comes under chapter XII-B, which is a separate Code by itself and thus section 14A disallowance cannot be used while adjusting book profit u/s.115JB of the Act.

9.1. Ld Counsel Mr. Soumitra Choudhury appearing for the assessee further submitted that the disallowance u/s.14A calculated by the assessee was as per hypothetical formula prescribed under Rule 8D of the Act and thus such disallowance does not mean, that the assessee has debited such expenses while preparing profit and loss account. Moreover, both the scheme is explicit and independent to each other and taxes are levied on either one of the above phenomena, which yields a better result for the Revenue. It is further submitted that while the company under the provisions of sec 115JB of the Act, i.e. while calculating the MAT, the correctness of profit and loss account as prepared by the assessee and Certified by the Statutory Auditor in accordance with

requirements of Part II and III of Schedule to the Companies Act, cannot be examined by the learned AO. As such an action falls beyond the powers of Ld AO conferred to it by the Act. Hence, the provisions of Sec.14A cannot be applied for computing the book profit u/s. 115JB and placed reliance on the decision rendered by the **Co-ordinate Bench of this Tribunal in assessee's own case in ITA No.2216/Ahd/2018 dated 22-02-2021** relating to the Asst. Year 2015-16 wherein Department appeal was dismissed. Similarly for the **earlier Asst. years 2012-13 and 2013-14 in assessee's own case, department appeals on the very same disallowance u/s.14A made in the book profit u/s.115JB were dismissed which is reported in [2023] 153 taxmann.com 582 [Ahd Tri]**, thus the present department appeals are liable to be dismissed.

9.2. Ld CIT DR Shri Prithviraj Meena appearing for the Revenue could not dispute above facts and also could not place on record any contrary decision passed by any Higher Forum, however he pleaded to sustain the addition made by the Assessing Officer and allow the department appeals.

9.3. This issue is no more res-integra since the same is settled by the Special Bench decision in the case of ACIT vs. Vireet Investments Pvt. Ltd 82 Taxmann.com 415 (Delhi Tribunal) (SB) wherein it was held as follows:

'... The question is, whether the amount or amounts of expenditure relatable to exempt income as contemplated in clause (f) to Explanation 1 to section 115JB(2) could be arrived at by resorting to provisions of section 14A or not. The department, contention, is that

the object of section 14A and clause (1) to Explanation 1 to section 115JB(2) is same and, therefore, it cannot be disputed that section 14A can be resorted to for finding out the expenditure relatable to any income which is exempt. [Para 6.2]

When the question arises as to the applicability of similar provisions in different parts of the statute, then it is not only legitimate but proper to read both the provisions in their context. If context is same, different meaning cannot be assigned. It is to be found out that what mischief was intended to be remedied by Inserting a particular section. The intention of the legislature once is manifested in a particular section in the statute then said intention cannot be given a different meaning, if a similar provision has been incorporated in a different section in the statute. The intention of the Legislature must be found out by reading the statute as a whole. [Para 6.3]

Literal meaning cannot always be followed logically, because sometimes it tends to defect the obvious intention of the Legislature and results in producing a wholly unreasonable result. (Para 6.4)

Thus, the submission of Department is that when basic object and purpose of section 14A and clause (1) to Explanation 1 to section 115JB(2) is same, then it cannot be said that merely because section 14A has not been mentioned in clause (f), it has no application. The mode of computation with same purpose cannot be differently made merely because section 115JB creates a deeming section. The object of deeming provisions is to substitute the total income computed under normal provisions by that computed under MAT provisions. Submission of department is that this cannot be extended to computation for same items under normal as well as MAT provisions. Under the provisions of section 14A, both direct and indirect expenses in relation to earning of exempt income are to be reduced. Therefore, different meaning cannot be ascribed in clause (1) and, therefore, the submission of the assessee that only directly relatable expenditure is to be reduced, cannot be accepted. [Para 6.10]

In view of above discussion, **the computation under clause (f) of Explanation 1 to section 115JB (2), is to be made without resorting to the computation as contemplated under section 14A, read with rule 8D of the Income-tax Rules, 1962."**

9.4. Further jurisdictional High Court in the case of PCIT -Vs.- Gujarat Fluro Chemicals Ltd [2023] 155 taxmann.com 135 [Guj] had considered the entire issue in detail and judgements rendered by different High Courts, Special Bench of ITAT and held as follows:

“ ... 4.3 So far as question (D) is concerned, the coordinate bench has answered them as follows:

“22. The third question proposed by the revenue is in context with the adjustment made on account of the disallowance under section 14A in computing the book profit. In this context, the findings recorded by the ITAT are as follows:

17. Next common issue involved in both years is, whether the amount disallowed under section 14A read with rule 8D deserves to be added back in the book profit for the purpose of section 115JB. In other words, whether the additions which have been confirmed by the Tribunal at Rs.1.55 crores in the assessment year 2012-13 and Rs.75 lakhs in the assessment year 2013-14, deserves to be added back in the book profit computed for the purpose of section 115JB.

17.1 The ld. counsel for the assessee at the very outset contended that this issue is covered in favour of the assessee by the judgment of Hon'ble Gujarat High Court in the case of CIT Vs. Alembic Ltd. in Tax Appeal No.1249 of 2014 as well as decision of Hon'ble Bombay High Court in the case of CIT Vs. Bengal Finance & Investment P. Ltd. in Tax Appeal No.337 of 2013. He placed on record copies both these decisions. Apart from the above, he placed upon reliance Special Bench decision of the ITAT in the case of CIT Vs. Vireet Investment P. Ltd. 165 ITD 27. On the other hand, ld. CIT DR relied upon the order of DRP.

18. We have duly considered rival contentions and gone through the record carefully. We find that ld. DRP has relied upon the order of the ITAT, Mumbai in the case of DCIT Vs. Viraj Profiles Ltd., (2016) 46 ITR (Trib) 0626 (Mum) and held that addition required to be made in the book profit could be calculated as per Rule 8D of the Income Tax Rules. The ld. DRP thereafter made reference to decision of Hon'ble Delhi High Court in the case of CIT Vs. Geotze India Ltd., 361 ITR 505. According to the ld. DRP, this decision has been considered by the Special Bench in the case of Vireet Investment P. Ltd. (supra) but placed reliance upon Hon'ble Bombay High Court in the case of Vodafone India Services P. Ltd. ACIT, 361 ITR 0531 (Bom) and held that DRP is not bound by the ratio laid down by the Special Bench. The discussion made by the DRP on this issue in the assessment year 2013-14 reads as under:

“10.3 In the case of Viraj Profiles Ltd. [2015] 64 taxmann.com 52 (Mum Trib), the Hon'ble Bench has elaborately discussed the issue and held that the disallowance is liable to be calculated as per Rule 8 D of the Rules. After discussing the decisions which have also been relied on by the appellant, the Hon'ble Bench has concluded that;

“In view of our foregoing discussion, we find no infirmity with the orders of the AO and we hold that the AO has rightly disallowed the expenditure of Rs.73,07,018/ by invoking the provisions of Section 14a of the Act read with the Rule 8D of Income Tax Rules, 1962 for computing book profit u/s.115JB(2) of the Act read with clause (f) to Explanation 1 to clause 115JB(2) of the Act. We, therefore, set aside the orders of the CIT(A) and restore the orders of the AO. We order accordingly.

In the case of CIT (Central II) Vs. Goetze (India) Limited, the Hon'ble Delhi High Court has in ITA No.1179/2010 vide order dated 09.12.2013, held that the disallowance u/s.14A is to be taken into consideration for the purposes of calculating book profits u/s.115JB. The relevant paras of the judgment are reproduced below.

“36. By order dated 16th May, 2012, the following substantial questions of law were framed in the present appeals: "(i) Whether the Income Tax Appellate Tribunal was right in holding that while computing book profit under Section 115JA (sic. Section 115JB) of the Income Tax Act, 1961, no disallowance under Section 14A was required to be made? Learned counsel for the respondents assessee, during the course of hearing, has fairly conceded that the first question has to be answered in favour of the Revenue and against the assessee in view of specific provisions in the Explanation 1 below Section 115JB(2) clause (f). The Assessing Officer it is stated had made an addition of Rs.88,292/ to the book profits towards expenditure incurred having nexus with dividend income, which were exempt under Section 10(33). Recording the said statement, the first question is answered in favour of the appellant Revenue and against the respondent assessee.” The assessee has relied upon the judgment of ITAT special bench in the case of Vireet Investment Pvt. Ltd. In this regard, it is pertinent to

mention that Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd. Vs. Additional Commissioner of Income Tax & Ors. (2014) 264 CTR 0030 (Bom) : (2013) 96 DTR 0193 (Bom) : (2014) 361 ITR 0531 (Bom) : (2014) 221 Taxman 0166 (Bom); has held that the proceedings before DRP are extension of assessment proceedings. Therefore, they are not bound by the decision of Tribunals unlike CIT(A) as long as the issue is not acceptable on merit and/or the issue is being contested by the department. In this case, the decision of Hon'ble Delhi High Court in the case of Goetze (India) Ltd cited above is also in favour to the department on this issue which also shows that the view of AO confirmed by the Panel is a plausible view.

19. There were contradictory orders at the end of the Tribunal. Therefore, Special Bench was constituted to consider the following question:

“Whether expenditure incurred to earn exempt income computed under section 14A could not be added while computing book profit under section 115JB of the Act.”

20. When the Special Bench has considered this question, it was confronted with two decisions of the Hon'ble Delhi High Court diagonally opposite to each other. One referred by the Id. DRP also in the present case, rendered in the case of CIR Vs. Goetze India Ltd. (Supra) and other in the case of Pr. CIT Vs. Bhushan Steel. ITAT, Special Bench has reproduced both these orders in Vireet Investment P. Ltd. (supra) and thereafter it considered as to which decision ought to be followed by a subordinate authority. The department advanced an argument that in the case of Bhushan Steel, Hon'ble Delhi High Court failed to consider subsequent decision of CIT Vs. Goetze India Ltd. (supra). However, the Tribunal after placing reliance upon the decision of Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products Ltd., 88 ITR 192 (SC) and other decisions has held that it is incumbent upon it follow the decision of Hon'ble Delhi High Court in the case of Bhushan Steel.

In this case, Hon'ble Delhi High Court has held as under:
“However, Ld. Senior Counsel has relied on the decision in the case of Bhushan Steel Ltd. (supra) wherein it has been held as under:

“ITA 593/2015 PR. CITAppellant Through: Mr. N.P. Sahni, Senior Standing Counsel with Mr. Nitin Gulati, Advocate Versus BHUSHAN STEEL LTD. ...Respondent Through: Ms. Kavita Jha, Advocate with Ms. Roopali Gupta, Advocate. ORDER 29.09.2015 **
** ** ** **

7. Question No.6 concerns deletion of addition of Rs.89,00,000 made by the AO for computation of the income for the purposes of Minimum Alternate Tax (MAT) under section 115JB of the Act. This pertained to the expenditure incurred for earning exempt income under section 14A read with Rule 8D. The ITAT has rightly held that this being in the nature of disallowance, and with Explanation 115JB not specifically mentioning Section 14A of the Act, the addition of Rs.89,00,000 was not justified. The view taken by the ITAT cannot be faulted with. It is consistent with the decision in **Apollo Tyres Ltd. V. Commissioner of Income Tax 255 ITR 273 (SC)** which held that “**the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to Section 115J.**” The Court declines to frame a question on the above issue.”

21. Apart from the above, we have a binding precedent before us – one from Hon'ble jurisdictional High Court and other from the Hon'ble Bombay High Court. The question considered by the **Hon'ble Gujarat High Court in the case of Alembic Ltd.** (supra) is as under:

“Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in holding that adjustment made on account of disallowance u/s.14A of the Act in computation of book profit u/s. 115JB of the Act is not as per law without appreciating that the amount disallowable under section 14A is covered under clause (f) of Explanation to section 115JB(2) and, thus, said amount has to be added back while computing amount of book profit?

22. The Hon'ble Gujarat High Court has replied this question as under:

7. So far as issue Nos.(iii) and (iv) are concerned, the learned counsel for the assessee has relied on the decision of this court in the case of Commissioner of Income tax I v. Gujarat State Fertilizers & Chemicals Ltd., reported in (2013) 358 ITR 323 (Gujarat) Where this court has held in paragraph Nos.6 to 6.5 this court has observed as under:

6. So far as the fourth question is concerned, it pertains to addition of Rs.1,14,43,040/ under Section 115JB of the Act being the expenditure estimated on earning of dividend income under Section 14A of the Act. 6.1 The Assessing Officer on referring to the said provision of Section 115JB(2) of the Act added the said amount considering that any amount of expenditure relatable to the income exempted under Section 10 of the Act shall need to be added in the profit shown in the 'Profit and Loss Account'. When the matter travelled to the CIT (Appeals), since it deleted the addition of Rs.1,14,43,040/ while deciding the question No.1, it consequently deleted such addition under Section 115JB of the Act on the ground that this would not serve any purpose. The Tribunal decided the said issue as follows:

"94. We have considered the rival submissions and we find that similar issue was raised by Revenue as per ground No.3 above in respect of regular assessment of income and while deciding that ground, we have already upheld that disallowance of Rs.5 lakh in respect of administrative expenses will meet the ends of justice and no disallowance is called for in respect of interest expenditure. Hence, for the purpose of computing book profit u/s.115JB of the Act also, we hold accordingly and confirm the addition of Rs.5 lakh. This ground of Revenue's appeal is partly allowed."

As rightly held by both, the CIT (Appeals) and the Tribunal, this issue has a direct correlation with the first question. It was argued by the Revenue that while computing the book profit under Section 115JB of the Act, the disallowance of interest expenditure on exempt income was wrongly negated by both the authorities on the ground that it was not the liability for expenses, but a liability relating to assets. We find no fault in the approach adopted by both the authorities. The addition under section 115JB of the Act of a

sum of Rs.1,14,43,040/ when was made as an expenditure estimated on earning of dividend income under Section 14A of the Act, without reiterating the rationale of confirming deletion of such amount as has been elaborately done at the time of deciding question No.1, this deletion requires to be confirmed.”

8. Taking into consideration the evidence on record and considering the decision of this court in the case of Commissioner of Income tax vs. Gujarat State Fertilizers & Chemicals Ltd. (supra), we are of the opinion that issue Nos.(iii) and (iv) required to be answered in favour of the assessee and against the revenue. In that view of the matter, we answer questions (iii) and (iv) referred to us in favour of the assessee and against the revenue. The appeal of revenue is dismissed.

23. Similarly, Hon'ble Bombay High Court has formulated following question in the case of Bengal Finance & Investments P. Ltd. (supra) and replied as under:

(b) Whether on the facts and in the circumstances of the case, and in law, the ITAT is justified in deleting the addition of Rs.78,84,387/ under clause (f) of Explanation 1 to Section 115JB relying upon the decision in the case of Goetze (India) Ltd. Vs. CIT (2009) 32 SOT 101 (Del.), which has been followed by ITAT, Mumbai in the cases referred to in para 5 of the impugned order without appreciating that the above decision in the case of Goetze (India) Ltd. was rendered by the ITAT, Delhi Bench on completely distinguishable set of facts, peculiar to the said case?”

..... 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 14A 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 7th August, 2014. In view of the above, question (b) does not raise any substantial question of law.**

24. Respectfully following the above decision, **we hold that no addition in the book profit would be made on the basis of**

calculations worked out under section 14A of the Act. We allow this ground of appeal in both the years and delete the additions. We take notice of the fact that in context with the third proposed question, the ITAT placed reliance on the following decisions:

- (1) CIT Vs. Alembic Ltd. (Tax Appeal No.1249/2014)
- (2) CIT Vs. Gujarat State Fertilizers & Chemicals Ltd. (2013)
358 ITR 323

24. The issue is squarely covered and in our opinion, **no error could be said to have been committed by the ITAT in taking the view that no addition in the book profit can be made on the basis of the calculations worked out under section 14A of the Act."**

9.5. Considering entire issue in detail and respectfully following the above Judgements by different High Courts, Special Bench of Delhi ITAT and also assessee's own case cited supra, we have no hesitation in confirming that the provisions of section 14A cannot be applied for computing the book profit u/s. 115JB of the Act and thereby delete the addition made by the AO. Thus the Ground raised by the Revenue is devoid of merits and liable to be dismissed.

10. In the result **the appeal filed by the Revenue in ITA No. 302/Ahd/2023 relating to the Asst. year 2016-17 is hereby dismissed.**

11. Now we deal with the **Assessee's Appeal in ITA No.198/Ahd/2023 for A.Y. 2016-17.** Ground Nos.1 to 4 are relating to disallowance made u/s.14A rwr 8D of the Act, which was confirmed by the Ld CIT[A]. Ld Counsel Mr. Soumitra Choudhury

appearing for the **assessee filed a detailed Written Submission** on this issue which reads as follows:

"Assessee most respectfully submits that the impugned disallowance is contrary to law and is unsustainable for the following reasons:

i. Reliance on CBDT Circular No.05/2014 by the AO to make disallowance u/s.14A of the Act is bad in law:

The AO primarily placed reliance on the Circular issued by the Central Board of Direct Taxes (CBDT) viz., Circular No. 05/2014 dated 11.02.2024 wherein it was clarified by the Board that the intention of the legislature was to disallow deductions on expenditures incurred for earning exempt income irrespective of the fact whether any such income has been earned during the said financial year or not. In *Chemivest Ltd. v. CIT* 317 ITR 33 (Delhi), the Hon'ble Delhi High Court while dealing with the same issue observed that the expression 'does not form part of the total income' in section 14A envisages that there should be an actual receipt of income, which is not includible in the total income during the relevant previous year to disallow any expenditure incurred concerning the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year (Para 23). Some of the judgements on the similar observations which were relied upon by the Hon'ble Delhi High Court, in this case, such as *CIT v. Holcim India (P.) Ltd* [2015] 57 taxmann.com 28 (Delhi). were *CIT v. Lakhani Marketing Ine* 2014] 49 taxmann.com 257 / 226 Taxman 45 (Punj. & Har.) *CIT v. Corrttech Energy (P.) Ltd.* [2014] 45 taxmann.com 116 / 223 Taxman 130.(Gui) Jurisdiction High Court. and *CIT v Shivan Motors Pvt. Ltd* 2015] 55 taxmann.com 262/230 Taxman 63. (All). Similarly, in *Redington (India) Ltd. v. Additional Commissioner of Income Tax*, [2017] 77 taxmann.com 257 (Mad.), Hon'ble Madras High Court while dealing with the same issue negated the contention of the revenue that the word 'includible' in Section 14A meant exempt income whether earned in the previous year or not would attract Section 14A for disallowing corresponding expenditure. The Hon'ble Court further observed that an assessment in terms of the Act is specific to an assessment year and related previous year as per section 4 r.w. section 5 of the Act. And if any contrary intention would have been there it would have been expressly stated therein (Section 14A) therefore, the language of Section 14A

should be read in that context such that it advances the scheme of the Act rather than distort it. Thus, Section 14A is only applicable where earning is of actual income and not against notional or anticipated income, hence, where there is no exempt income in a year, there cannot be disallowance of expenditure concerning assumed/anticipated income. Similarly, the Hon'ble Supreme Court in Principal CIT v. GVK Project and Technical Services Ltd. [2019] 106 taxmann.com 181 / 264 Taxman 76 (SC), while dismissing the SLP filed by the revenue held that the observation of CIT(A), ITAT and Hon'ble Delhi High Court while relying upon Cheminvest Ltd. (supra) has rightly ordered in favour of the Assessee i.e. in the absence of any exempt income reported by assessee disallowance was impermissible.

Thus, these judicial observations adhere to the same reasoning that Section 14A would only apply where exempt income is earned in the relevant previous year. Therefore, Section 14A would not apply to a notional/anticipated exempted income that is not earned in the relevant previous year. The Hon'ble High Court of Delhi in the case of Prl.CIT Vs. IL & FS Energy Development Co. Ltd. (2017) 84 taxmann.com 186(Delhi) has held that CBDT Circular upon which extensive reliance is placed by revenue does not refer to rule 8D(1) at all but only refers to the word "includible" occurring in the title to rule 8D as well as the title to section 14A. The circular concludes that it is not necessary that exempt income should necessarily be included in a particular year's income for the disallowance to be triggered.

The Court held that the process of interpretation adopted by the CBDT will be a truncated reading of section 14A and rule 8D particularly when rule 8D(1) uses the expression 'such previous year'. Further, it does not account for the concept of 'real income'. It does not note that under section 5, the question of taxation of 'notional income' does not arise. For all of the aforementioned reasons, the Court held that the CBDT Circular dated 11-5-2014 cannot override the expressed provisions of section 14A, read with rule 8D. For the above reasons, the revenue authorities were not justified in placing reliance on CBDT circular to sustain the disallowance.

ii. RELIANCE ON THE AMENDMENT TO SECTION 14-A by the Finance Act, 2022 by the CIT(A) to sustain the

disallowance made by the AO is bad in law and is unsustainable :

By the Finance Act, 2022 an explanation to section 14A of the Act was inserted to clarify 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 exempt income 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 exempt income.

The Notes on clauses explaining the intention behind insertion of Explanation to Section 14A states as under-

It is also proposed to insert an Explanation to the said section to clarify that notwithstanding anything to the contrary contained in this Act, the provisions of the said section shall apply and shall be deemed to have been always applied in a case where the income, not forming part of the total income, 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 form part of the total income. This amendment will take effect from 1st April, 2022.

Clauses 4, 5, 6 & 7 of the Memorandum of Finance Bill, 2022 reproduced herein below provide following guidelines:

"4. In order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to insert an Explanation to section 14A of the Act to clarify 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 exempt income 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 exempt income.

5. This amendment will take effect from 1st April, 2022.

6. It is also proposed to amend sub-section (1) of the said section, so as to include a non-obstante clause in respect of other

provisions of the Income-tax Act an provide that no deduction shall be allowed in relation 1 exempt income, notwithstanding anything to the contra contained in this Act.

7. This amendment will take effect from 1st April, 20 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years."

Thus, Memorandum of the Finance Bill, 2022 reveals that it explicitly stipulates that the amendment made to Section 14A will take effect from 1st April, 2022 and apply in relation to the assessment year 2022-23 and subsequent assessment years.

This Explanation was considered by ITAT Guwahati Bench in ACIT -Vs- Williamson Financial Services Ltd 196 ITD 422 [Guw], which observed as under:-

In order to remove the prevailing doubts about the interpretation of the provisions of section14A and to overcome the interpretation given by the various High Courts regarding the applicability of provisions of section14A and to make the intention of the legislation clear and to make it free from any misinterpretation, the Parliament has brought in an Explanation to section 14A. Further, sub-section (1) of section 14 has been amended so as to include a non obstante clause to provide that no direction shall be allowed in relation to exempt income, notwithstanding anything contrary contained in the Act.

Thus, the earlier judgments holding that if there is no exempt income, no disallowance u/s 14A can be made are overruled. It is also held that this Explanation is clarificatory in nature and will therefore, be applicable retrospectively as it effective from 01-04-2022.

The view held by ITAT Guwahati Bench in the above case is not approved by Hon'ble Delhi High Court in Pr. CIT v. Era Infrastructure (India) Ltd. [2022] 141 taxmann.com 289/288 Taxman 384 (7), where it was held, following the judgment of Hon'ble Supreme Court in Sedco Forex International Drill Inc. v. CIT [2005] 149 Taxman 352/12 SCC 717 (SC), that the amendment of Section14A, which is "for removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. Therefore, the Explanation is held prospective. The decision of Hon'ble Delhi High Court in Era Infrastructure Ltd. (supra) was followed in following cases Dy. CIT v. Lodha Developers Ltd. (2022) 143

Taxmann.com 442 (Mum) and; Asstt. CIT v. Bajaj Capital Ventures (P.) Ltd (2022) 140 Taxmann.com 1.

An authority like a Tribunal acting anywhere in the country has to respect the law laid down by the High Court, though of a different State, so long as there is no contrary decision of any other High Court on that question - CIT v. Smt. Godavaridevi Saraf [1978] 113 ITR 589, 592 (Bom.); CIT v. Vrajlal Manilal & Co. [1981] 127 ITR 513, 515 (MP); All India Lakshmi Commercial Bank Officers Union v. Union of India [1984] 150 ITR 1 (Delhi); CIT v. Ceanattu Firms [1986] 160 ITR 588, 591 (Ker.).

Another aspect which is incidental to the proposition that if there is no exempt income earned, there can be no disallowance u/s.14A of the Act, is the revenue's reliance on the Hon'ble Apex Court decision in Maxopp Investment Ltd. v. CIT(2018) 91 taxmann.com 154. An observation in paragraph 40 of the said judgment is to the effect that Section 14A has to be invoked for disallowance of any expenditure in relation to any exempt income irrespective of fact whether the dividend is actually earned or not in the FY." This view of the Revenue is not correct because the Apex Court has not rejected the theory of apportionment. The observation of Hon'ble Apex Court in above judgment that "Whether dividend is earned or not becomes immaterial" is in the context of holding the shares as stock-in-trade and it becomes a business activity of the assessee to deal in those shares as a business proposition. There is no applicability of section 14A in respect of the shares held as stock-in-trade and that is why it is observed that in respect of stock-in-trade whether dividend is earned or not becomes immaterial. Similar view was expressed by Hon'ble Delhi High Court in Pr.CIT v. PNB Housing Finance Ltd (2023) 146 taxmann.com 5 following Maxopp's case (supra) holding that where shares were held by assessee, housing finance company, as stock-in-trade, dividend earned on shares would not attract section 14A.

Secondly in para 41 of the judgement, Hon'ble Apex Court has approved the theory of apportionment while disallowance u/s.14A read with Rule 8D as under:-

"41. Having regard to the language of Section 14A(2) of the Act, read with rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to

the kind the assessee, suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the AO."

Also, Hon'ble Apex Court clearly analysed section 14(1) and held that only that expenditure which is in relation to exempt income alone has to be disallowed. To read para 32 from the judgement-

"32. In the first instance, it needs to be recognised that as per section 14(1) of the Act, deduction of that expenditure is not to be allowed which has been incurred by the assessee "in relation to income which does not form part of the total income under this Act". Axiomatically, it is that expenditure alone which has been incurred in relation to the income which is includible in total income that has to be disallowed. **If an expenditure incurred has no causal connection with the exempted income, then such an expenditure would obviously be treated as not related to the income that is exempted from tax, and such expenditure would be allowed as business expenditure.** To put it differently, such expenditure would then be considered as incurred in respect of other income which is to be treated as part of the total income."

Thus, it is respectfully submitted that it is incorrect to infer from the judgement of Hon'ble Apex Court in Maxopp's case that expenditure has to be disallowed even if there is no exempted income. ITAT Chennai in Tamilnadu Road Development Co. Ltd. v. Dy. CIT- [2021] 124 taxmann.com 598 (Chennai - Trib.), following this kind of interpretation held that disallowance u/s 14A irrespective of whether assessee has earned exempted income or not. However, this decision was reversed by Hon'ble Madras High Court in Tamilnadu Road Development Co. Ltd. v. Dy. CIT (2021) 124 Taxmann.com 599 (Mad) and held that "Provisions of section 14A read with rule 8D will have no applicability if there is no exempt income earned or received during previous year though disallowance is linked to expenditure incurred on investment which could fetch exempt income."

In view of the above judicial pronouncements, the order of CIT(A) sustaining the disallowance made by the AO u/s.14A of the Act, cannot be sustained and deserves to be deleted.

(iii) Since the Own funds of the Assessee were much more than the investments made by the Assessee, no disallowance can be made u/s.14A of the Act on account of interest expenditure:

As against "Investments" of Rs.2652.4 crore, assessee has interest free funds of Rs.2928.17 crore/- as at 31.03.2016 i.e. almost 1.1 times of the advances (Pg.55 of CIT(A)'s order). The said fact is not in dispute. The CIT(A)'s contention that some of the reserves do not generate cash and hence cannot be considered as available for making investments is contrary to judicial pronouncements on the subject as no such condition has been laid down in those decisions. The Hon'ble Karnataka High Court in the case of Commissioner of Income Tax & Anr. Vs. Microlabs Ltd., [2016] 383 ITR 490 (Karn) summed up the law on the issue after noticing the availability of own funds as per Balance Sheet of the Assessee and after digesting all decisions on the subject. The Hon'ble Court noticed the decision of the Hon'ble Bombay High Court in Reliance Utilities & Power Ltd 313 ITR 340 (Bom) (confirmed by the Hon'ble Supreme Court in SLP No. 37/2019 order dated 2.1.2019) wherein it was held that where the interest free funds far exceed the value of investments, it should be considered that investments have been made out of interest free funds and no disallowance u/s. 14A towards any interest expenditure can be made. The Hon'ble Court referred to the Judgment of Hon'ble Bombay High Court in CIT Vs. HDFC Bank ITA No.330 of 2012 dated 23.7.2014, wherein it was held that when investments are made out of common pool of funds and non-interest bearing funds were more than the investments in tax free securities, no disallowance of interest expenditure u/s. 14A can be made. The Hon'ble Court accepted the ratio laid down in these decisions and held that no disallowance can be made u/s.14A of the Act, when own funds available were far more than the investments made by the Assessee. In the following decisions, similar view has been taken by the Hon 'ble Supreme Court. Viz., CIT v. UTI Bank Ltd. [2022] 142 taxmann.com 136/289 Taxman 238 (SC); Pr. CIT v. Shapoorji Pallonji & Co. Ltd. (2022) 141 taxmann.com 509 (SC); South Indian Bank Ltd. v. CIT (2021) 130 Taxmann.com 178(SC).

IV. It is mandatory for the AO to record satisfaction as required u/s 14(2).

U/S.14A(2) of the Act, 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.

If no satisfaction is recorded on the basis of the accounts of the assessee, then no disallowance by invoking rule 8D can be made. If the AO has merely expressed a casual dissatisfaction on the claim of disallowance made by the assessee and nowhere has, he examined the books of accounts of the assessee so as to arrive at a dissatisfaction having regard to the accounts of the assessee, rule 8D cannot be invoked. A casual kind of compliance about dissatisfaction is not envisaged in section 14A(2). Merely writing in the assessment order that he is not satisfied with the claim of the assessee is not sufficient, but he has also to give reasons after examining the accounts of the assessee that the claim of disallowance made by the assessee is not enough or is not adequately related to exempted income. The compliance of dissatisfaction has to be substantive and not merely a pretence. The following cases support the above proposition

Dy. CIT v. Galileo India (P.) Ltd. (2017) 88 taxmann.com 739(Del-Trib); CIT v. Brigade Enterprises Ltd. (2021) 124 taxmann.com 237(Kar); CIT v. Sociedade De Fomento Industrial (P.) Ltd. (2021) 123 taxmann.com 38(Bom); Essilor India (P.) Ltd. v. Dy. CIT (2022) 137 taxmann.com 60(Kar.); Pr. CIT v. Godrej & Boyce Mfg. Co. Ltd. (2023) 149 taxmann.com 222(Bom); Pr. CIT v. PTC India Financial Services Ltd. (2023) 146 taxmann.com 174 (Delhi); Pr. CIT v. TV Today Network Ltd. (2022) 141 taxmann.com 275(Delhi); Pr. CIT v. West Bengal Infrastructure Development Finance Corpn Ltd. (2022) 143 taxmann.com 135(cal.); Pr. CIT v. West Bengal Infrastructure Development Finance Corpn. Ltd. (2023) 149 taxmann.com 181 (Cal); Infrastructure Logistics (P.) Ltd. v. Jt. CIT (2022) 141 taxmann.com 24(Panaji-Trib.); Jt. CIT v. Rare Enterprises (2021] 124 taxmann.com 71(Mum-Trib); Kodagu District Co-operative Central Bank Ltd. v. Asst. CIT (2021) 124 taxmann.com 597 (Kar.); Pr. CIT v. Hindusthan Aeronautics Ltd.(2022) 143 taxmann.com 357 (kar.)

In the light of the above submissions, this Hon'ble Tribunal may kindly delete the disallowance made u/s.14A of the Act and allow Grd No.1 to 4 raised by the assessee and render justice."

12. Per contra Ld CIT DR Shri Prithviraj Meena appearing for the Revenue strongly relied upon the orders passed by the lower authorities and pleaded to sustain the addition made by the Assessing Officer and dismiss the Assessee appeals.

13. We have heard rival submissions at length and also considered the materials placed on record including the Paper Books and case laws compilation. Though large number of case laws are referred in the submission, we have considered most relevant judgements herein for our decision. The assessee's contention is of four folds which are dealt each item wise as follows:

13.1. First fold of submission that CBDT Circular No.05/2014 relied by the AO to disallow u/s.14A of the Act is not correct: The Ld AO held that nowhere in the section 14A provides that disallowance is to be made only, if assessee has earned exempt income during the year. Whereas the CBDT Circular No.5/2014 dated 11-02-2014 has expressly clarified that Rule 8D rws 14A of the Act provides for disallowance of expenditure even whereas taxpayer in a particular year **has not earned any exempt income**. This Circular No.5/2014 was considered by the Delhi High Court in the case of **PCIT Vs. IL&FS Energy Development Co. Ltd.** (2017) 84 taxmann.com 186 (Delhi) and held that the CBDT Circular dated 11th May 2014 cannot override the expressed provisions of [Section 14A](#) read with Rule 8D after considering various other High Court judgements as follows:

“... 12. [Section 14A](#) of the Act, which was inserted with retrospective effect from 1st April 1962, provides for disallowance of the expenditure incurred in relation to income exempted from tax. From 11th May 2001, a proviso was inserted in [Section 14A](#) to clarify that it could not be used to reopen or rectify a completed assessment. Sub-sections (2) and (3) of [Section 14A](#) were inserted with effect from 1st April, 2007 to provide for methodology for computing of disallowance under [Section 14A](#). However, the actual methodology was provided in terms of Rule 8D only from 24 th March 2008. There was a further amendment to Rule 8D with effect from 2nd June 2016 limiting the disallowance the aggregate of the amount of expenditure directly relating to income which does not form part of total income and an amount equal to one per cent of the annual average of the monthly average of the opening and closing balances of the value of investment, income from which does not form part of the total income. It is also provided that the amount shall not exceed the total expenditure claimed by the Assessee.

13. In the above background, the key question in the present case is whether the disallowance of the expenditure will be made even where the investment has not resulted in any exempt income during the AY in question but where potential exists for exempt income being earned in later AYs.

14. In the Explanatory Memorandum to the Finance Act 2001, by which [Section 14A](#) was inserted with effect from 1st April 1962, it was clarified that "expenses incurred can be allowed only to the extent they are relatable to the earned income of taxable income". The object behind [Section 14A](#) was to provide that "no deduction shall be made in respect of any expenditure incurred by the Assessee in relation to income which does not form part of the total income under the [Income Tax Act](#)".

15. What is taxable under [Section 5](#) of the Act is the "total income" which is neither notional nor speculative. It has to be 'real income'. The subsequent amendment to [Section 14A](#) does not particularly clarify whether the disallowance of the expenditure would apply even where no exempt income is earned in the AY in question from investments made, not in that AY, but earlier AYs.

16. Rule 8D (1) of the Rules is helpful, to some extent, in understanding the above issue. It reads as under:

"8D. (1) Where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with—

(a) the correctness of the claim of expenditure made by the assessee; or

(b) the claim made by the assessee that no expenditure has been incurred, in relation to income which does not form part of the total income under the Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2)."

17. The words "in relation to income which does not form part of the total income under the Act for such previous year" in the above **Rule 8D (1)** indicates a correlation between the exempt income earned in the AY and the expenditure incurred to earn it. In other words, the expenditure as claimed by the Assessee has to be in relation to the income earned in 'such previous year'. This implies that if there is no exempt income earned in the AY in question, the question of disallowance of the expenditure incurred to earn exempt income in terms of [Section 14A](#) read with Rule 8D would not arise.

18. The CBDT Circular upon which extensive reliance is placed by Mr. Hossain does not refer to Rule 8D (1) of the Rules at all but only refers to the word "includible" occurring in the title to Rule 8D as well as the title to [Section 14A](#). The Circular concludes that it is not necessary that exempt income should necessarily be included in a particular year's income for the disallowance to be triggered.

19. In the considered view of the Court, this will be a truncated reading of [Section 14 A](#) and Rule 8D particularly when Rule 8D (1) uses the expression 'such previous year'. Further, it does not account for the concept of 'real income'. It does not note that under [Section 5](#) of the Act, the question of taxation of 'notional income' does not

arise. As explained in [Commissioner of Income Tax v. Walfort Share and Stock Brokers Pvt. Ltd](#) [2010] 326 ITR 1 (SC), the mandate of [Section 14A](#) of the Act is to curb the practice of claiming deduction of expenses incurred in relation to exempt income being taxable income and at the same time avail of the tax incentives by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. Consequently, the Court is not persuaded that in view of the Circular of the CBDT dated 11th May 2014, the decision of this Court in [Cheminvest Ltd.](#) (supra) requires reconsideration.

20. In M/s. [Redington \(India\) Ltd. v. The Additional Commissioner of Income Tax, Company Range - V, Chennai](#) (order dated 23rd December, 2016 of the High Court of Madras in TCA No. 520 of 2016), a similar contention of the Revenue was negated. **The Court there declined to apply the CBDT Circular by explaining that [Section 14A](#) is "clearly relatable to the earning of the actual income and not notional income or anticipated income."** It was further explained that, "The computation of total income in terms of Rule 8D is by way of a determination involving direct as well as indirect attribution. Thus, accepting the submission of the Revenue would result in the imposition of an artificial method of computation on notional and assumed income. We believe thus would be carrying the artifice too far."

21. The decisions in CIT v. M/s Lakhani Marketing Inc. 2014 SCC Online P&H 20357, CIT v. Winsome Textile Industries Limited [2009] 319 ITR 204 (P&H), CIT v. Shivam Motors (P) Ltd. (2014) 272 CTR (All) 277 have all taken a similar view. The decision in [Taikisha Engineering India Pvt. Ltd.](#) (supra) does not specifically deal with this issue.

22. It was suggested by Mr. Hossain that, in the context of [Section 57\(iii\)](#), the Supreme Court in [Commissioner Of Income Tax, West v. Rajendra Prasad Moody](#) [1978] 115 ITR 519 (SC) explained that deduction is allowable even where income was not actually earned in the AY in question. This aspect of the matter was dealt with by this Court in M/s [Cheminvest Ltd.](#) (supra) where it reversed the decision of the Special Bench of the ITAT by observing as under:

"20. Since the Special Bench has relied upon the decision of the Supreme Court in [Rajendra Prasad Moody](#) (supra), it is considered necessary to discuss the true purport of [the said decision](#). It is noticed to begin with that the issue before the Supreme Court in the said case was whether the expenditure under [Section 57 \(iii\)](#) of the Act could be allowed as a deduction against dividend income assessable under the head "income from other sources". Under [Section 57 \(iii\)](#) of the Act deduction is allowed in respect of any expenditure laid out or expended wholly or exclusively for the purpose of making or earning such income. The Supreme Court explained that the expression "incurred for making or earning such income", did not mean that any income should in fact have been earned as a condition precedent for claiming the expenditure. The Court explained:

"What [s. 57\(iii\)](#) requires is that the expenditure must be laid out or expended wholly and exclusively for the purpose of making or earning income. It is the purpose of the expenditure that is relevant in determining the applicability of [s. 57\(iii\)](#) and that purpose must be making or earning of income. s. 57(iii) does not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It does not say that the expenditure shall be deductible only if any income is made or earned. There is in fact nothing in the language of [s. 57\(iii\)](#) to suggest that the purpose for which the expenditure is made should fructify into any benefit by way of return in the shape of income. The plain natural construction of the language of [s. 57\(iii\)](#) irresistibly leads to the conclusion that to bring a case within the section, it is not necessary that any income should in fact have been earned as a result of the expenditure."

21. There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in [Rajendra Prasad Moody](#) (supra) was rendered in the context of allowability of deduction under [Section 57\(iii\)](#) of the Act, where the expression used is "for the purpose of making or earning such income." [Section 14A](#) of the Act on the other hand contains the expression "in relation to income which does not form

part of the total income." The decision in Rajendra Prasad Moody (supra) cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act."

23. The decisions of the ITAT in ACIT v. Ratan Housing Development Ltd. (supra) and Relaxo Footwear Ltd. v. Addl. CIT (supra), to the extent that they are inconsistent with what has been held hereinbefore do not merit acceptance. Further, the mere fact that in the audit report for the AY in question, the auditors may have suggested that there should be a disallowance cannot be determinative of the legal position. That would not preclude the Assessee from taking a stand that no disallowance under Section 14A of the Act was called for in the AY in question because no exempt income was earned.

24. For all of the aforementioned reasons, this Court is of the view that the CBDT Circular dated 11th May 2014 cannot override the expressed provisions of Section 14A read with Rule 8D.

25. No substantial question of law arises from the impugned order of the ITAT. The appeal is accordingly dismissed."

13.2. Respectfully following the above judicial precedents rendered by various High Courts, **we hold that the reliance placed by the Ld AO of the CBDT Circular No.5 of 2014 to make disallowance u/s.14A is legally not tenable and liable to be deleted.**

14. Second fold of submission of the assessee namely Amendment to Section 14A by the Finance Act, 2022 is prospective in nature and thereby not applicable for the present Asst. Year 2016-17. The Ld CIT[A] in his impugned order relying upon the decision of ITAT Guwahati Bench in the case of ACIT -Vs- Williamson Financial Services Ltd 196 ITD 422 [Guw] held that the

Amendment to Section 14A by the Finance Act, 2022 is Retrospective in nature and thereby applicable for the present Asst. Year.

14.1. We need not labour ourself on this issue, since very recently Hon'ble Guwahati High Court reversed the decision of the ITAT Guwahati Bench in Williamson Financial Services Ltd vide its Judgement dated 24-09-2024 in ITA No.4 of 2024 and others and held that the Amendment to Section 14A by the Finance Act, 2022 is to be applicable Prospective only, after considering the judgements rendered by Delhi, Calcutta, Madras and Madhya Pradesh High Courts by observing as follows:

".... 12. Learned counsel for the Revenue has frankly admitted that in view of the Memorandum Explaining the Provisions of the Finance Bill, 2022, issued by the Ministry of Finance, it is now settled that the Explanation inserted to Section 14A of the Act of 1961, is prospective in nature and cannot be made effective retrospectively.

13. Heard the learned counsel appearing for the parties and also perused the material placed on record. The Explanation to Section 14A of the Income Tax Act, 1961 is inserted vide Finance Bill, 2022. The Ministry of Finance, Union of India, issued Memorandum Explaining the Provisions in the Finance Bill, 2022. The relevant extract of the said Memorandum reads as under:

"Clarification in respect of disallowance under Section 14A in absence of any exempt income during an assessment year. Section 14A of the Act provides that no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income that does not form part of the total income as per the provisions of the Act (exempt income).

2. Over the years, disputes have arisen in respect of the issue whether disallowance under section 14A of the Act can be

made in cases where no exempt income has accrued, arisen or received by the assessee during an assessment year.

3. The CBDT issued Circular No.5 of 2014, dated 11/02/2014, clarifying that rule 8D read with Section 14A of the Act provides for disallowance of the expenditure even where tax payer in a particular year has not earned any exempt income. However, still some courts have taken a view that if there is no exempt income during a year, no disallowance under section 14A of the Act can be made for that year. Such an interpretation is not in line with the intention of the Legislature. To illustrate, if during a previous year, an assessee incurs an expense of Rs. 1 lakh to earn non-exempt income of Rs. 1.5 lakh and also incurs an expense of Rs. 20,000 to earn exempt income which may or may not have accrued/received during the year. By holding that provisions of section 14A of the Act does not apply in this year as the exempt income was not accrued/received during the year, it amounts to holding that Rs.20,000 would be allowed as deduction against non-exempt income of Rs.1.5 lakh even though this expense was not incurred wholly and exclusively for the purpose of earning non-exempt income. Such an interpretation defeats the legislative intent of both Section 14A as well as Section 37 of the Act.

4. In order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to insert an Explanation to section 14A of the Act to clarify 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 exempt income 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 exempt income.

5. This amendment will take effect from 1st April, 2022.

6. It is also proposed to amend sub-section (1) of the said section, so as to include a non-obstante clause in respect of other provisions of the Income-tax act and provide that no deduction shall be allowed in relation to exempt income, notwithstanding anything to the contrary contained in this Act.

7. This amendment will take effect from 1st April, 2022 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years."

14. Taking note of above, the Division Bench of Delhi High Court in "Pr. CIT Vs. Era Infrastructure (India) Ltd., Judgment dated 20.07.2022" (supra), considering the question whether the Explanation inserted to Section 14A of Act of 1961 is retrospective or prospective in nature, has held as under:

"However a perusal of the Memorandum of the Finance Bill, 2022 ([2022] 440 ITR (St.) 226) reveals that it explicitly stipulates that the amendment made to Section 14A will take effect from 1st April, 2022 and will apply in relation to the assessment year 2022-23 and subsequent assessment years. The relevant extract of Clauses 4, 5, 6 & 7 of the Memorandum of Finance Bill, 2022

... ..

Furthermore, the Supreme Court in Sedco Forex International Drill. Inc. v. CIT, (2005) 12 SCC 717 has held that a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. The relevant extract of the said judgment is reproduced herein below (page 316 of 279 ITR)

"The High Court did not refer to the 1999 Explanation in upholding the inclusion of salary for the field break periods in the assessable income of the employees of the appellants. However, the respondents have urged the point before us. In our view the 1999 Explanation could not apply to assessment years for the simple reason that it

had not come into effect then. Prior to introducing the 1999 Explanation, the decision in CIT v. S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] was followed in 1989 by a Division Bench of the Gauhati High Court in CIT v. Goslino Mario [(2000) 241 ITR 314 (Gau)] . It found that the 1983 Explanation had been given effect from 1-4-1979 whereas the year in question in that case was 1976-77 and said (page 318) :

'.....It is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question had somehow remained pending on 1-4-1979, cannot be cogent reason to make the Explanation applicable to the cases of the present assesseees. This fortuitous circumstance cannot take away the vested rights of the assesseees at hand.' The reasoning of the Gauhati High Court was expressly affirmed by this Court in CIT v. Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312].

These decisions are thus authorities for the proposition that the 1983 Explanation expressly introduced with effect from a particular date would not effect the earlier assessment years. In this state of the law, on 27-2-1999 the Finance Bill, 1999 substituted the Explanation to Section 9(1)(ii) (or what has been referred to by us as the 1999 Explanation). Section 5 of the Bill expressly stated that with effect from 1-4-2000, the substituted Explanation would read:

'Explanation.--For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for—

(a) service rendered in India; and

(b) the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment, shall be regarded as income earned in India."

The Finance Act, 1999 which followed the Bill incorporated the substituted Explanation to Section 9(1)(ii) without any

change. The Explanation as introduced in 1983 was construed by the Kerala High Court in CIT v. S.R. Patton [(1992) 193 ITR 49 (Ker)], while following the Gujarat High Court's decision in CIT v. S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] to hold that the Explanation was not declaratory but widened the scope of Section 9(1)(ii).

It was further held that even if it were assumed to be clarificatory or that it removed whatever ambiguity there was in Section 9(1)(ii) of the Act, it did not operate in respect of periods which were prior to 1-4-1979. It was held that since the Explanation came into force from 1-4-1979, it could not be relied on for any purpose for an anterior period. In the appeal preferred from the decision by the Revenue before this Court, the Revenue did not question this reading of the Explanation by the Kerala High Court, but restricted itself to a question of fact viz. whether the Tribunal had correctly found that the salary of the assessee was paid by a foreign company. This Court dismissed the appeal holding that it was a question of fact. (CIT v. S.R. Patton [(1998) 8 SCC 608]. Given this legislative history of Section 9(1)(ii), we can only assume that it was deliberately introduced with effect from 1-4-2000 and therefore intended to apply prospectively [See CIT v. Patel Bros. & Co. Ltd., (1995) 4 SCC 485, 494.

It was also understood as such by CBDT which issued Circular No. 779 dated 14-9-1999 containing Explanatory Notes on the provisions of the Finance Act, 1999 insofar as it related to direct taxes. It said in paras 5.2 and 5.3 :

'5.2 The Act has expanded the existing Explanation which states that salary paid for services rendered in India shall be regarded as income earned in India, so as to specifically provide that any salary payable for the rest period or leave period which is both preceded and succeeded by service in India and forms part of the service contract of employment will also be regarded as income earned in India.

5.3 This amendment will take effect from 1-4-2000, and will accordingly, apply in relation to Assessment Year 2000-01 and subsequent years.'

The departmental understanding of the effect of the 1999 Amendment even if it were assumed not to bind the respondents under Section 119 of the Act, nevertheless affords a reasonable construction of it, and there is no reason why we should not adopt it. As was affirmed by this Court in *Goslino Mario* [(2000) 10 SCC 165 : (2000) 241 ITR 312] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also *Reliance Jute and Industries Ltd. v. CIT* [(1980) 1 SCC 139 : 1980 SCC (Tax) 67] .)

An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See *Sonia Bhatia v. State of U.P.*, (1981) 2 SCC 585, 598 : AIR 1981 SC 1274, 1282 para 24] . If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See *Shyam Sunder v. Ram Kumar*, (2001) 8 SCC 24 (para 44); *Brij Mohan Das Laxman Das v. CIT*, (1997) 1 SCC 352, 354; *CIT v. Podar Cement (P) Ltd.*, (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts". (emphasis supplied)

7. The aforesaid proposition of law has been reiterated by the Supreme Court in *M.M Aqua Technologies Ltd. V. Commissioner of Income Tax, Delhi-III*, [2021] SCC OnLine SC 575. The relevant portion of the said judgment is reproduced hereinbelow (page 597 OF 436 ITR):-

"Second, a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in *Sedco Forex International Drill. Inc. v. CIT*, (2005) 12 SCC 717 as follows (page 318 of 279 ITR): `17. As was affirmed by this Court in *Goslino Mario* [(2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is

in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also *Reliance Jute and Industries Ltd. v. CIT* [(1980) 1 SCC 139].)

An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See *Ku. Sonia Bhatia v. State of U.P.*, (1981) 2 SCC 585]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See *Shyam Sunder v. Ram Kumar*, (2001) 8 SCC 24; *Brij Mohan Das Laxman Das v. CIT*, (1997) 1 SCC 352; *CIT v. Podar Cement (P) Ltd.*, (1997) 5 SCC 482]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".

18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in *S.G. Pgnatale* [(1980) 124 ITR 391 (Guj)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

19. When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively." (emphasis supplied) Consequently, this Court is of the view that the amendment of Section 14A, which is "for removal of doubts" cannot

be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood.”

15. In Pr.CIT Vs. M/s Era Infrastructure India Ltd., order dated 16.07.2024 (supra), the Delhi High Court, relying on the decision rendered in “Pr.CIT Vs. Era Infrastructure (India) Ltd., Judgment dated 20.07.2022” (supra), has dismissed the appeal preferred on behalf of the Revenue.

16. The High Court of Kolkata in M/S Jas Toll Road Company Ltd. (supra) has dismissed the appeal filed by the Revenue while relying on the decision of the Delhi High Court rendered in “Pr.CIT Vs. Era Infrastructure (India) Ltd., Judgment dated 20.07.2022” (supra) and held that the explanation inserted to Section 14A by Finance Act, 2022 will be applicable prospectively. The operative portion of the decision rendered in M/s Jas Toll Road Company Ltd. (supra) is reproduced hereunder:

“Upon careful consideration and going through the materials on record we find that the learned tribunal was fully justified in dismissing the appeal filed by the revenue affirming the order passed by the Commissioner of Income Tax [Appeals], Kolkata-20. The issue involved in the case is that **whether disallowance under Section 14A of the Act can be made even if the assessee has not earned any exempt income, the issue is no longer res integra and there are several decisions to the effect that amendment made under Section 14A of the Act by Finance Act, 2022 will be applicable prospectively and disallowance should not exceed the exempt income earned by the assessee during the year.** The PCIT has also noted the decision of the Hon’ble Supreme Court in CIT vs. Chettinad Logistics Pvt. Ltd [2018] 95 taxmann.com 250 and PCIT-18 vs. Oil Industries Development Board, SLP (Civil) Diary No.2755/2019. Thus, we find no ground to interfere with the order passed by the learned tribunal. Accordingly, the appeal is dismissed and the substantial questions of law are answered against the revenue.”

17. In *Avantha Realty Ltd.* (supra), the High Court of Calcutta, relying on the decision of Delhi High Court, rendered in **“Pr.CIT Vs. Era Infrastructure (India) Ltd., Judgment dated 20.07.2022”** (supra), **has dismissed the appeal filed by the Revenue and held that the Explanation inserted to Section 14A by Finance Act, 2022 will be applicable prospectively.** The operative portion of the decision in *Avantha Realty Ltd.* (supra) reads as under: “Substantial questions Nos. D & E pertain to the deletion of the disallowance made under Section 14A of the Act. The learned Tribunal took note of the decision of the High Court of Delhi in *Era Infrastructure (India) Ltd.* (supra), which had taken note of the decision in the case of *Cheminvest Ltd.* (supra), **wherein it was held that amendment by the Finance Act, 2022 of Section 14 A of the Act by inserting a non-obstante clause and explanation we take effect from 01.04.22 and cannot be presumed to have retrospective effect and, therefore, on facts the amendment cannot be applied to the assessment year under consideration. We find no error in such conclusion arrived at by the learned Tribunal. Accordingly, substantial questions of law No. D & E are decided against the revenue.”**

18. Later on, the **Delhi High Court, in *Uniparts India Ltd.*** (supra), has made a specific statement that so far as the applicability of Explanation inserted to Section 14A by Finance Bill, 2022 is concerned, it is settled that the same will apply prospectively.

19. The **High Court of Madhya Pradesh** has also followed the same view in *Principal Commissioner of Income Tax (Central) Vs. Keti Construction Ltd.*, reported in [2024] 162 taxmann.com.

20. In view of the Memorandum Explaining the Provisions in the Finance Bill, 2022 and various decisions rendered by the different High Courts, we also hold that the Explanation inserted to Section 14A vide Finance Act, 2022 is applicable prospectively. In view of above discussions, the substantial questions of law framed in these appeals are answered as follows:

(i) the order passed by the Tribunal dated 06.07.2022, holding that insertion of Explanation to Section 14A of the Income Tax Act, 1961 is clarificatory and thereby retrospective in nature, is erroneous in law.

(ii) the findings of the Tribunal to the effect that the insertion of Explanation to Section 14A of the Income Tax Act, 1961 is clarificatory, is contrary to the legislative intention as expressed in Memorandum to the Finance Bill, 2022.

21. Consequently, we allow the present appeals. The impugned order dated 06.07.2022 passed by the Tribunal in ITA Nos.159/Gau/2019, 154/Gau/2019, 155/Gau/2019 and 156/Gau/2019 is set aside and the orders passed by the CIT(A) dated 31.01.2019 are affirmed.

22. We have also taken note of the fact that the Bench of the Tribunal, in earlier decision dated 09.11.2022 rendered in ITA No.103/Kol/2021, while relying on decision of Delhi High Court in "Pr.CIT Vs. Era Infrastructure (India) Ltd., Judgment dated 20.07.2022" (supra) has held that the Explanation inserted to Section 14A is applicable prospectively. However, the same Bench, while deciding the Miscellaneous Applications (supra), preferred on behalf of the appellants subsequently has concluded that the decision of the Delhi High Court is not binding the Tribunal. Having taken note of the above fact, while restraining ourselves from making harsh comments, we can only say that such a conduct of the members of an authority, which is discharging judicial functions, cannot be appreciated. Any authority discharging judicial functions is expected to maintain consistency in its views in respect of judicial matters because any unjust deviation may affect the credibility of such authority.

14.2. Respectfully following the above judicial precedents rendered by various High Courts, **we hold that the reliance placed by the Ld CIT[A] to confirm the disallowance made u/s.14A is legally not tenable and liable to be deleted.**

15. Third fold of submission of the assessee namely own funds of the Assessee were much more than the investments made by the Assessee, hence no disallowance be made u/s.14A of the Act on account of interest expenditure. It is seen from records as against Investments of Rs.2652.4 crores, assessee has interest free funds of Rs.2928.17 crores as on 31.03.2016 i.e. almost 1.1 times of the advances, which fact is not in dispute by the Revenue. The CIT(A)'s contention that some of the reserves do not generate cash and hence cannot be considered as available for making investments is contrary to judicial pronouncements on the subject, as no such condition has been laid down in those judgements. The Hon'ble Karnataka High Court in the case of CIT -Vs- Microlabs Ltd., [2016] 383 ITR 490 (Karn) summed up the law on the issue after noticing the availability of own funds as per Balance Sheet of the Assessee and after digesting all decisions on the subject. The Hon'ble High Court noticed the decision of the Hon'ble Bombay High Court in **Reliance Utilities & Power Ltd 313 ITR 340 (Bom), which was later confirmed by the Hon'ble Supreme Court in SLP No. 37/2019 vide order dated 02-01-2019, wherein it was held that where the interest free funds far exceed the value of investments, it should be considered that investments have been made out of interest free funds and no disallowance u/s. 14A towards any interest expenditure can be made.** The Hon'ble Court referred to the Judgment of Hon'ble Bombay High Court in CIT Vs. HDFC Bank ITA No.330 of 2012 dated 23.7.2014, wherein it was held that when investments are made out of common pool of funds and non-interest bearing funds were more than the investments in tax free securities, no disallowance of interest

expenditure u/s. 14A can be made. The Hon'ble Court accepted the ratio laid down in these decisions and held that no disallowance can be made u/s.14A of the Act, when own funds available were far more than the investments made by the Assessee.

15.1. Hon'ble Supreme Court in the case of CIT -Vs- UTI Bank Ltd. reported in [2022] 142 taxmann.com 136 held that where interest free own funds available with assessee exceeded their investments in tax free securities, investments would be presumed to be made out of assessee's own funds and proportionate disallowance was not warranted u/s.14A of the Act by observing as follows:

"Section 14A of the Income-tax Act, 1961 - Expenditure incurred in relation to income not includible in total income (Tax-free bonds/securities) - Whether legal issue relating to disallowance under section 14A was squarely covered by Supreme Court in South Indian Bank Ltd. v. CIT [2021] 130 taxmann.com 178/283 Taxman 178/438 ITR 1/ [2021] 10 SCC 153 **wherein it was held that since interest free own funds available with assessee exceeded their investments in tax-free securities, investments would be presumed to be made out of assessee's own funds and proportionate disallowance was not warranted under section 14A of the Act**".

15.2. Hon'ble Supreme Court in the case of South Indian Bank Ltd -Vs- CIT reported in [2021] 130 taxmann.com 178 (SC) held as follows:

"Section 14A of the Income-tax Act, 1961 - Expenditure incurred in relation to exempt income not includible in total income (General) - Assessee-scheduled banks earned income from investments made in tax-free securities - Assessing Officer made proportionate disallowance of interest attributable to funds

invested to earn tax free income under section 14A on grounds that separate accounts were not maintained for investment in tax-free securities - **Whether since interest free own funds available with assessee exceeded their investments; investments would be presumed to be made out of assessee's own funds and proportionate disallowance was not warranted under section 14A on ground that separate accounts were not maintained by assessee for investments and other expenditure incurred for earning tax-free income.**

15.3. Respectfully following the above judicial precedents rendered by Hon'ble Apex Court and various High Courts, **we hold that the disallowance made by the Ld AO u/s.14A is legally not tenable and liable to be deleted.**

16. Fourth fold of submission of the assessee namely it is mandatory for the AO to record dis-satisfaction as required u/s. 14(2) of the Act. The Assessee company has made suo-motu disallowance of Rs.3,93,211/- under section 14A of the Act while filing its return of income. But the AO without recording his dissatisfaction as to the disallowance made by assessee u/s 14A is correct or not and simply brushed aside assessee's working of suo-motu disallowance without assigning any valid reason for rejecting the same or without finding any defect in the same. Thus, there is no satisfaction on the part of AO, as contemplated u/s 14A(2), as to why the claim of the assessee is incorrect. It is well settled that where AO does not record satisfaction as per section 14(2) of the Act, AO cannot apply Rule 8D for computing disallowance u/s.14A of the Act. Under such circumstances, no further disallowance over and above suo-motu disallowance made by the assessee u/s 14A of the Act is called for.

16.1. In this connection reliance is placed on Jurisdictional High Court in the case of PCIT -Vs- CIMS Hospital Pvt Ltd. reported in (2021) 125 taxmann.com 227 held that where Assessing Officer did not record satisfaction as per section 14A[2], Rule 8D could not be applied for computation of amount of expenditure to be disallowed u/s.14A of the Act by observing as follows:

"... 6. In order to consider whether the Tribunal has the correctly deleted disallowance made under section 14A of the Act-1961 read with rule 8D of the Rules-1962, it would be germane to refer section 14A of the Act-1961, which reads thus:—

"Expenditure incurred in relation to income not includible in total income:--

14A. (1) 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."

7. On perusal of the aforesaid provisions, it is clear that to determine the amount of expenditure incurred by the assessee in relation to the income which does not form part of the total income under the Act-1961, the Assessing Officer can apply the method to calculate such expenditure as provided under Rule 8D of the Rules-1962 only if the Assessing Officer having regard to accounts of the assessee is not satisfied with the correctness of the claim made by the assessee in respect of such expenditure in relation to the exempted income under the Act-1961. Thus, pre-condition for applying rule 8D of the Rules-1962, the Assessing Officer is required to be satisfied as provided in sub-section 2 of section 14A of the Act-1961.

8. In the aforesaid context, we may refer recent pronouncement of this Court in the case of Pr. CIT v. Gujarat State Fertilizer & Chemicals Ltd [2019] 108 taxmann.com 560/416 ITR 13 (Guj), wherein this Court has observed as under:-

"17. This Court, in Shreno Limited (supra), has taken the view that Maxopp Investment Limited (supra) cannot be seen or understood to be fundamentally changing the understanding and interpretation of section 14A and Rule 8D. It went on to hold that the judgment of the Supreme Court does not lay down the proposition that, the requirement of sub-rule (1) of rule 8D of recording the satisfaction by the Assessing Officer before applying the formula given in sub-rule (2) of rule 8D is done away with. It clarifies that the judgment in the case of Maxopp Investment Limited does not lay down a proposition that the moment it is demonstrated that the assessee had availed of mixed funds and utilized them for making investment into securities earning tax free income, Section 14A read with rule 8D would be attracted automatically. The assessee has further relied on the judgment in the case of Principal Commissioner of Income-tax v. Gujarat State Financial Services Limited in the Tax Appeals Nos.1252, 1253 and 1255 of 2018 decided on 15th August 2018, which has followed the decision in the case of Shreno Limited (supra) dealing with the same issue and also an identical argument taken by the department.

18. The language of section 14A of the Act is plain and clear. Before invoking rule 8D, the Assessing Officer is obliged to indicate that having regard to the accounts of

the assessee, he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to the income which does not form part of the total income under the Act. To put it in other words, the condition precedent of recording the requisite satisfaction which is a safeguard provided in section 14A should not be overlooked before going to rule 8. In such circumstances we are not impressed by the submission canvassed on behalf of the Revenue that once there are mixed funds, rule 8 would be attracted automatically."

9. The Tribunal has arrived at finding of fact that as the Assessing Officer did not record any satisfaction under section 14(2) of the Act-1961 prior to invoking rule 8D, he could not have made any disallowance by applying rule 8D of the Rules-1962.

10. We are in agreement with the finding of facts arrived at by the Tribunal. Therefore, Question No. 2(A) as proposed by the Revenue cannot be termed as substantial question of law arising from the impugned order of the Tribunal. "

16.2. Since this issue also now settled by Jurisdictional High Court **we hold that the disallowance made invoking Rule 8 without recording dis-satisfaction by the Assessing Officer is against the provisions of section 14[2] and the addition is liable to be deleted.**

17. In the result **the Ground Nos. 1 to 4 raised by the assessee are hereby allowed.**

18. **Ground Nos. 5 to 6** are relating to Ld. CIT(A) has erred in law and facts in confirming the action of AO in confirming the **disallowance of depreciation on goodwill** arising out of amalgamation of Rs.132,47,53,370/- u/s.32 of the Act. Both the Ld Counsel Mr. Soumitra Choudhury appearing for the assessee

and the Ld CIT DR Shri Prithviraj Meena appearing for the Revenue filed a detailed Written Submission.

18.1. Before entering into the merits of the case, preliminary objections raised by the Ld CIT DR Shri Prithviraj Meena on the Scheme of Amalgamation are as follows:

1. The Hon'ble NCLT did not issue any notice pertaining to the composite scheme of arrangement to the Income Tax Department. It can be seen in Para 3 of the NCLT order dated 31.05.2017 wherein list of Departments have been given from where the Hon'ble Tribunal has asked for representations and in the said list at Sr. No. (iv) the order merely states concerned Tax Authorities' without specially listing out the relevant Departments.
2. In addition the above, it is also stated on Page 12, at point (vi) of Para 15 of the said order, that the Regional Director had sent letter dated 27.10.2016 to the Income Tax Department but no response was received by it from the Department and no representation was filed from the Income Tax Authorities in response to the notice served in the month of April 2017. No response does not mean that the appellant by amalgamation skip the statutory tax liability. The amalgamation has been carried out as per Companies Act but Statutory taxes will be applicable as per Income Tax Act.

The valuation report of Goodwill was prepared by the valuer on 08.07.2017 whereas the NCLT passed its order on 31.5.2017. This proves that the Valuation of Goodwill was carried out after the order passed by the NCLT. Therefore, it is established that the NCLT never sent the Goodwill valuation report to the Income Tax Department even if any notice was sent to the department.

- 3 Moreover, the company too did not give any prior notice/information about the said scheme of arrangement to the Department.

18.2. In reply Mr. Soumitra Choudhury the Ld Counsel appearing for the assessee submitted that when a Scheme of Amalgamation has been duly approved by the Competent Authority namely NCLT,

the Revenue cannot seek to review the terms of the scheme and come to a conclusion that the excess consideration paid over and above the net worth of the transferor company cannot be regarded as "Goodwill" and a tangible asset on which depreciation is to be allowed as per Sec.32 of the Act. The Scheme of Amalgamation has been duly approved by NCLT vide order dated 31.05.2017 which is at placed at page nos.100-114 of the Paper Book. It is also pertinent to mention in the proceedings before the NCLT, Income-tax Department was duly served with the notice and was asked to raise objection (if any) to the Scheme of Amalgamation. However, despite service of notice, the Income-tax Department choose not to raise any objection before NCLT (the relevant observations of the NCLT are placed at page nos.100-114 @ 101, 102, 111 of Paper Book).

18.3. Our attention is also drawn to the finding of the AO in the assessment order at Page no.29, Para 5.2 that the Revenue is not challenging the Scheme of Amalgamation, **but is merely challenging the claim depreciation on goodwill as a result of amalgamation.** Thus the Ld Counsel submitted that once Revenue accepts Scheme of Amalgamation duly approved by NCLT, then effect of such amalgamation has to be given in its entirety and accordingly, depreciation on resultant goodwill has to be allowed. Revenue cannot blow hot and cold simultaneously i.e. 'accept the scheme of amalgamation' but reject the claim of depreciation on the resultant goodwill'.

18.4. After hearing rival submissions, we directed the Revenue to get a report “Whether the NCLT order dated 31-05-2017 was challenged by the Income Tax Department before National Company Law Appellate Tribunal or any Higher Forums ? ”. In reply the **Jurisdictional Assessing Officer vide his letter dated 20-09-2024** submitted as follows:

“Respected Sir,

(Kind attention: /TO,ITAT-2, D Bench, Ahmedabad)
Sub: Appeal in ITA No. 198 & 199/Ahd/2023, 302 & 303/Ahd/2023
in the case of Suzlon Energy Ltd. PAN- AADS0472N for A.Y.
2016-17 and 2017-18- reg.

Ref: Letter No. CIT(DR)/(ITAT)-4/Suzlon Energy/Appeal/'D' Bench/
2024-25 dated 18/09/2024

Kindly refer to the above referred letter of your office wherein it has been intimated that Hon'ble members of ITAT, Ahmedabad desire to know whether Department filed appeals against the order passed by NCLT in the issue of Amalgamation in the case of the assessee.

2. In this regard, it is submitted that SE Electricals Limited, SE Blades Limited & Suzlon Wind International Limited (Transferor Companies) and Suzlon Wind International Limited (Demerged Company) was amalgamated with Suzlon Energy Limited, PAN: AADCS0472N] with effect from 01.01.2016 as per National Company Law Tribunal (NCLT) order dated 31.05.2017. **The department has not filed any appeal against the said order of NCIT.**

Submitted for your kind perusal.

Yours faithfully, ”

18.5. Since the department has not filed any appeal against the said order of NCLT, that order has attained finality. The Revenue if aggrieved against NCLT order, it ought to challenged the same in the manner known to law in the appropriate Forum, having not

done so, it is not open to the Revenue to raise this Ground before this Tribunal. Therefore in our considered view the argument of the Revenue is hereby liable to be rejected.

19. On merits of the case, Ld Counsel submitted that a detailed explanation about the nature of the proposed amalgamation was provided to the AO and it was explained as to how the :-

- Decision of amalgamation' was based on 'commercial expediency';
- Assessee acquired the three subsidiaries on 'going concern basis'
- 'Scheme of amalgamation' was 'approved by NCLT';
- Revenue did not raise any objections before 'NCLT'.
- 'Scheme of amalgamation' has to be given 'effect in its entirety'.

19.1. Therefore Ld Counsel submitted that depreciation on goodwill arising on account of amalgamation has to be allowed. It is well settled legal proposition that in case of amalgamation, if consideration paid by "amalgamated company" to the "amalgamating company" is more than the "net assets" acquired by it, then the "differential amount" shall be treated as "goodwill" and the amalgamated company shall be eligible for claiming depreciation on such goodwill. Reliance is placed on following decisions:

CIT vs. Smifs Securities Ltd. - (2012) 348 ITR 302 (SC);
PCIT vs. Zydus Wellness Ltd. - (2017) 87 taxmann.com 82 (Guj);
PCIT vs. Zydus Wellness Ltd. - SLP 29859 of 2018 (SC);
Urmin Marketing P. Ltd. - (2020) 122 taxmann.com 40 (Ahd);
KIFS International LLP vs. DCIT - ITA 557/Ahd/2022;
M/s. Suzlon Global Services Ltd. vs. PCIT - ITA 67-68/ Ahd/2021

20. Per contra Ld CIT DR Shri Prithviraj Meena appearing for the Revenue filed a detailed Written Submission on this issue which are nothing but the findings recorded by the Ld AO, which were confirmed by the Ld CIT[A].

21. We have given our thoughtful consideration and perused the materials available on record including the Paper Book and Case laws compilation. Facts of the case is already discussed in paragraph 4 to 5.1 herein above, therefore the same is not repeated here.

21.1. The Ld AO denied the claim for depreciation on goodwill by placing reliance on few statutory provisions. The relevant statutory provisions relied by the Ld AO and as to **how those provisions are not applicable to the facts of the assessee case are set out below:**

(i) Sixth proviso to S.32(1) of the Act which provides that the aggregate deduction in respect of depreciation of tangible and intangible assets allowable to the amalgamating company and the amalgamated company in the case of amalgamation, [or to the demerged company and the resulting company in the case of demerger], as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates, as if the amalgamation or demerger had not taken place, and such deduction shall be apportioned between the amalgamating company and the amalgamated company or [the demerged company and resulting company], as the case may be in the ratio of the number of days for which the assets were used by them.

Whether it will come into operation when goodwill was not an item of asset in the hands of the amalgamating and amalgamated company and comes into existence for the first time as a result of excess consideration paid over and above the net value of the assets transferred in the process of amalgamation.

(ii) Section 49(1)(iii)(e) which deals with cost of acquisition in the hands of the previous owner, which is not applicable in the present case as the Goodwill was never the asset of the previous owner.

(iii) Explanation 7 to Section 43(1): Where an asset is acquired by amalgamating company, without incurring any financial outlay and such asset is transferred to amalgamated company without incurring any financial outlay. The Assessee did incur financial outlay and hence this provision prior to the Amendment will not be applicable.

(iv) Explanation 2(b) to Section 43(6)(c); Explanation 2 to Section 43(6) of the Act, provides for cases where block of assets is transferred to amalgamated company, then the WDV of the block has to be taken as cost for the purpose of allowing depreciation. Whether it will apply in a case where an existing block of asset is transferred to goodwill comes into existence only for the first time because of excess consideration paid, is to be considered.

(v) Section 55(2)(a)(ii) of the Act prior to its amendment did not provide that it is only goodwill acquired by paying a purchase price that will be considered as cost of acquisition and not goodwill which is created owing to difference between price at which

amalgamation or merger takes place and there is a difference between the net worth of the business taken over and consideration paid for acquiring the business. Now the amended provisions substituted clause (a) of subsection (2) to provide that in relation to a capital asset, being goodwill of a business or profession, or a trade mark or brand name associated with a business or profession, or a right to manufacture, produce or process any article or thing, or right to carry on any business or profession, or tenancy rights, or stage carriage permits, or loom hours, only on price paid for purchase of the Asset.

22. Further in the following decisions, the above provisions have been considered and it has been held that such aspects will not be valid grounds to deny the claim of depreciation on goodwill.

22.1. Hon'ble Supreme Court in the case of CIT vs. Smifs Securities Ltd. - (2012) 348 ITR 302 (SC) held as follows :

Question No. [b]: "Whether goodwill is an asset within the meaning of Section 32 of the Income Tax Act, 1961, and whether depreciation on 'goodwill' is allowable under the said Section?"

Answer: In the present case, the assessee had claimed deduction of Rs. 54,85,430/- as depreciation on goodwill. In the course of hearing, the explanation regarding origin of such goodwill was given as under:

"In accordance with Scheme of Amalgamation of YSN Shares & Securities (P) Ltd with Smifs Securities Ltd (duly sanctioned by Hon'ble High Courts of Bombay and Calcutta) with retrospective effect from 1st April, 1998, assets and liabilities of YSN Shares & Securities (P) Ltd were transferred to and vest in the company. In the process goodwill has arisen in the books of the company."

2. It was further explained that excess consideration paid by the assessee over the value of net assets acquired of YSN Shares and Securities Private Limited [Amalgamating Company] should be considered as goodwill arising on amalgamation. It was claimed that the extra

consideration was paid towards the reputation which the Amalgamating Company was enjoying in order to retain its existing clientele.

3. The Assessing Officer held that goodwill was not an asset falling under Explanation 3 to Section 32(1) of the Income Tax Act, 1961 ['Act', for short].

We quote hereinbelow Explanation 3 to Section 32(1) of the Act:

"Explanation 3. -- For the purposes of this sub-section, the expressions 'assets' and 'block of assets' shall mean—

[a] tangible assets, being buildings, machinery, plant or furniture;

[b] intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature."

4. Explanation 3 states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading the words 'any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression 'any other business or commercial right of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b).
5. In the circumstances, we are of the view that 'Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act.
6. One more aspect needs to be highlighted. In the present case, the Assessing Officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The Commissioner of Income Tax (Appeals) ['CIT(A)', for short] has come to the conclusion that the authorised representatives had filed copies of the Orders of the High Court ordering amalgamation of the above two Companies; that the assets and liabilities of M/s. YSN Shares and Securities Private Limited were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-Company stood increased. This finding has also been upheld by Income Tax Appellate Tribunal ['ITAT', for short]. We see no reason to interfere with the factual finding.
7. One more aspect which needs to be mentioned is that, against the decision of ITAT, the Revenue had preferred an appeal to the High Court in

which it had raised only the question as to whether goodwill is an asset under Section 32 of the Act. In the circumstances, before the High Court, the Revenue did not file an appeal on the finding of fact referred to hereinabove.

8. For the afore-stated reasons, we answer Question No.[b] also in favour of the assessee.”

22.2. The above Apex Court judgement is followed by the Jurisdictional High Court in the case of PCIT -Vs- Zydus Wellness Ltd and held as follows:

“ 3. The remaining questions no. (E) to (I) relate to the assessee's claim of depreciation. In the return filed for the assessment year 2010-11, the assessee had not raised such a claim. However, during the course of assessment proceedings, the assessee presented revised computation which included the assessee's claim of depreciation of Rs.7.19 crores on the goodwill expanded at the time of amalgamation of the companies. The assessee pointed out that such claim would be allowable by virtue of the judgement of the Supreme Court in case of CIT v. Smifs Securities Ltd. [2012]_348 ITR 302/210 Taxman 428/24 taxmann.com 222. The Assessing Officer disallowed the claim on two grounds. Firstly, that the claim was not made in the original return nor did the assessee file the revised return. The second ground was that the claim was fictitious and the goodwill has been accounted as a balancing factor in the hands of the assessee without acquisition of an intangible asset as contemplated under Section 32 of the Act.

4. The assessee carried the matter in appeal. The CIT (Appeals) as well as the Tribunal both ruled in favour of the assessee. With respect to raising an additional claim without revising the return the Tribunal relied on the decision of the Bombay High Court in case of CIT v. Pruthvi Brokers & Shareholders (P.) Lid. 2012] 349 ITR 336/208 Taxman 498/23 taxmann.com 23. With respect to the claim of depreciation on acquisition of goodwill, the Tribunal relied on the decision of the Supreme Court in case of Smifs Securities Ltd [supra].

....

6. With respect to the claim of depreciation, the decision of Supreme Court in case of Smifs Securities Ltd. (supra) would squarely apply. **There is no material referred to by the Assessing Officer to hold that the claim of depreciation was fictitious. If we read his entire expression in this respect, he seems to be suggesting that being an intangible asset**

acquisition thereof would not qualify for depreciation. If that be so, the view of the Assessing Officer was opposed to the decision of the Supreme Court in case of Smifs Securities Ltd. (supra). On the other hand, if the observations of the Assessing Officer can be seen as his findings that the claim itself was baseless, there was no discussion or reference to any material to enable him to come to such a conclusion.

7. In the result, tax appeal is dismissed.”

22.3. Revenue’s SLP against the above judgement is also dismissed by Hon’ble Supreme Court in SLP Diary No.29859 of 2018 dated 08-10-2018 as covered matter by following judgement of the Supreme Court in case of Smifs Securities Ltd.

22.4. Further the above judgement of Apex Court is followed by the Co-ordinate Bench of this Tribunal in the case of M/s. Urmin Marketing Pvt. Ltd. -Vs- DCIT (2020) 122 taxmann.com 40 (Ahd) and held that goodwill is a part and parcel of intangible assets and assessee is eligible for claim of depreciation on goodwill by observing as follows:

“Section 32 of the Income-tax Act, 1961 - Depreciation - Allowance/Rate of (Intangible assets) - Assessment year 2015-16 - A company namely, 'UPPL' amalgamated with assessee-company and all assets and liabilities of 'UPPL' became assets and liabilities of assessee - In return, assessee paid certain amount of purchase consideration to shareholder of 'UPPL' by issuing its fresh equity shares, resulting in excess payment of 4.86 billion over net book value of assets and liabilities acquired by it - Assessee treated said excess payment as goodwill and claimed depreciation on same which was disallowed by Assessing Officer - Whether in view of decision of Supreme Court in case of CIT v. Smifs Securities Ltd. [2012] 24 taxmann.com 222, since goodwill is a part and parcel of intangible assets, assessee was eligible for depreciation on goodwill.

.....

32.4. From the above, it would appear that the intent of the Legislature is to make amalgamation a tax neutral scheme for

companies as well as for the shareholders and not to provide a tax planning mechanism to either of them. However, a conjoint reading of the above provisions reveal that the assets which were transferred by the amalgamating company to the amalgamated company in the process of amalgamation were not made subject to the capital gain tax. Furthermore, the 6th proviso to section 32 of the Act has limited the amount of depreciation available to the amalgamated company post amalgamation to the extent of the amount of intangible assets/goodwill being self-generated assets. However, we note that all the relevant provisions of the Act as discussed above deal with respect to the assets available/recorded in the books of the transferor/amalgamating company. In other words, the assets which have been acquired by the assessee in the scheme of amalgamation would continue at the book value in the books of the amalgamated company. The question arises whether the goodwill shown by the assessee as discussed above was acquired in the scheme of amalgamation from the amalgamating company. The answer stands in negative. It is because there was no entry in the books of accounts of the amalgamating/ transferor company reflecting the value of the goodwill. As such, the amount of goodwill as claimed by the assessee represents the difference between the purchase consideration and the NAV acquired by it. The purchase consideration paid by the assessee was based on the valuation report as discussed above after considering the various factors. **Thus the assessee has not acquired any goodwill from the amalgamating/transferor company as alleged, accordingly the provisions of the Act i.e. 6 proviso to section 32, explanation 7 to section 43(1), explanation 2 to section 43(6)(c) of the Act cannot be applied to the case on hand.**

32.5. Normally, the issue/question of the goodwill arises when one company is acquired by another company. In other words, when one company transfers its business to another company against the consideration, the difference between the net value of the assets acquired and the purchase consideration paid by the transferee is regarded as goodwill/capital reserve as the case may be. The succeeding question arises whether such goodwill acquired by the assessee is eligible for depreciation under the provisions of section 32 of the Act. In this connection, we are inclined to refer to the provisions of section 32(1) of the Act which reads as under:

32. (1) In respect of depreciation of—

(i) buildings, machinery, plant or furniture, being tangible assets;

ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—

32.6 On perusal of the above provisions, we note that the word goodwill has nowhere been mentioned. However we note that, the Hon'ble Supreme Court in the case of Smifs Securities Ltd. (supra) reported in 348 ITR 302 has held that the goodwill falls within the definition of the assets under the category of any other business or commercial rights of similar nature. The relevant extract reads as under:

Explanation 3 to section 32(1) states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading of the words 'any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression 'any other business or commercial rights of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b). (Para 4)

In view of the above, it is opined that Goodwill is an asset under Explanation 3(b) to section 32(1). (Para 5)

In view of the above judgment, **there remains no ambiguity that the goodwill is part and parcel of intangible assets. Hence, the assessee is eligible for depreciation on the goodwill.**

32.7. Moving further, we note that for claiming the depreciation, among other conditions as provided under section 32 of the Act, one of the condition is that the assessee can claim depreciation on the goodwill being intangible asset if acquired on or after 1st day of April 1998. In other words, the assessee can claim depreciation on the goodwill acquired by it. Thus the controversy arises whether the goodwill generated in the scheme of amalgamation is acquired by the transferee company. Such controversy has been answered by the Hon'ble Supreme Court in the case of Smifs securities Ltd. (supra) by holding as under:

One more aspect needs to be highlighted. In the present case, the Assessing Officer, as a matter of fact, came to the conclusion that no

amount was actually paid on account of goodwill. This is a factual finding. The Commissioner (Appeals) has come to the conclusion that the assessee had filed copies of the orders of the High Court ordering amalgamation of the above two companies; that the assets and liabilities of 'Y' Ltd. were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-company stood increased. This finding has also been upheld by Tribunal. There is no reason to interfere with the factual finding. (Para 6)

From the above, there remains no ambiguity that the goodwill generated in the scheme of amalgamation is acquired by the assessee. Thus, in our considered view the assessee has complied all the conditions provided under section 32 of the Act. Accordingly, we are not convinced with the finding of the authorities below."

23. In our considered view, the basic fallacy in the approach of the Ld AO in this case is that he has proceeded further on the premise that the goodwill in question was transferred from "amalgamating company" to "amalgamated company" and hence depreciation on the same is not allowable in the eye of law. However, in the present case, as a matter of fact, "goodwill in question" is a "result of amalgamation" and has come into existence only pursuant to Scheme of Amalgamation duly approved by competent authority namely Hon'ble NCLT. Thus all the provisions relied upon by the Ld AO (enlisted hereinabove) would apply only in a case where an "asset" is "transferred" in the course of "amalgamation" by "transferor company" to the "transferee company" and would not apply when a particular "asset" is a "result" of amalgamation.

24. Further we need to take on record the law with regard to allowing depreciation on goodwill has since been amended by the Finance Act, 2021 by making the following statutory amendments:

Section 2(11): Definition of 'Block of Assets' has been amended to specifically provide that 'Goodwill of a Business or Profession' shall not form part of block of assets comprising of 'Intangible Assets'.

Section 32 (1)(ii): 'Goodwill of a Business or Profession' has been specifically excluded from the definition of assets on which depreciation shall be calculated.

Explanation 3(b) of Section 32(1): 'Goodwill of a Business or Profession' has been specifically excluded from the definition of intangible assets.

Section 43(6)(c)(ii): Definition of WDV of the block of assets has been amended to provide that written down value of Goodwill is required to be reduced from the Opening WDV in such cases, where the Goodwill is already forming part of Block of Assets.

Section 50: Computation of capital gains in case of depreciable assets has been amended to provide that where goodwill forms part of block of asset for assessment year 2020-21 and depreciation has been claimed, the written down value of the block and short-term capital gains would be determined in the prescribed manner. Rule 8AC has been prescribed for this purpose.

Section 55: Meaning of 'Cost of Acquisition' in case of Goodwill of Business or Profession has been amended to provide that

- in case it is acquired from a previous owner, the cost would be the amount of purchase price paid.
- in case it is acquired as a result of gift, amalgamation etc. and goodwill was acquired by previous owner
- cost will be the cost to the previous owner
- all other cases- cost will be NIL.

24.1. The reasoning given in the Memorandum explaining the Finance Bill, 2021 for excluding 'goodwill' from the ambit of intangible assets is that the actual calculation of depreciation of goodwill is required to be carried out in accordance with various other provision of the IT Act. Once those provisions are applied, in some situations (like that of business re-organization) there could be no depreciation on account of actual cost being zero and the WDV of that asset in the hands of the predecessor/amalgamating company being zero. It is further stated that goodwill, in general, is not a depreciable asset and it depends upon how the business runs, goodwill may see appreciation and in the alternative no depreciation to its value. Hence, for the said reasons assesseees have been barred from claiming depreciation on goodwill. These amendments are to take effect from 01st April 2021 and will accordingly apply to the assessment years 2021-22 and subsequent assessment years. Therefore the amendments in question will have no impact on the claim of the assessee company in this appeal which pertains to the Asst. Years 2016-17 and 2017-18. In view of the above findings depreciation on goodwill created as a result of amalgamation is allowable and directed the JAO to allow the same by passing appropriate orders.

24.2. In the result **the Ground Nos. 5 & 6 raised by the assessee are hereby allowed.**

25. Remaining Ground Nos. 7 to 11 are general and consequential Grounds, which does not require separate adjudication.

26. In the result the appeal filed by the Assessee in ITA No. 198/Ahd/2023 is hereby allowed.

27. Revenue's Appeal in ITA No.303/Ahd/2023 for the Asst. Year 2017-18 and the Grounds of Appeal raised by the Revenue is identical with that of the earlier Asst. year except change in figures.

28. The facts in the above case is identical with that of the earlier asst. year 2016-17 and therefore fully covered by the order passed in paragraphs 9 to 10 of this order, following the same **the appeal filed by the Revenue in ITA No.303/Ahd/2023 relating to the Asst. year 2017-18 is hereby dismissed.**

29. Assessee's Appeal in ITA No.199/Ahd/2023 for the Asst. Year 2017-18 and the Grounds of Appeal raised by the assessee Thus the two issues therein is fully covered by the order passed in paragraphs 13 to 25 of this order, following the same **the appeal filed by the Assessee in ITA No.198/Ahd/2023 relating to the Asst. year 2017-18 is hereby Allowed.**

30. In the **combined result the appeals filed by the Revenue are Dismissed** and the **appeals filed by the Assessee are hereby allowed.**

Order pronounced in the open court on 12-11-2024
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Sd/
(MAKARAND V MAHADEOKAR)
ACCOUNTANT MEMBER

Sd/
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

Ahmedabad :
Dated 12/11/2024

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद