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IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH: MUMBAI

BEFORE SHRI P.M. JAGTAP, ACCOUNTANT MEMBER
AND SHRI R.S. PADVEKAR, JUDICIAL MEMBER

ITA No.5779/Mum/2006
(Assessment Year: 2003-04)
ITA No.208/Mum/2009
(Assessment Year: 2004-05)

Avshesh Mercantile P. Ltd.
(Now merged with: Entity Communication Pvt. Ltd.)
84-A, Mittal Court,
224, Nariman Point,
Mumbai-400021 ……..Appellant

Vs

Dy. Commissioner of Income-tax,
Range -3(1),
Mumbai ....…Respondent
PAN : **AAACA 9469 L**

ITA No.5780/Mum/2006
(Assessment Year: 2003-04)

Adbhuth Trading Co. P. Ltd.,
Mumbai ……..Appellant

Vs

Dy. Commissioner of Income-tax,
Range -3(1),
Mumbai ....…Respondent
PAN : **AAACA 0984 A**

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ITA No.6194/Mum/2006
(Assessment Year: 2003-04)
ITA No.6742/Mum/2008
(Assessment Year: 2004-05)

Ascent Tradecom Private Limited,
(Now merged with: M/s. Evershine Traders Pvt. Ltd.)
84-A, Mittal Court, 224 Nariman Point,
Mumbai-400021 ……..Appellant

Vs

Dy. Commissioner of Income-tax,
Range -3(1),
Mumbai …….Respondent
PAN : **AAACA 3412 E**

ITA No.1427/Mum/2008
(Assessment Year: 2003-04)

Lavanya Holdings and Trading Pvt. Ltd.,
84-A, Mittal Court, 224 Nariman Point,
Mumbai-400021 ……..Appellant

Vs

Asst. Commissioner of Income-tax,
Range -3(2),
Mumbai …….Respondent
PAN : **AAACL 1945 J**

ITA No.6266/Mum/2006
(Assessment Year: 2003-04)

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Hansdhwani Trading Company Pvt. Ltd.,
84-A, Mittal Court,
224 Nariman Point,
Mumbai-400021 ....Appellant

Vs

Income-tax Officer 3(1)(4),
Mumbai .... Respondent
PAN : **AAACH 1014 Q**

ITA No.6032/Mum/2006
(Assessment Year: 2003-04)

Akshya Textiles Trading Agencies Pvt. Ltd.,
84-A, Mittal Court,
224 Nariman Point,
Mumbai-400021 ....Appellant

Vs

Income-tax Officer 3(1)(1),
Mumbai ....Respondent
PAN : **AAACA 6810 H**

ITA No.6033/Mum/2006
(Assessment Year: 2003-04)

Esteem Textiles Trading Pvt. Ltd.,
84-A, Mittal Court, 224 Nariman Point,
Mumbai-400021 ....Appellant

Vs

Income-tax Officer 3(1)(1),
Mumbai ....Respondent
PAN : **AAACE 0878 E**

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ITA No.5821/Mum/2006
(Assessment Year: 2003-04)

Dadhichi Texfab Pvt. Ltd.,
84-A, Mittal Court, 224 Nariman Point,
Mumbai-400021 ……..Appellant

Vs

Income-tax Officer 3(1)(1),
Mumbai …….Respondent
PAN : **AAACD 1413 H**

ITA No.6196/Mum/2006
(Assessment Year: 2003-04)

Marvel Shipping Pvt. Ltd.
(Previously known As: Arjun Shipping Private Ltd.),
84-A, Mittal Court, 224 Nariman Point,
Mumbai-400021 ……..Appellant

Vs

Deputy Commissioner of Income-tax
Range 3(1),
Aayakar Bhavan,
Mumbai …….Respondent
PAN : **AAACA 9462 B**

ITA No.6611/Mum/2006
(Assessment Year: 2003-04)

Kunjvan Texfab Pvt. Ltd.,
84A, Mittal Court, 224 Nariman Point,
Mumbai-400021 ……..Appellant

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Vs

Income-tax Officer 3(2)(2),
Aayakar Bhavan,
Mumbai …….Respondent
PAN : **AAACK 4548 G**

ITA No.7318/Mum/2008
(Assessment Year: 2004-05)

Vatayan Synthetics Pvt. Ltd.
(Now merged with: M/s. Entity Communication
Pvt. Ltd.),
84-A, Mittal Court, 224 Nariman Point,
Mumbai-400021 ……..Appellant

Vs

Dy. Commissioner of Income-tax- Circle-3(3),
Aayakar Bhavan,
Mumbai …….Respondent
PAN : **AAACV 1296 R**

ITA No.210/Mum/2009
(Assessment Year: 2003-04)

Ornamental Trading Enterprises Pvt. Ltd.,
(Now merged with: M/s. Entity Communication
Pvt. Ltd.),
84-A, Mittal Court, 224 Nariman Point,
Mumbai-400021 ……..Appellant

Vs

Income-tax Officer -3(2)(4),
Aayakar Bhavan,
Mumbai …….Respondent
PAN : **AAACV 1296 R**

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ITA No.1748/Mum/2009
(Assessment Year: 2004-05)

Chandragupta Traders Pvt. Ltd.,
84-A, Mittal Court, 224 Nariman Point,
Mumbai-400021 ……..Appellant

Vs

Deputy Commissioner of Income-tax
Range -3(1), Aayakar Bhavan,
Mumbai …..…Respondent
PAN : **AAACC 2263 J**

ITA No.6198/Mum/2006
(Assessment Year: 2003-04)

Lazor Syntex Pvt. Ltd.,
84-A, Mittal Court,
224 Nariman Point,
Mumbai-400021 ……..Appellant

Vs

Income-tax Officer -3(2)(1),
Aayakar Bhavan,
Mumbai …..…Respondent
PAN : **AAACL 0583 G**

Appellant by: Shri J.D. Mistry
Respondent by: Shri Subacham Ram
Date of hearing: 15.03.2012

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Date of Pronouncement: 13.06.2012

O R D E R

PER BENCH

The main issue involved in all these 16 appeals relating to disallowance made by the AO and confirmed by the learned CIT(Appeals) on account of the premium paid on redemption of premium notes by invoking the provisions of section 14A is common. These appeals, therefore, have been heard together and are being disposed of by a single composite order.

2. All the assessees in the present case are investment and trading companies. They issued unsecured optionally convertible premium notes of Rs.1 lakh each. As per the terms of the said issue, the premium note holders could convert the said premium notes into equity shares of the company at the end of maturity period or redeem the same at any time after the end of three years from the date of allotment. In case of early redemption, the premium note holder were entitled to a proportionate premium. During the year under consideration, the holders of premium notes got the said notes redeemed and accordingly proportionate premium was paid by the assessees to the premium note holders on redemption. The premium so paid was claimed by the assessee as deduction being allowable business expenditure. During the course of assessment proceedings, the claim of the assessee for deduction on account of premium paid on redemption of premium notes was examined by the AO. On such examination, he found that the amount received by the assessee on issue of premium notes was utilized for making investment in the purchase of shares of Reliance Utilities and Power Ltd. ('RUPL' in short) He also found that income arising from the said investment was exempt

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u/s 10(23G) of the Income-tax Act. He, therefore, required the assessee to explain as to why the premium paid on redemption of premium notes should not be disallowed u/s 14A. In reply, it was submitted on behalf of the assessee companies that they were engaged in the business of investment and finance since incorporation and since the amount received on issue of premium notes was invested in the shares of RUPL in the normal course of their business, the premium paid on redemption of premium notes was the expenditure incurred for the purpose of its business which should be allowed u/s 36(1)(iii). As regards the applicability of section 14A, it was submitted that the only income by way of dividend on shares was exempt from tax in respect of securities notified for the purpose of section 10(23G). It was submitted that since the said shares were also capable of generating other income in the form of short term capital gain, income from stock lending, income by way of fees for providing of shares, as collateral etc., and it was not a case wherein the borrowed funds were exclusively utilized for making investment in order to earn the exempt dividend income. It was contended that the premium paid on redemption of premium notes, therefore, could not be considered as expenditure incurred in relation to income which did not form part of total income of the assessee companies so as to attract the provisions of section 14A.

3. The submissions made on behalf of the assessee companies were not found acceptable by the AO. According to him, even though making of investment in shares was the object contained in the Memorandum and Articles of Association of the assessee companies, the same alone was not a conclusive yardstick to ascertain the nature of business activity carried on by the assessee in the year under consideration. He noted in this regard that even in the tax audit report, the nature of business of the assessee companies was indicated as “trading” but there was no

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cogent material to support and substantiate the case of the assessee companies that making of investments in the shares of RUPL was a part of their business activities. Accordingly the contention of the assessee that premium paid on redemption of premium notes was in the nature of expenditure incurred for the purpose of their business was rejected by the AO.

4. As regards the applicability of section 14A, the AO held that even though the investment in shares had not yielded any tax free income in the form of dividend in the year under consideration, the expenditure incurred in the form of premium paid on redemption of premium notes was in relation to earning of such exempt income. He, therefore, held that the provisions of section 14A were clearly applicable irrespective of the fact that no exempt income in the form of dividend was actually earned by the assessee in the year under consideration. He held that the only test that was required to be applied is whether the expenditure incurred was for the purpose of earning the exempt income or not. In this regard, he placed reliance on the decision of Hon'ble Supreme Court in the case of CIT vs. Rajendra Prasad Moody 115 ITR 519 and held that even if no income from shares of Reliance Utilities and Power Ltd. had been earned during the year under consideration in the form of dividend, the expenditure incurred on account of premium paid on redemption of premium notes was still liable to be disallowed u/s 14A. As regards the claim of the assessee for allocation of the expenditure incurred on premium with reference to different streams of income which the investment in shares was capable of generating, the AO held that it was for the assessee to establish their case supported by relevant fund flow statement. He noted that no such exercise, however, was made by the assessee and it was not possible to do the same even from the analysis of the balance sheet of the assessees. Accordingly the

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entire premium paid by the assessee on redemption of premium note was disallowed by the AO u/s 14A of the Act.

5. The matter was carried before the learned CIT(Appeals) by way of appeals filed by the assessees. It was submitted before the learned CIT(Appeals) that the assessee companies had raised funds from Reliance Chemicals Ltd. through issue of optionally convertible premium notes and the said funds were invested in shares of RUPL. It was contended that making such investment in shares was the business of the assessee companies and, therefore, the premium paid on redemption of premium notes was an allowable business expenditure being in the nature of interest u/s 36(1)(iii) since the same was incurred for making investment which was the business of the assessee companies. As regards the applicability of section 14A, it was contended that the whole of income derivable from the investment made in RUPL was not exempt from tax. It was submitted that the said investment was capable of earning other income in the form of short term capital gain, income by way of giving the premium notes as collateral etc. and such income not being exempt from tax, the provisions of section 14A were not applicable.

6. The learned CIT(Appeals) did not find merit in the submissions made on behalf of the assessee companies. He found on perusal of the profits & loss account of the assessee companies that the entire receipts of Rs.92.84 lakhs credited therein was on account of dividend and interest income. He held that the income from dividend was assessable to tax under the head "Income from other sources" by virtue of section 56(2)(i). He also held that interest income mainly received by the assessee company on investment made in debentures with RUPL was also chargeable to tax under the head "Income from other sources" and the same being exempt from tax, expenditure incurred by the assessee on payment of premium on redemption in relation to the said income was covered by the

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provisions of section 14A. He held that the said debentures were held by the assessee as investment and not as a trading asset and the expenditure incurred on payment of premium on redemption was not the expenditure incurred for the purpose of business. He held that the premium paid on redemption of premium notes which had been utilized by the assessee for making investment in shares/debentures of RUPL was allowable as deduction only against interest/dividend income received from RUPL and such income being totally exempt from tax u/s 10(23G), the premium paid was liable to be disallowed u/s 14A as rightly held by the AO. As regards the contention of the assessee that the investment in the shares of RUPL having potential to earn even the taxable income, the learned CIT(Appeals) rejected the same relying on the decision of Ahmedabad Bench of ITAT in the case of Hari Krishna Bhat vs. ITO reported in 91 ITD 311. In the said case, it was held by the Tribunal that the possibility of earning the income by way of capital gain on sale of shares in future may not be of any help to the assessee in advancing the contention that it was of indivisible source of income and, therefore, the expenditure could be allowable while computing the capital gain on sale of the said shares. The learned CIT(Appeals) held that the premium paid by the assessee on redemption of premium notes thus had a direct nexus with the investment made in the shares of RUPL and since the said investment had the potential of earning dividend income which was exempt from tax u/s 10(23G), premium paid was an expenditure incurred in relation to earning of exempt income which was liable to be disallowed u/s 14A. Reliance was also placed by the learned CIT(Appeals) on the decision of Hon'ble Supreme Court in the case Rajendra Prasad Moody (supra) to hold that the only requirement was that the expenditure must be laid out or expended exclusively for making or earning exempt income and not that such income must have been actually earned. He, therefore, upheld the disallowance made by the AO on account of entire

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premium paid by the assessee on redemption of premium notes by invoking the provisions of section 14A.

7. The learned counsel for the assessee at the outset explained the relevant facts of the case giving rise to this main issue as involved in the present appeals. He submitted that he proposes to put forth five propositions in support of the assessee's case while challenging the disallowance made by the AO and confirmed by the learned CIT(Appeals) on account of premium paid on redemption of premium notes by invoking the provisions of section 14A. He submitted as a first proposition that only the dividend income and income from long term capital gain from the shares of RUPL was exempt from tax u/s 10(23G). He submitted that the said investment made in the shares of RUPL had the potential of earning other income also in the form of short term capital gain, income from guarantee commission by offering the said shares as collateral security etc. He submitted that since such income was not exempt from tax, the premium paid on redemption of premium notes utilized for making investment in the shares of RUPL cannot be said to be expenditure incurred exclusively for earning of exempt income so as to attract the provisions of section 14A. He contended that the investment in shares of RUPL thus had the potential to earn exempt income as well as taxable income and the authorities below were not justified in proceeding to disallow the entire premium u/s 14A on the basis that the only potential income from the said shares was dividend which is exempt from tax.

8. The learned counsel for the assessee then put forth a second proposition that no exempt income in the form of dividend was actually received by the assessee from the shares of RUPL either in the year under consideration or even in any other year. In this regard, he relied on the decision of Madras Bench of ITAT in the case of Siva Industries and holdings Ltd. (ITA No.2148/Mad/2010) wherein

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it was held that if there is no income claimed to be exempt from tax by the assessee, disallowance u/s 14A cannot be made. He also relied on the decision of Hon'ble Bombay High Court in the case of Godrej and Boyce Manufacturing Co. Ltd. 328 ITR 91 wherein it was held at page 99 that as a result of section 14A, the permissible deduction can be allowed only with reference to income which is brought under one of those heads and is chargeable to tax. It was held that if the income does not form part of the total income, then the related expenditure is liable to be disallowed. It was held that a proximate cause for disallowance u/s 14A is the relationship of the expenditure with income which does not form part of the total income and once the same is established, the disallowance u/s 14A has to be effected. He also relied on the decision of coordinate bench of this Tribunal in the case of Delite Enterprises (ITA No.2983/M/2005) wherein it was held in paragraph No. 7.1 that if there is no income earned by the assessee which is claimed to be exempt, no disallowance u/s 14A can be made. He submitted that the said decision of the Tribunal has been upheld by the Hon'ble Bombay High Court in Income Tax Appeal No. 110 of 2009. He contended that this issue thus is squarely covered by the decision of Hon'ble jurisdictional High court and since, there was no exempt income earned by the assessee on the investment made in the shares of RUPL, no disallowance on account of premium paid on redemption of premium notes can be made u/s 14A as held by the Hon'ble Bombay High Court in the case of Delite Enterprises (supra).

9. The learned counsel for the assessee then proceeded to put forth a third proposition by submitting that the exemption available u/s 10(23G) for income received from shares of RUPL was initially granted for the specific period of time and although it was extended further, it was not possible to anticipate such extension. He submitted that even the said extension was granted subject to

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satisfaction of certain conditions and if the said conditions had not been satisfied, the exemption u/s.10(23G) would not have been available. He contended that keeping in view all these uncertainties and contingencies, the premium paid by the assessee on redemption of premium notes utilized for making investment in the shares of RUPL could not be regarded as expenditure incurred in relation to earning of exempt income so as to invoke the provisions of section 14A. In this regard, he invited our attention to the copy of Notification issued u/s 10(23G), which is placed at page No. 24 of his paper book, to show that the exemption was initially made available only to assessment year 1999-2000 to 2001-2002. He also invited our attention to the copy of relevant notification placed at page No. 29 of his paper book extending the exemption u/s 10(23G) upto assessment year 2004-05 subject to satisfaction of certain conditions.

10. The learned counsel for the assessee then submitted as fourth proposition that the premium paid on redemption of premium notes cannot be treated as in the nature of interest. He took us through the terms and conditions of premium notes issued in the year 1998 to point out that the tenure of the premium notes was that of 61 months. He submitted that the said premium notes were convertible into equity shares of the assessee company at the option of the premium note holders and had they been opted for such conversion, there would have been no occasion for the assessee to incur any expenditure on payment of premium on redemption of premium notes. He submitted that there was a lock-in period of three years for premium notes and only after the expiry of lock-in period, the premium note holders had the option to get the same redeemed on a premium of Rs.503/- per premium note. He contended that the premium paid by the assessee thus was not a period cost and the same, therefore, could not be treated as in the nature of interest. He contended that if the same is to be treated as in the nature of interest as done by

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the authorities below, premium becomes a period cost which is relatable to earlier three years and such cost to the extent relatable to the earlier years cannot be disallowed u/s 14A in the year under consideration. He contended that disallowance u/s 14A can be made only in respect of expenses incurred in relation to exempt income for the relevant year and not in respect of expenditure relatable to the earlier years. He contended that although entire premium amount has been claimed by the assessee as deduction on accrual basis in the year under consideration, the same only to the extent attributable to the earning of exempt income for the year under consideration can be considered for making disallowance u/s 14A. He contended that deduction and disallowance are two different concepts and matching principle has to be applied for making disallowance u/s 14A. He relied on the decision of Hon'ble Supreme Court in the case of Walfort Share and Stock Broker Pvt. Ltd. 326 ITR 1 and pointed out that at page No. 17 of the report, Hon'ble Supreme Court has recognized the concepts of proximity and apportionment in the context of applicability of section 14A.

11. Lastly, the learned counsel for the assessee made an alternative submission that premium paid on redemption of premium notes may be treated as in the nature of interest and the same may be added to the cost of acquisition of shares of RUPL being the expenditure incurred for acquisition of the said shares.

12. The learned DR, on the other hand, strongly supported the impugned orders of the learned CIT(A) confirming the disallowance made by the AO on account of redemption premium by invoking the provisions of section 14A. He submitted that it is wrong to claim that there is no element of interest or interest like expenses involved in the payment of redemption premium. In this context, he relied on the provisions of section 2(28A) of the I.T. Act wherein interest is defined as interest payable in any manner in respect of any moneys borrowed or debt incurred

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(including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized. He contended that the said definition is wide enough to cover the impugned premium paid by the assessees in the present case on redemption on premium notes and the argument of learned counsel for the assessee raised in this regard is not tenable law. In support of this contention, the learned DR relied on the decision of Hon'ble Madras High Court in the case of Vishwapriya Financial Services & Securities Ltd. (2003) 127 Taxman 385 (Mad.). He submitted that though the nomenclature of the expenses is in the nature of the fixed amount based on option of premium notes holder, the same, in reality, is the cost paid for money borrowed from RCL. He contended that the expense by whatever name called is basically a payment to compensate RCL for obtaining its funds and investing the same in the equity shares and this legal character of the transaction cannot be ignored. He contended that there is, in any case, no such proposition under law which says that only interest expenditure can be disallowed u/s 14A and even expenses other than interest can also be disallowed u/s 14A if they are incurred in relation to earning of exempt income.

13. Regarding the second argument of the learned counsel for the assessee that the assessee being in the business of investment, redemption premium has to be allowed as business expenditure, the learned DR submitted that the assesses are not in any sort of investment business as transpires from the facts of the years in appeal, but has one time invested borrowed money in equity share of RUPL which obviously related to earning of dividend and for no other consideration. He submitted that there is no visible business of share trading or of any other sort. He submitted that if few shares involving negligible gains are shown in computation of income, it does not become the dominant activity of assessees' so called

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business of investment. He contended that even otherwise it makes no difference as far as disallowance of redemption premium u/s 14A is concerned as the same is the expenditure incurred by the assessee in relation to earning of exempt income.

14. As regards the alternative argument raised by the learned counsel for the assessee that the expenditure on redemption premium should be allowed as part of cost of acquisition of shares, the learned DR submitted that such cost can only be allowed in the year of actual capital gains shown by the assessees. He submitted that this argument nevertheless is raised only for the sake of arguments as an alternative since the fact on hand is that assesses have not done any transactions of sale of shares in the year under consideration giving rise to any capital gains and they have simply incurred expenditure on redemption premium which is in relation to exempt income.

15. As regards the argument of the learned counsel for the assessee that the investment in shares had the potential of earning taxable income also, the learned DR submitted that this aspect will not preclude the applicability of law u/s 14A as has been held by the Hon'ble ITAT in the case of ITO vs. Daga Capital Management (P) Ltd. (2008) 119 TTJ (Mum) (SB) 289. In this regard, he invited our attention to Para 26 of the majority order wherein it was held as under:

> "In view of the foregoing discussion we hold that the provisions of section 14A of the Act are applicable with respect of the dividend income earned by the assessee engaged in the business of dealing with shares and securities, on the shares held as stock-in-trade when earning of such dividend income is incidental to the trading in shares."

The learned DR submitted that even in the case where dividend on shares is earned as incidental income, the provisions of section 14A are held to be applicable by the Tribunal. He submitted that the assessess in the present case have admittedly made

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investment in equity share of a company notified u/s 10(23G) and, therefore, the redemption premium paid is the expenditure which has been laid out for earning tax free income making the provisions of section 14A clearly applicable. He contended that if the argument of the assessee raised in this regard is accepted, the provisions of section 14A would become inoperative, ineffective or sterile. He submitted that it is settled law that nothing should be read in or read out in a fiscal provision and there is no room for any intendment in interpreting any provision of law particularly when it comes to interpretation of fiscal laws.

16. Regarding the argument of the learned counsel for the assessee that there being on exempt income actually earned by the assessees in the year under consideration, no disallowance of expenditure u/s 14A could be made, the learned DR contended that it is wrong to claim that there should be tax free income in the same year for invoking the provisions of section 14A to make the disallowance of expenditure incurred in relation to tax free income. In support of this contention, he placed reliance on the following decisions :

1. Everplus Securities & Finance Ltd. vs. DCIT 102 TTJ (Del) 120.
2. Harsh Krishnakant Bhatt vs. ITO 85 TTJ (Ahd.) 872.
3. ITO vs. Daga Capital Management Pvt. Ltd. 117 ITD 169.
4. M/s Cheminvest Ltd. vs. ITO and Others ITA No.87/Del/2008 & ITA No.4788/Del/2007, ITAT, Special Bench, Delhi.
5. Godrej & Boyce Mfg. Co. Ltd. vs. DCIT 328 ITR 81(Bom.).

17. Regarding the argument of the learned counsel for the assessee that the investment in shares of RUPL could also result in taxable income from stock

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lending, STCG fees for providing securities collaterals etc., the learned DR submitted that such a specious argument, if accepted, will make the provisions of section 14A redundant and inoperative. He submitted that this argument of the learned counsel for the assessee, in any case, is not supported by the visible facts of the case as the assessees have neither earned nor offered any such income to tax from the deployment of RUPL shares. He contended that there is thus no substance in this argument and the same can not be accepted.

18. The learned DR further submitted that there is also no merit in the argument of the learned counsel for the assessee seeking apportionment of expenses towards tax-free income and taxable income. He contended that there is no such taxable income that has been earned by the assessees and even otherwise, there is no provision in the Income Tax Act allowing such apportionment. In support of this contention, he placed reliance on the decision of the ITAT in the case of Harish Krishnakant Bhatt 91 ITD 311 (Ahd.) and pointed out that similar argument raised on assessee's behalf in that case was rejected by the Tribunal in para 34 of its order by observing as under :

> "The fourth and the last contention of the assessee is that the interest expenditure is partly assessable source, i.e., when the assessee sells the shares it gives rise to capital gain. This contention, in our opinion, has no force firstly because the interest is not allowable deduction for computing capital gain unless it relates prior to the date of acquisition of shares or being the shares into existence. Secondly, because capital gain on the impugned shares does not form part of total income of the assessee until they are sold or transferred."

19. As regards the decision of Hon'ble Bombay High Court in the case of CIT vs. Delite Enterprises Ltd. (supra) relied upon by the learned counsel for the assessee, the learned DR submitted that there was a taxable income in that case and

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hence expenditure was held to be allowable by the Tribunal and the decision of the Tribunal was upheld by the Hon'ble High Court observing that there was no substantial question of law involved. In this regard, he relied on the decision of Hon'ble Bombay High Court in the case of Blue Star Ltd. vs. CIT 217 ITR 514, wherein it was held that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.

20. As regards the reliance of the learned counsel for the assessee on the decision of the Tribunal in the case of Siva Indus. & Holding Ltd. vs. ACIT, ITA No. 2142/Mds/2010, the learned DR submitted that the same in fact supports the revenue's case. He submitted that as held by the Tribunal in the said case, interest expenditure can be disallowed u/s 14A if the corresponding loan is found to be utilized for making the investment. He submitted that the funds raised by the assessees in the present case were utilized for making investment in 10(23G) shares as proved by the AO as well as by the learned CIT(Appeals). He further submitted that the Tribunal in that case has relied on the proposition of Hon'ble Supreme Court in the case of CIT vs. Walfort share and Stock Brokers Pvt. Ltd. 233 CTR42 (SC) which applies to the present case and supports the contention of the Department since the proximate cause for disallowance of expenditure u/s 14A in the present case has been established.

21. In the rejoinder, the learned counsel for the assessee submitted that in the case of Delhi Enterprises Ltd. (supra), there were two assessment years involved & in one of these two years, there was no taxable income. He submitted that the

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assessee had not earned any exempt income also in that year and it was held by the Tribunal that no disallowance u/s 14A could be made in the absence of any exempt income actually earned by the assessee. He contended that the said decision of the Tribunal has been upheld by the Hon'ble Bombay High Court and the order of the Tribunal having been merged with the order of Hon'ble Jurisdictional High Court, this bench has to follow the same being a binding precedent.

22. We have heard the rival submissions and also perused the relevant material on record. It is observed that the proceeds of premium notes (OCPN) on which the impugned redemption premium was paid by the assessee had been invested in the shares/debentures of RUPL and although the dividend income and income from long term capital gain from the said investment was exempt from tax u/s 10(23G), perusal of the copy of relevant Notification issued u/s 10(23G) placed at page No. 24 of the paper book, shows that such exemption was initially granted only for the specific period i.e. assessment year 1999-2000 to 2001-2002. No doubt, the said exemption was further extended upto assessment year 2004-05 as submitted by the learned DR, a perusal of the copy of relevant notification placed at page No. 29 of the paper book clearly shows that such extension was granted subject to satisfaction of certain conditions. Keeping in view all these uncertainties and contingencies, we are inclined to agree with the contention of the learned counsel for the assessee that the premium paid by the assessee on redemption of premium notes (OCPN) utilized for making investment in the shares/debentures of RUPL can not be regarded as expenditure incurred exclusively in relation to earning of exempt income so as to invoke the provisions of section 14A. Moreover, the said investment had the potential of generating taxable income also as explained by the learned counsel for the assessee in the form of short term capital gains etc. In this regard, the learned DR has submitted that no such taxable income however was

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actually earned by the assesses during the years under consideration. The learned counsel for the assessee on the other hand has pointed out that no exempt income from the said investment was also actually earned by the asseesee in the years under consideration. He has also relied on the decision of coordinate bench of this Tribunal in the case of Delite Enterprises Pvt. Ltd. (supra) as affirmed by the Hon'ble Bombay High Court stating that in the similar facts and circumstance, disallowance made under section 14A was held to be not sustainable.

23. We have carefully gone through the order of the Tribunal passed in the case of Delite Enterprises Pvt. Ltd. (supra) as well as the judgment of Hon'ble Bombay High Court affirming the decision of the Tribunal. In the case of Delite Enterprises Pvt. Ltd. (supra), the borrowed amount was utilized by said assessee for the purpose of making investment in the capital of the firm in which it was a partner. The said investment was capable of earning exempt income in the form of share of profit as well as taxable income in the form of interest on partner's capital. In one of the years involved i.e. assessment year 2001-02, the assessee was not paid any interest on it's capital by the firm which was taxable nor had it earned any exempt income in the form of share of profit from the firm. In backdrop of those facts and circumstances, the Tribunal upheld the decision of the learned CIT(A) allowing the claim of the assessee for deduction on account of interest paid on borrowed funds which were utilised for making investment in the firm as partner's capital.

24. The decision of the Tribunal in the case of Delite Enterprises (supra) was challenged by the Revenue in an appeal preferred before the Hon'ble Bombay High Court and their Lordships considered following question which projected the grievance of the revenue on this issue:

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" Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was right in deleting the disallowance made by the Assessing Officer of interest paid by the Assessee Company on the borrowed funds amounting to Rs. 241.10 lakhs overlooking the fact that the borrowed funds were used by the Assessee Company to invest in the capital of another Partnership Firm and since profits derived by the Assessee Company from a partnership firm were exempt from tax u/s 10(2A) of the Income tax Act, the interest expense related to such tax-free profits is to be disallowed u/s 14A of the Income Tax Act? "

Hon'ble Bombay High Court vide its judgment delivered on 26th February, 2009 held that when there was no share of profit from the Firm which otherwise would be exempt (as referred to in the question) for the relevant year, the question as framed by the Revenue would not arise. Consequently the decision of the Tribunal on this issue was upheld by Hon'ble High Court of Bombay and the appeal of the Revenue was dismissed.

25. At the time of hearing, the contention raised by the learned DR in this regard is that the appeal of the Revenue on the issue having been dismissed by the Hon'ble Bombay High Court merely observing that no question arises, it can not be treated as a decision rendered by the Hon'ble High Court on the merit of the issue which is binding on this Tribunal. We are unable to accept this contention of the learned DR. It is well settled proposition of judicial precedents that ia appeal the Hon'ble High Court considers facts pertaining to the issue and gives approval to the decision of the lower forum, the decision of lower forum gets merged with the judgment and order of the High Court and it becomes binding precedent even though approval to decision of lower forum/court is summarily recorded. Similar situation had arisen for consideration before the Hon'ble Gujarat High Court in

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the case of Nirma Industries Ltd. 283 ITR 402 wherein the effects of summary disposal of appeal by the High Court were analysed and explained by their Lordships. It was clarified that while hearing an appeal even for deciding whether substantial question of law arises or not from the order of the Tribunal, the High Court does not exercise either the original jurisdiction or the jurisdiction to issue writs and the only jurisdiction exercised by the High Court is the appellate jurisdiction. It was held that merely because the High Court in the first instance decides whether or not substantial question of law arises from the order of the Tribunal, it can not be said that the High Court does not exercise the appellate powers or that there is no decision on merit when the high court dismisses an appeal holding that no substantial question of law arises from the order of the Tribunal. It was held that whenever an order of the subordinate forum is carried in appeal before the higher appellate forum/court, operative part thereof merges into the judgment, decision or order of the higher court after the confirmation, modification or reversal, as the case may be, and the decision of the lower court or forum has no independent existence thereafter in relation to the issue which was carried before the appellate court or forum. It was held that where the High Court comes to the conclusion that no substantial question of law arises on a particular issue, it can not be stated that the subject matter of controversy between the parties has not been dealt with by the High Court. It was held that when the decision of the Tribunal is affirmed on the issue brought before the High Court, it is the decision of the High Court which becomes operative and which is capable of being given effect to for all intents and purposes. Keeping in view the decision of Hon'ble Gujarat High Court in the case of Nirma Industries Ltd. (supra), we have no hesitation to hold that the decision of the Hon'ble Bombay High Court in the case of Delite Enterprise Ltd. (supra) is a decision on merit which is binding precedent on us. As the issue involved in the present cases as well as all the material facts

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relevant thereto are similar to that of the case of Delite Enterprise (supra), we respectfully follow the said decision of the jurisdictional High Court and delete the disallowance made by the AO and confirmed by the learned CIT(A) on account of premium paid by the assessees on redemption of premium notes(OCPN) by invoking the provisions of section 14A of the Act. As regards the case laws cited by the learned DR, it is observed that in none of these cases, the facts involved were similar to the case of the present assessees in as much as the investment made therein was not found to be capable of earning taxable as well as exempt income which was actually not earned by the assessee in the relevant period as are the facts of the present case or that of the case of Delite Enterprise (supra) decided by the Hon'ble Bombay High Court. Accordingly, we decide the common issue involved in all these appeals in favour of the assesses following the decision of Jurisdictional High Court in the case of Delite Enterprises (supra) and allow the appeals of all the assessees.

26. In the result, all the appeals of the assessees are allowed.

Order pronounced in the open court on this 13th day of June 2012.

Sd/- **(R.S. PADVEKAR)** **JUDICIAL MEMBER**	**Sd/-** **(P.M. JAGTAP)** **ACCOUNTANT MEMBER**

Mumbai, Date: **13th June 2012**

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Copy to:-

1) The Appellant.
2) The Respondent.
3) The CIT (A) –III/ Concerned ____, Mumbai.
4) The CIT-MC-III/ Concerned _____, Mumbai.
5) The D.R. "F" Bench, Mumbai.

By Order

// True Copy //

Asstt. Registrar
I.T.A.T., Mumbai

*Wakode