# IN THE INCOME TAX APPELLATE TRIBUNAL
# MUMBAI BENCH "J", MUMBAI

## BEFORE SHRI PRAMOD KUMAR(VICE PRESIDENT) AND SHRI RAVISH SOOD (JUDICIAL MEMBER)

## ITA No. 6612/Mum/2018

## Assessment Year: 2012-13

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| Voltas Limited<br>Voltas House-A, 4th Floor,<br>Dr. Babasaheb Ambedkar<br>Road, Chinchpokli,<br>Mumbai 400 033 | Vs. | Asst. CIT Range-8(3)(2)<br>Room No. 615, 6th Floor,<br>Aayakar Bhavan, M.K. Road<br>Mumbai – 400 020 |
| **PAN No. AAACV2809D** | | |
| **Appellant** | | **Respondent** |

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## ITA No. 7028/MUM/2018

## Assessment Year: 2012-13

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| DCIT-8(3)(2)<br>R. No.615, 6th Floor,<br>Aayakar Bhavan, M.K. Road<br>Mumbai- 400 020 | Vs. | Voltas Limited<br>Voltas House-A, 4th Floor,<br>Dr. Babasaheb Ambedkar Road,<br>Chinchpokli,<br>Mumbai 400 033 |
| | | **PAN No. AAACV2809** |
| **Appellant** | | **Respondent** |

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| Assessee by | : | Shri. Nitesh Joshi |
| Revenue by | : | Shri. Uodal Raj Singh, D.R |
| Date of Hearing | : | 17.06.2020 |
| Date of pronouncement | : | 30.06.2020 |

## ORDER

**PER RAVISH SOOD, JM**

The captioned cross-appeals filed by the assessee and the revenue are directed against the order passed by the CIT(Appeals)- 58, Mumbai, dated 05.09.2018, which in turn arises from the assessment order passed by the A.O u/s 143(3) r.w.s 144C(4) of the Income-tax Act, 1961 (for short "Act"), dated 29.04.2016 for A.Y 2012-13. We shall first take up the appeal of the asseseee wherein the impugned order has been assailed before us on the following grounds of appeal :

"GROUND NO. 1 DISALLOWANCE U/S 14A

The learned Commissioner of Income-tax Officer (Appeals) [hereinafter referred to as CIT(A)) and the Assessing Officer thereinafter referred to as the AO] failed to appreciate that the Appellant Company had on its own, offered Rs. 17 lakhs as disallowance u/s.14A, being Operating & Administrative Expenses and Establishment / General Expenses, which could be considered as attributable towards earning exempt dividend income. The CIT(A) has disallowed 0.5% of average investments (excluding Investments which yielded taxable income), which is unwarranted.

The Appellant Company therefore prays that the additional disallowance made by the CIT(A), over and above the disallowance of Rs. 17 lakhs voluntarily offered by the Appellant Company be deleted.

[Refer page Nos.3 to 7, point No. 5 of the Assessment Order and page 1 to 3, point No. 1 of CIT(A)'s order].

GROUND NO 2: INTEREST ON OUTSTANDING AMOUNT OF ASSOCIATED ENTERPISE :-

The CIT(A) and the Assessing Officer/TPO erred on facts and in law in disregarding the fact that the Appellant Company had a small outstanding towards re-imbursement of expenses aggregating Rs.4,84,879/- from Saudi Ensas Company for Engineering Services W.L.L., a wholly owned subsidiary of the Appellant Company (Associated Enterprise) situated in Kingdom of Saudi Arabia. The said outstanding was reflected as Advance in the Annual Report (Page No 57) of the Appellant Company, being recoverable.

The Appellant Company states that reimbursement of expenses recoverable is not in the nature of Advance/Loan given by the Appellant Company and therefore, no interest should be

notionally charged. Therefore, the Appellant Company prays that no addition be made on the outstanding re-imbursement of expenses.

[Refer page Nos.2 and 3 of TPO's Order , point N. 4 of the Assessment Order and page 4 and 5, Ground No. 3 of CIT(A), order].

The Appellant Company craves leave to add, amend, alter, vary, substitute or add fresh grounds of appeal before or at the time of hearing of the appeal as they may be advised from time to time."

Further, the assessee had also raised before us an additional ground of appeal, which reads as under:

"1.1 Whether on the facts and in the circumstances of the case and position on law, the Education Cess and the Secondary and Higher Education Cess is a disallowable expenditure u/s 40(a)(ii) of the Income-tax Act, 1961."

It was submitted by the ld. A.R that the aforesaid additional ground of appeal was being raised on the basis of the recent judgment of the Hon'ble High Court of Bombay in the case of Sesa Goa Limited vs. Joint Commissioner of Income-tax (2020) 107 CCH 375 (Bom). The ld. A.R submitted that the Hon'ble High Court in its said judgment had observed, that if the legislature intended to prohibit the deduction of amounts paid by an assessee towards "Education Cess" or any other "Cess" and Higher and Secondary Education Cess, then, the legislature could have easily included reference to "cess" in clause (ii) of Sec. 40(a). It was further submitted by the ld. A.R that the High Court had observed, that as the legislature had not included "education cess" or any other "cess" in clause (ii) of Sec. 40(a), therefore, it would mean that there was no prohibition in claiming deduction of the said amounts while computing the income of the assessee under the head "Profits and gains of business or profession". As regards admissibility of the said issue by way of an additional ground of appeal, it was submitted by the ld. A.R, that the Hon'ble High Court in its aforesaid order, had observed, that where the assessee had raised a claim for deduction of the amount paid towards "cess", such claim for deduction was bound to be considered by the CIT(Appeals) or the ITAT before whom such claim was specifically raised. Per contra, the ld. D.R did not object to the admission of the aforesaid additional ground of appeal raised by the assesse before us. As observed by us hereinabove, the assessee has sought an adjudication on an issue i.e as to whether or not the amount paid by an assessee towards "Education Cess" or any "other

cess" viz. the Secondary and Higher Education Cess is disallowable as an expenditure u/s 40(a)(ii) of the Income-tax Act, 1961. In our considered view, as the assessee has raised a purely legal issue which would not require any verification of facts, therefore, we have no hesitation in admitting the same.

2. Briefly stated, the assessee company which is a part of the Tata group and is India's premier Air conditioning and Engineering Service Provider, had filed its "Original' return of income on 23.11.2012, which thereafter was followed by filing of a revised return of income on 28.03.2014, declaring a total income of Rs. 199,46,34,280/-. Subsequently, the case of the asssessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. As the assessee during the year under consideration had entered into International transactions with its AEs, therefore, a reference was made by the A.O to the DCIT, Transfer Priicinf -4(1)(1), Mumbai (hereinafter referred as "TPO"), for determining the Arms Length Price ("ALP") of the said transactions. The TPO vide his order passed u/s 92CA(3) of the Act, dated 29.01.2015 suggested the following adjustments :

| S.No. | Nature of International Transaction | Adjustment amount |
|---|---|---|
| 1. | Shortfall in interest receipt from AE | Rs. 36,682/- |
| 2. | Interest on Share Application money pending allotment with its AE in UAE. | Rs. 1,81,20,323/- |
| | Total | Rs. 1,81,57,003/- |

Further, it was observed by the A.O that the assessee had received dividend income on its investment at Rs. 36,08,34,228/-, which comprised of viz. (i). exempt dividend income :Rs. 12,80,54,497/-; and (ii).dividend from overseas company which was subject to tax : Rs. 23,27,79,731/-. Against the exempt dividend income, the assessee had suo motto disallowed an amount of Rs. 17 lacs u/s 14A of the Act. It was the claim of the assessee that it had not incurred any interest cost on borrowings for making investment in exempt income yielding assets. It was further submitted by the assessee that its investment portfolio was handled by its MIS department

which primarily attended to its accounts and banking operations. As such, it was submitted by the assessee that it did not have a separate department for handling its investment portfolio. As regards the staff cost, operating and administrative expenses and establishment/general expenses of MIS department, it was submitted by the assessee that out of the total expenses of Rs. 83.65 lacs incurred during the year viz. (i). Salary expenses: Rs. 55.07 lac; and (ii). Operating & Administrative, Establishment & General Expenses: Rs. 28..58 lacs, it had voluntarily offered an amount of Rs. 17 lac towards suo motto disallowance u/s 14A of the Act. Observing, that no part of the investment towards exempt income yielding shares was made by the assessee out of the interest bearing funds, the A.O did not disallow any part of the interest expenses claimed by the assessee. At the same time, holding a conviction that making of investments in shares would require substantial market research, day to day analysis of market trends and decisions with regards to acquisition, retention and sale of shares at the most appropriate time, the A.O worked out the disallowance u/s 14A r.w Rule 8D(2)(iii) i.e towards incurring of administrative expenses for earning of the exempt dividend income at an amount of Rs. 2,01,51,905/-. As the assessee had already offered a suo motto disallowance of an amount of Rs. 17 lac u/s 14A of the Act, therefore, the A.O restricted the addition/disallowance to an amount of Rs. 1,84,51,905/-[Rs. 2,01,51,905/- (-) Rs. 17,00,000/-]. The A.O after inter alia making the aforesaid additions/disallowances assessed the income of the assessee company at Rs. 203,43,63,070/-, vide his order passed u/s 143(3) r.w.s 144C(4), dated 29.04.2016.

4. Aggrieved, the assessee assailed the aforesaid additions/disallowances made by the A.O before the CIT(A). As regards the disallowance made by the A.O u/s 14A, it was observed by the CIT(A) that the assessee had made an ad hoc disallowance of Rs. 17 lac, which in the absence of any basis was not justified. Accordingly, the CIT(A) observed that the A.O was well within his right to work out the disallowance u/s 14A r.w Rule 8D. As regards the claim of the assessee that only dividend yielding investments were to be considered for computing the average value of investments u/s 14A r.w Rule 8D(2)(iii), the same was accepted by the CIT(A) in light of the order of the 'Special bench' of the ITAT, Delhi in the case of ACIT, Circle 17(1), New Delhi Vs. Vireet Investment Pvt. Ltd. (2017) 82 taxmann.com (Del)(SB). Insofar the claim of the assessee that its

strategic investments were to be excluded for the purposing of computing the disallowance u/s 14A of the Act was concerned, the same was rejected by the CIT(A) in the backdrop of the judgment of the Hon'ble Supreme Court in the case of Maxopp Investments Ltd. Vs. CIT, New Delhi (Civil Appeal No. 104-109 of 2015), dated 12.02.2018 (SC). Also, taking cognizance of the fact that the dividend received by the assessee from its investments made in foreign companies was taxable in India, the CIT(A) directed the A.O to exclude such investments for the purpose of computing the disallowance u/s 14A of the Act. As regards the TP adjustment of Rs. 36,682/-, it was observed by the CIT(A) that the assessee had a small outstanding towards re-imbursement of expenses aggregating to Rs. 4,84,879/- from its wholly owned subsidiary company viz. Saudi Enas Company for Engineering Services W.L.L that was situated in Saudi Arabia. The TPO applying interest rate of 7.81% on the said outstanding amount had made an upward adjustment of Rs. 36,880/-. Observing, that interest was rightly charged u/s 92 of the Act on the amount outstanding from the AE beyond reasonable period, the CIT(A) upheld the charging of interest by the TPO. As regards the rate of interest to be charged on the aforesaid outstanding amount, the CIT(A) taking cognizance of the fact that the amount receivable by the assessee was in foreign exchange i.e US $, therefore, directed the A.O to charge the same at LIBOR rate + 3 % mark up. Accordingly, the issue was restored to the file of the A.O for ascertaining the correct LIBOR rate. As regards the TP adjustment towards charging of notional interest on the Share Application money of the assessee pending allotment of shares with its AE in UAE viz. Saudi Enas Company for Engineering Services W.L.L, the CIT(A) observed that as a transaction of investment in share capital of subsidiaries outside India was not in the nature of a transaction referred to in Sec. 92B of the Act, therefore, the transfer pricing provisions were not applicable. The CIT(A) in support of his said view relied on the judgment of the Hon'ble High Court of Bombay in the case of Vodafone India Services Pvt. Ltd. Vs. Addl. CIT (2014) 368 ITR 1 (Bom). On the basis of his aforesaid observation the transfer pricing adjustment made by the TPO was vacated by the CIT(A).

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. As regards the additional disallowance u/s 14A r.w Rule 8D(2)(iii) of Rs. 1,84,51,905/-, it was submitted by the ld. A.R that involving identical facts the Tribunal had vide its consolidated

order dated 17.10.2019 in ITA No. 2822/Mum/2017 & ITA No. 2823/Mum/2017 for A.Y 2009-10 and A.Y 2010-11 had restored the matter to the file of the A.O, with a direction to firstly examine the sufficiency or correctness of the suo motto disallowance of Rs. 17 lac offered by the assessee. Alternatively, the Tribunal had also directed the A.O to exclude those investments which had not yielded any dividend income for the purpose of computing the disallowance u/s 14A r.w Rule 8D. The ld. A.R took us through the aforesaid order of the Tribunal and submitted that the said issue in all fairness and for the sake of consistency was required to be restored on the same terms to the file of the A.O. As regards the TP adjustment towards shortfall of interest received from its AE amounting to Rs. 36,682/-, it was submitted by the ld. A.R that as per instructions the said adjustment on account of smallness of amount therein involved was not being pressed. Accordingly, the **Ground of appeal No. 2** as per the concession of the ld. A.R is dismissed as not pressed. As regards the additional ground of appeal raised by the assessee was concerned, it was submitted by the ld. A.R that the same was squarely covered by the judgment of the Hon'ble High Court of Bombay in the case of Sesa Goa Limited vs. Joint Commissioner of Income-tax (2020) 107 CCH 375 (Bom). It was averred by the ld. A.R, that as held by the Hon'ble High Court as the legislature had not included "education cess" or any other "cess" in clause (ii) of Sec. 40(a), therefore, it would mean that there was no prohibition in claiming deduction of such amounts while computing the income of the assessee under the head "Profits and gains of business or profession".

6. Per contra, the ld. D.R relied on the orders of the lower authorities. Insofar the issue pertaining to the disallowance u/s 14A was concerned, the ld. D.R fairly admitted that the same as held by the Tribunal in the preceding years i.e A.Y 2009-10 & A.Y 2010-11 was required to be restored to the file of the A.O, with a direction to examine the sufficiency or correctness of the suo motto disallowance of Rs. 17 lac offered by the assessee.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also the judicial pronouncements relied upon by them. We shall first adjudicate the additional ground of appeal raised by the assessee. Insofar the claim of the Ld. A.R that unlike "rates" and "taxes" the amount paid by an

assessee towards "Education Cess" or any "other cess" viz. the Secondary and Higher Education Cess is not a disallowable expenditure u/s 40(a)(ii) of the Income-tax Act, 1961, we find that the said issue is squarely covered by the recent order of the **Hon'ble High Court of Bombay** in the case of **Sesa Goa Limited vs. Joint Commissioner of Income-tax (2020) 107 CCH 375 (Bom).** In the case before the Hon'ble High Court the following substantial question of law was inter alia raised :

> "iii. Whether on the facts and in the circumstances of the case and in law, the Education Cess and Higher and Secondary Education Cess is allowable as a deduction in the year of payment."

After exhaustive deliberations, the Hon'ble High Court had observed that the legislature in Sec. 40(a)(ii) had though provided that "any rate or tax levied" on "profits and gains of business or profession" shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession", but then there was no reference to any "cess". Also, the High Court observed that there was no scope to accept that "cess" being in the nature of a "tax" was equally not deductible in computing the income chargeable under the head "profits and gains of business or profession". It was further observed that if the legislature would had intended to prohibit the deduction of amounts paid by an assessee towards say, "education cess" or any other "cess", then, it could have easily included a reference to "cess" in clause (ii) of Section 40(a). On the basis of its aforesaid observations, the Hon'ble High Court had concluded that now when the legislature had not provided for any prohibition on the deduction of any amount paid towards "cess" in clause (ii) of Sec. 40(a), therefore, holding to the contrary would amount to reading something which is not to be found in the text of the provision of Sec. 40(a)(ii). Accordingly, the Hon'ble High Court had concluded that there was no prohibition on the deduction of any amount paid towards "cess" in Sec. 40(a)(ii), while computing the income chargeable under the head "profits and gains of business or profession", observing as under :

> "16. The aforesaid question arises in the context of provisions of Section 40(a)(ii) which inter alia provides that notwithstanding anything to the contrary in sections 30 to 38 of the IT Act, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession", -

(a) in the case of any assessee –
(ia).....
(ib).....
(ic) .....
**(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.**

[Explanation 1.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.]

[Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any 9 TXA17&18-13 dt.28.02.2020 sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A;]

17. Therefore, the question which arises for determination is whether the expression "any rate or tax levied" as it appears in Section 40(a)(ii) of the IT Act includes "cess". The Appellant – Assessee contends that the expression does not include "cess" and therefore, the amounts paid towards "cess" are liable to be deducted in computing the income chargeable under the head "profits and gains of business or profession".

However, the Respondent – Revenue contends that "cess" is also included in the scope and import of the expression "any rate or tax levied" and consequently, the amounts paid towards the "cess" are not liable for deduction in computing the income chargeable under the head "profits and gains of business or profession".

18. In relation to taxing statute, certain principles of interpretation are quite well settled. In New Shorrock Spinning and Manufacturing Co. Ltd. Vs Raval, 37 ITR 41 (Bom.), it is held that one safe and infallible principle, which is of guidance in these matters, is to read the words through and see if the rule is clearly stated. If the language employed gives the rule in words of sufficient clarity and precision, nothing more requires to be done. Indeed, in such a case the task of interpretation can hardly be said to arise : Absoluta sententia expositore non indiget. The language used by the Legislature best declares its intention and must be accepted as decisive of it.

19. Besides, when it comes to interpretation of the IT Act, it is well established that no tax can be imposed on the subject without words in the Act clearly showing an intention to lay a burden on him. The subject cannot be taxed unless he comes within the letter of the law and the argument that he falls within the spirit of the law cannot be availed of by the department. [See CIT vs Motors & General Stores 66 ITR 692 (SC)].

20. In a taxing Act one has to look merely at what is clearly said.

There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied, into the provisions which has not

been provided by the legislature [See CIT Vs Radhe Developers 341 ITR 403 ]. One can only look fairly at the language used. No tax can be imposed by inference or analogy. It is also not permissible to construe a taxing statute by making assumptions and presumptions [See Goodyear Vs State of Haryana 188 ITR 402(SC)].

21. There are several decisions which lay down rule that the provision for deduction, exemption or relief should be interpreted liberally, reasonably and in favour of the assessee and it should be so construed as to effectuate the object of the legislature and not to defeat it. Further, the interpretation cannot go to the extent of reading something that is not stated in the provision [See AGS Tiber Vs CIT 233 ITR 207].

22. Applying the aforesaid principles, we find that the legislature, in Section 40(a)(ii) has provided that "any rate or tax levied" on "profits and gains of business or profession" shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". There is no reference to any "cess". Obviously therefore, there is no scope to accept Ms. Linhares's contention that "cess" being in the nature of a "Tax" is equally not deductable in computing the income chargeable under the head "profits and gains of business or profession". Acceptance of such a contention will amount to reading something in the text of the provision which is not to be found in the text of the provision in Section 40(a)(ii) of the IT Act.

23. If the legislature intended to prohibit the deduction of amounts paid by a Assessee towards say, "education cess" or any other "cess", then, the legislature could have easily included reference to "cess" in clause (ii) of Section 40(a) of the IT Act. The fact that the legislature has not done so means that the legislature did not intend to prevent the deduction of amounts paid by a Assessee towards the "cess", when it comes to computing income chargeable under the head "profits and gains of business or profession".

24. The legislative history bears out that the Income Tax Bill, 1961, as introduced in the Parliament, had Section 40(a)(ii) which read as follows :

> "(ii) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains"

25. However, when the matter came up before the Select Committee of the Parliament, it was decided to omit the word "cess" from the aforesaid clause from the Income Tax Bill, 1961. The effect of the omission of the word "cess" is that only any rate or tax levied on the profits or gains of any business or profession are to be deducted in computing the income chargeable under the head " profits and gains of business or profession". Since the deletion of expression "cess" from the Income Tax Bill, 1961, was deliberate, there is no question of reintroducing this expression in Section 40(a)(ii) of IT Act and that too, under the guise of interpretation of taxing statute.

26. In fact, in the aforesaid precise regard, reference can usefully be made to the Circular No. F. No.91/58/66-ITJ(19), dated 18th May, 1967 issued by the CBDT which reads as follows :-

"Interpretation of provision of Section 40(a)(ii) of IT Act, 1961–Clarification regarding. "Recently a case has come to the notice of the Board where the Income Tax Officer has disallowed the 'cess' paid by the assessee on the ground that there has been no material change in the provisions of section 10(4) of the Old Act and Section 40(a)(ii) of the new Act.

2. The view of the Income Tax Officer is not correct. Clause 40(a)(ii) of the Income Tax Bill, 1961 as introduced in the Parliament stood as under:-

> "(ii) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains".

When the matter came up before the Select Committee, it was decided to omit the word 'cess' from the clause. The effect of the omission of the word 'cess' is that only taxes paid are to be disallowed in the assessments for the years 1962-63 and onwards.

3. The Board desire that the changed position may please be brought to the notice of all the Income Tax Officers so that further litigation on this account may be avoided.[Board's F. No.91/58/66-ITJ(19), dated 18-5-1967.]"

27. The CBDT Circular, is binding upon the authorities under the IT Act like Assessing Officer and the Appellate Authority. The CBDT Circular is quite consistent with the principles of interpretation of taxing statute. This, according to us, is an additional reason as to why the expression "cess" ought not to be read or included in the expression "any rate or tax levied" as appearing in Section 40(a)(ii) of the IT Act.

28. In the Income Tax Act, 1922, Section 10(4) had banned allowance of any sum paid on account of 'any cess, rate or tax levied on the profits or gains of any business or profession'. In the corresponding Section 40(a)(ii) of the IT Act, 1961 the expression "cess" is quite conspicuous by its absence. In fact, legislative history bears out that this expression was in fact to be found in the Income Tax Bill, 1961 which was introduced in the Parliament. However, the Select Committee recommended the omission of expression "cess" and consequently, this expression finds no place in the final text of the provision in Section 40(a)(ii) of the IT Act, 1961. The effect of such omission is that the provision in Section 40(a)(ii) does not include, "cess" and consequently, "cess" whenever paid in relation to business, is allowable as deductable expenditure.

29. In Kanga and Palkhivala's "The Law and Practice of Income Tax" (Tenth Edition), several decisions have been analyzed in the context of provisions of Section 40(a)(ii) of the IT Act, 1961. There is reference to the decision of Privy Council in CIT Vs Gurupada Dutta 14 ITR 100, where a union rate was imposed under a Village Self Government 15 TXA17&18-13 dt.28.02.2020 Act upon the assessee as the owner or occupier of business premises, and the quantum of the rate was fixed after consideration of the 'circumstances' of the assessee, including his business income. The Privy Council held that the rate was not 'assessed on the basis of profits' and was allowable as a business expense. Following this decision, the Supreme Court held in Jaipuria Samla Amalgamated Collieries Ltd Vs CIT [82 ITR 580] that the expression 'profits or gains of any business or profession' has reference only to profits and gains as determined in accordance with

Section 29 of this Act and that any rate or tax levied upon profits calculated in a manner other than that provided by that section could not be disallowed under this sub-clause. Similarly, this sub-clause is inapplicable, and a deduction should be allowed, where a tax is imposed by a district board on business with reference to 'estimated income' or by a municipality with reference to 'gross income'. Besides, unlike Section 10(4) of the 1922 Act, this sub-clause does not refer to 'cess' and therefore, a 'cess' even if levied upon or calculated on the basis of business profits may be allowed in computing such profits under this Act.

30. The Division Bench of the Rajasthan High Court (Jaipur Bench) in Income Tax Appeal No.52/2018 decided on 31st July, 2018 (Chambal Fertilisers and Chemicals Ltd. Vs CIT Range-2, Kota ), by reference to the aforesaid CBDT Circular dated 18th May, 1967 has held 16 TXA17&18-13 dt. 28.02.2020 that the ITAT erred in holding that the “education cess” is a disallowable expenditure under Section 40(a)(ii) of the IT Act. Ms. Linhares was unable to state whether the Revenue has appealed this decision. Mr. Ramani, learned Senior Advocate submitted that his research did not suggest that any appeal was instituted by the Revenue against this decision, which is directly on the point and favours the Assessee.

31. Mr. Ramani, in fact pointed out three decisions of ITAT, in which, the decision of the Rajasthan High Court in Chambal Fertilisers and Chemicals Ltd.(supra) was followed and it was held that the amounts paid by the Assessee towards the 'education cess' were liable for deduction in computing the income chargeable under the head of “profits and gains of business or profession”. They are as follows :- (i) DCIT Vs Peerless General Finance and Investment and Co. Ltd. (ITA No.1469 and 1470/Kol/2019 decided on 5th December, 2019 by the ITAT, Calcutta; (ii) DCIT Vs Graphite India Ltd. (ITA No.472 and 474 Co. No.64 and 66/Kol/2018 decided on 22nd November, 2019 )by the ITAT, Calcutta; (iii) DCIT Vs Bajaj Allianz General Insurance (ITA No.1111 and 1112/PUN/2017 decided on 25th July, 2019) by the ITAT, Pune.

32. Again, Ms. Linhares, learned Standing Counsel for the Revenue was unable to say whether the Revenue had instituted the appeals in the aforesaid matters. Mr. Ramani, learned Senior Advocate for the Appellant submitted that to the best of his research, no appeals were instituted by the Revenue against the aforesaid decisions of the ITAT.

33. The ITAT, in the impugned judgment and order, has reasoned that since “cess” is collected as a part of the income tax and fringe benefit tax, therefore, such “cess” is to be construed as “tax”. According to us, there is no scope for such implications, when construing a taxing statute. Even, though, “cess” may be collected as a part of income tax, that does not render such “cess”, either rate or tax, which cannot be deducted in terms of the provisions in Section 40(a)(ii) of the IT Act. The mode of collection, is really not determinative in such matters.

34. Ms. Linhares, has relied upon M/s Unicorn Industries Vs Union of India and others, 2019 SCC Online SC 1567 in support of her contention that “cess” is nothing but “tax” and therefore, there is no question of deduction of amounts paid towards “cess” when it comes to computation of income chargeable under the head profits or gains of any business or profession.

35. The issue involved in Unicorn Industries ( supra ) was not in the context of provisions in Section 40(a)(ii) of the IT Act. Rather, the issue involved was whether the 'education cess, higher education cess and National Calamity Contingent Duty (NCCD)' on it could be construed as “duty

of excise" which was exempted in terms of Notification dated 9th September, 2003 in respect of goods specified in the Notification and cleared from a unit located in the Industrial Growth Centre or other specified areas with the State of Sikkim. The High Court had held that the levy of education cess, higher education cess and NCCD could not be included in the expression "duty of excise" and consequently, the amounts paid towards such cess or NCCD did not qualify for exemption under the exemption Notification. This view of the High Court was upheld by the Apex Court in Unicorn Industries (supra ).

36. The aforesaid means that the Supreme Court refused to regard the levy of education cess, higher education cess and NCCD as "duty of excise" when it came to construing exemption Notification. Based upon this, Mr. Ramani contends that similarly amounts paid by the Appellant – Assessee towards the "cess" can never be regarded as the amounts paid towards the "tax" so as to attract provisions of Section 40(a)(ii) of the IT Act. All that we may observe is that the issue involved in Unicorn Industries (supra ) was not at all the issue involved in the present matters and therefore, the decision in Unicorn Industries ( supra ) can be of no assistance to the Respondent – Revenue in the present matters.

37. Ms. Linhares, learned Standing Counsel for the Revenue however submitted that the Appellant – Assessee, in its original return, had never claimed deduction towards the amounts paid by it as "cess". She submits that neither was any such claim made by filing any revised return before the Assessing Officer. She therefore relied upon the decision of the Supreme Court in Goetze (India) Ltd. Vs Commissioner of Income Tax (2006) 284 ITR 323 (SC) to submit that the Assessing Officer, was not only quite right in denying such a deduction, but further the Assessing Officer had no power or jurisdiction to grant such a deduction to the Appellant – Assessee. She submits that this is what precisely held by the ITAT in its impugned judgments and orders and therefore, the same, warrants no interference.

38. Although, it is true that the Appellant – Assessee did not claim any deduction in respect of amounts paid by it towards "cess" in their original return of income nor did the Appellant – Assessee file any revised return of income, according to us, this was no bar to the Commissioner (Appeals) or the ITAT to consider and allow such deductions to the Appellant – Assessee in the facts and circumstances of the present case. The record bears out that such deduction was clearly claimed by the Appellant – Assessee, both before the Commissioner (Appeals) as well as the ITAT.

39. In CIT Vs Pruthvi Brokers & Shareholders Pvt. Ltd. 349 ITR 336, one of the questions of law which came to be framed was whether on the facts and circumstances of the case, the ITAT, in law, was right in holding that the claim of deduction not made in the original returns and not supported by revised return, was admissible. The Revenue had relied upon Goetze (supra ) and urged that the ITAT had no power to allow the claim for deduction. However, the Division Bench, whilst proceeding on the assumption that the Assessing Officer in terms of law laid down in Goetze (supra) had no power, proceeded to hold that the Appellate Authority under the IT Act had sufficient powers to permit such a deduction. In taking this view, the Division Bench relied upon the Full Bench decision of this Court in Ahmedabad Electricity Co. Ltd Vs CIT (199 ITR 351) to hold that the Appellate Authorities under the IT Act have very wide powers while considering an appeal which may be filed by the Assessee. The Appellate Authorities may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because,

unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of the Assessee in accordance with law.

40. The decision in Goetze (supra) upon which reliance is placed by the ITAT also makes it clear that the issue involved in the said case was limited to the power of the assessing authority and does not impinge on the powers of the ITAT under section 254 of the said Act. This means that in Goetze (supra), the Hon'ble Apex Court was not dealing with the extent of the powers of the appellate authorities but the observations were in relation to the powers of the assessing authority. This is the distinction drawn by the division Bench in Pruthvi Brokers (supra) as well and this is the distinction which the ITAT failed to note in the impugned order.

41. Besides, we note that in the present case, though the claim for deduction was not raised in the original return or by filing revised return, the Appellant – Assessee had indeed addressed a letter claiming such deduction before the assessment could be completed. However, even if we proceed on the basis that there was no obligation on the Assessing Officer to consider the claim for deduction in such letter, the Commissioner ( Appeals ) or the ITAT, before whom such deduction was specifically claimed was duty bound to consider such claim. Accordingly, we are unable to agree with Ms. Linhare's contention based upon the decision in Goetze (supra ).

42. For all the aforesaid reasons, we hold that the substantial question of law No.(iii) in Tax Appeal No.17 of 2013 and the sole substantial question of law in Tax Appeal No.18 of 2013 is also required to be answered in favour of the Appellant – Assessee and against the Respondent-Revenue. To that extent therefore, the impugned judgments and orders made by the ITAT warrant interference and modification.

43. Thus, we answer all the three substantial questions of law framed in Tax Appeal No.17 of 2013 in favour of the Appellant – Assessee and against the Respondent -Revenue. Similarly, we answer the sole substantial question of law framed in Tax Appeal No.18 of 2013, in favour of the Appellant – Assessee and against the Respondent – Revenue."

Accordingly, we respectfully following the aforesaid judgment of the Hon'ble High Court of Bombay in the case of Sesa Gold Limited (supra), therein conclude that "Education Cess" and the Secondary and Higher Education Cess is not disallowable as a deduction u/s 40(a)(ii) of the Act. The additional ground of appeal raised by the assessee is allowed.

8. We shall now deal with the additional disallowance made by the A.O u/s 14A r.w Rule 8D in the case of the assessee. On a perusal of the assessment order, we find that though the assessee had offered a suo motto disallowance of Rs. 17 lac u/s 14A of the Act, but the quantification of the same was divorced of any logic or reasoning. Although, it was the claim of the assessee before the lower authorities that it did not have any separate 'Investment department', and its investment portfolio was being handled by its MIS department which primarily attended to its accounts and

banking operations, however, it had failed to give any cogent basis for attributing on an ad hoc basis a disallowance of Rs. 17 lac out of the administrative expenses, establishment/general expenses of Rs. 83.65 lac incurred by the MIS department during the year under consideration. On the basis of the aforesaid facts, we are of the considered view that the lower authorities had rightly declined to accept the suo motto disallowance u/s 14A of Rs. 17 lac made by the assessee on an ad hoc basis. At the same time, we find that the Tribunal while dealing with an identical claim of ad hoc disallowance u/s 14A offered by the assessee in A.Y 2009-10 and A.Y 2010-11, had for the sake of consistency followed its earlier order passed in the assessee's own case for A.Y 2008-09, and had restored the matter to the file of the A.O with a direction to examine the sufficiency or correctness of suo moto disallowance made by the assessee having regard to the assessee's accounts and explanations and proceed further after recording speaking reasons for his non-satisfaction. The Tribunal while disposing off the appeals of the assessee for A.Y 2009-10 and A.Y 2010-11 in ITA No. 2822/Mum/2017 and ITA No. 2823.Mum/2017, had observed as under:

> 3.3.4 So far as the merits of the case are concerned, we find that this issue was restored by Tribunal to the file of learned AO in AY 2008-09 vide para 4.3.4 of ITA No. 1667/Mum/2012 order dated 08/07/2016, wherein learned AO was directed to examine the sufficiency or correctness of suo moto disallowance made by the assessee having regards to assessee's accounts and explanations and proceed further after recording speaking reasons for non-satisfaction. We note that, in this AY, learned AO has already rejected the assessee's working. Nevertheless, with a view to enable revenue to take consistent stand in the matter, we restore the matter back to the file of learned AO on similar lines. The learned AO is directed to reappreciate the disallowance made by the assessee and invoke Rule 8D only if not satisfied with assessee's working of disallowance. It is made clear that if the disallowance is computed in terms of Rule 8D(2)(iii) then apart from the directions of Ld. CIT(A) to exclude certain investments, those investments which have not yielded any exempt income during the year under consideration would also be excluded as per the decision of Delhi Tribunal (Special Bench) rendered in ACIT Vs. Vireet Investment (P.) Ltd. [82 Taxmann.com 415]. Accordingly, Ground No.1 of assessee's appeal may be treated as partly allowed for statistical purposes."

As the fact pattern involved in the case of the assessee for the year under consideration remains the same as was there before the Tribunal in the assessee's own case for A.Y 2009-10 and A.Y 2010-11, therefore, we respectfully follow the view therein taken and for the sake of consistency restore the matter to the file of the A.O for fresh adjudication. The A.O in the course of the 'set aside' proceedings is directed to examine the sufficiency or correctness of suo moto disallowance

made by the assessee having regards to its accounts and explanations and shall proceed further after recording speaking reasons for his non-satisfaction, if any. Apart from that, the assessee shall in the course of the 'set aside' proceedings remain at a liberty to substantiate its claim for disallowance on the basis of fresh material. The **Ground of appeal No. 1** is allowed for statistical purposes.

9. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

**ITA No. 7028/Mum/2018**
**A.Y : 2012-13**
**(Revenue's appeal)**

10. We shall now take up the appeal of the revenue wherein the impugned order has been assailed before us on the following grounds of appeal:

"1.1 Whether on the facts at d circumstances of in law, the CIT,A) is correct in deleting the interest charged of Rs.1,81,20,323 on the average share application money of Rs. 23.8 crore advanced by the assessee to the AE Saudi Ensas Company, treated by the TPO as loan ?

1.2 Whether on the facts and circumstances of the case and in law, the C/T(A) is correct in deleting the said interest in just one paragraph in a non-speaking manner without understanding the basic fact that the TPO treated the share application money pending for quite a long time since 31.03.2011 without allotment of any shares (even as on 31.03.2015) as loan, and in stating that section 928 does not apply as no income arises without understanding the above fact.

1.3 Whether on the facts and circumstances of the case and in law, the C1T(A) is correct in ignoring the Hon,. Del. High Court decision in the case of CIT vs. EKL Appliances Ltd, 345 ITR 241 wherein it has been held that such re-characterisation is possible in exceptional circumstances as under ?

"18. Two exceptions have been allowed to the aforesaid principle and they are –

(i) where the economic substance of a transaction differs from its form ; and

(ii) where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner.

1.4 Whether on the facts and circumstances of the case and in law, the C1T(A) is correct in ignoring the economic substance of the transaction which is essentially loan though its external form is stated to be share application money, as shares have been allotted by the AE to assessee for years?

1.5 Whether on the facts and circumstances of the case and in law, the CIT(A) is correct in relying on the ease of Vodafone India Service Pvt. Ltd. [368 ITR 1 (Bom), without realizing the distinguishing facts like in the Vodafone case the issue is assessment of excess inbound capital as income as per valuation, whereas the issue in the present case is re-characterisation of share application money Fending for quite a long time QS loan and charging interest on the same?

1.6 Whether on the facts and circumstances the case and in law, the CIT(A) is correct in relying on the case of Parle Biscuits (P.) Ltd. Vs DCIT [2014] 46 taxmann.com 11 (Mum) without realizing the distinguishing facts like in the Parle case the issue is de/ay occurred in issuance of share certificates, whereas the issue in the instant case non-allotment of shares itself a consequence the a for quite a long time and as the AE in the c mount advanced by the assessee to move mount form' of share application y pending without allotment of shares beyond a reasonable time is essentially loan in `substance'?

1.7 Whether on the facts and circumstances of the case and in law, the CIT(A) is correct in deviating from his own order in the same assessee's case on the very same issue for the AY 2009-10, wherein the CIT(A) considered the share application money lying unrefunded beyond the reasonable period as deemed loan and has approved the charging of interest on the same?

**2. Disallowance U/s 14A:**

On the facts and circumstances of the and in law, the CIT(A) erred in directing the AO not to consider the asset which did not yield dividend income for computation of average value of investment for making disallowance u/ s. 14A."

11. We shall first deal with the claim of the revenue that the CIT(A) had erred in vacating the transfer pricing adjustment as regards charging of notional interest on the share application money that was given to its wholly owned subsidiary company viz. Saudi Ensas Company for Engineering Services WLL, UAE, for which allotment of shares was pending on 31.03.2012. In order to appreciate the nature of the controversy involved in the present appeal, the narration of the facts would be instructive. As is discernible from the records, the assessee company had during the year ended 31.03.2011 paid an amount of Rs. 23,01,70,000/- as share application money to its WOS viz. Saudi Ensas Company for Engineering Services WLL, UAE. It was the claim of the assessee,

that the share capital was infused to revive the company foreseeing the business opportunities available in Saudi Arabia. Observing, that the issue of share application money to the AES pending allotment of shares beyond the reasonable period of time as described under the FEMA Act had to be looked into from the Transfer Pricing angle, the TPO holding a conviction that as the money was given to the AE in the preceding year but no shares were allotted, thus computed the interest @7.61% on the said amount for the whole year and quantified the same at Rs. 1,81,20,323/-. On appeal, the CIT(A) relying on the judgment of the Hon'ble High Court of Bombay in the case of Vodafone India Services Pvt. Ltd. Vs. Addl. CIT (2014) 368 ITR 1 (Bom) observed, that as a transaction of investment in share capital of subsidiaries outside India was not in the nature of a transaction referred to in Sec. 92B of the Act, therefore, the transfer pricing provisions were not applicable. It was submitted by the ld. A.R that the Tribunal in its consolidated order for A.Y 2009-10 and A.Y 2010-11 in ITA No. 2822/Mum/2017 and ITA No. 2823.Mum/2017, had vacated the additions that were made by the A.O towards charging of notional interest on the share application money that was given to its wholly owned subsidiary company viz. Saudi Ensas Company for Engineering Services WLL, UAE. We have perused the aforesaid order of the Tribunal, and find, that the said addition was vacated by the Tribunal by observing as under:

> 3.5.7 Upon careful consideration of factual matrix as enumerated by us in the preceding paragraphs, the undisputed position that emerges is the fact that the assessee has advanced Share Application Money to one of its AE situated in Saudi Arabia with a view to acquire further stake in that entity. The entity has become wholly owned subsidiary of the assessee company during the month of January, 2009. The financial health of its AE was not good and the money was advanced with a view to infuse further capital in the AE and with a view to acquire controlling stake in its AE. The money has been utilized by its AE to pay-off business debts and to meet working capital requirements. Another undisputed fact is that ultimately the shares have been allotted to the assessee during December, 2015 after getting the desired regulatory approvals from concerned authority i.e. SAGIA. It is also undisputed fact that there was delay in the legal process which has been substantiated by the assessee, inter-alia, by furnishing email correspondences etc. The entirety of the facts and circumstances would demonstrate that the investment made by the assessee was for genuine business purpose and the stated transaction was not found to be a sham transaction, in any manner. Another fact is that whatever benefit would accrue to assessee's AE, they would indirectly accrue to the assessee since AE ultimately became wholly owned subsidiary of the assessee company. No doubt, there was inordinate delay in allotment of shares, nevertheless, the assessee was successful in explaining the delay 20 VOLTAS LIMITED Assessment Years 2009-10 & 2010-11 in allotment of share and was able to demonstrate with evidences the circumstances which led to delay in allotment of shares. Therefore, recharacterization of this transaction as advance / loan by revenue authorities, in our

considered opinion, was not correct approach and this transaction could not be equated with loan transactions. The Ld. DR has contended that the transactions have not been re-characterized as loan but the same has been benchmarked since certain benefits have accrued to AE by infusion of fund which must be shared with the assessee. However, we find that ALP of the transaction has been computed in similar manner as it would be computed for a loan transaction. Further as already noted, assessee's AE ultimately became wholly owned subsidiary of the assessee and therefore, whatever benefit would accrue to AE, the same would indirectly accrue to the assessee. Therefore, not convinced with the approach of lower authorities, we hold that no addition would be warranted on this account. To arrive at aforesaid conclusion, we draw strength from the observation of Hon'ble Bombay High Court in Pr. CIT V/s Aegis Limited (ITA No. 1248 of 2016 dated 28/01/2019) wherein Hon'ble court has observed that in the absence of finding that the transaction was sham, the TPO could not have treated such transaction as a loan and charge interest thereon on notional basis.

3.5.8 Our view is further fortified by the decision of co-ordinate bench of Delhi Tribunal rendered in Bharti Airtel Limited V/s Addl. CIT (ITA No. 5816/Del/2012 dated 11/03/2014) wherein Hon'ble Bench has observed as under: -

> "47. We find that in the present case the TPO has not disputed that the impugned transactions were in the nature of payments for share application money, and thus, of capital contributions. The TPO has not made any adjustment with regard to the ALP of the capital contribution. He has, however, treated these transactions partly as of an interest free loan, for the period between the dates of payment till the date on which shares were actually allotted, and partly as capital contribution, i.e. after the subscribed shares were allotted by the subsidiaries in which capital contributions were made. No doubt, if these transactions are treated as in the nature of lending or borrowing, the transactions can be subjected to ALP adjustments, and the ALP so computed can be the basis of computing taxable business profits of the assessee, but the core issue before us is whether such a deeming fiction is envisaged under the scheme of the transfer pricing legislation or on the facts of this case. We do not find so. We do not find any provision in law enabling such deeming fiction. What is before us is a transaction of capital subscription, its character as such is not in dispute and yet it has been treated as partly of the nature of interest free loan on the ground that there has been a delay in allotment of shares. On facts of this case also, there is no finding about what is the reasonable and permissible time period for allotment of shares, and even if one was to assume that there was an unreasonable delay in allotment of shares, the capital contribution could have, at best, been treated as an interest free loan for such a period of ' inordinate delay' and not the entire period between the date of making the payment and date of allotment of shares. Even if ALP determination was to be done in respect of such deemed interest free loan on allotment of shares under the CUP method, as has been claimed to have been done in this case, it was to be done on the basis as to what would have been interest payable to an unrelated share applicant if, despite having made the payment of share application money, the applicant is not allotted the shares. That aspect of the matter is determined by the relevant statute. This situation is not in pari materia with an interest free loan on commercial basis between the share applicant and the company to which capital contribution is being made. On these facts, it was unreasonable and inappropriate to treat the transaction as partly in the nature of interest free loan to the AE. Since the TPO has not brought on record anything to show

that an unrelated share applicant was to be paid any interest for the period between making the share application payment and allotment of shares, the very foundation of impugned ALP adjustment is devoid of legally sustainable merits.

48. Let us also deal with two judicial precedents which have been heavily relied upon by the TPO, as also by the learned Departmental Representative, on which their case rests. None of these decisions, however, deal with the core issue before us i.e. whether a capital contribution can be deemed to be partly an interest free loan, for the period till the shares were actually allotted, and partly as capital contribution, after the subscribed shares were issued by the subsidiary in which capital contribution was made. In the case of Perot Systems TSI India Ltd (supra), a coordinate bench of this Tribunal had an occasion to deal with the arm's length price adjustment with regard to interest free advances to the subsidiaries. That was a case in which the assessee, an Indian company, advanced interest-free loans to its 100% foreign subsidiaries. The subsidiaries used those funds to make investments in other step- down subsidiaries. On 22 VOLTAS LIMITED Assessment Years 2009-10 & 2010-11 the question whether notional interest on the said loans could be assessed in the hands of the assessee under the transfer pricing provisions of Chapter X, the assessee argued that the said "loans" were in fact "quasi - equity" and made out of commercial expediency. It was also argued that notional income could not be assessed to tax. However, both of these arguments were rejected by a coordinate bench of this Tribunal. While doing so, the coordinate bench observed that there was no material on record to establish that the loans were in reality not loans but were quasi-capital and that there is also no reason why the loans were not contributed as capital if they were actually meant to be a capital contribution. It was observed that, "It is not the case that there was any technical problem that the loan could not have been contributed as capital originally, if it was meant to be a capital contribution". The argument of loan being in the nature of quasi capital was thus rejected on facts. It was not even a case of quasi capital, and, therefore, this case has no bearing on the question before us i.e. whether ALP adjustments can be made in respect of payments towards share application money in a situation in which the shares have been issued several months after the payments for share application money have been made. Similarly, in VVF's case (supra), the transaction was admittedly in the nature of interest free loan between AEs and the commercial expediency in advancing interest free loans was on account of ownership and control of subsidiary being in the hands of the assessee, which was recognized as a significant factor for commercial expediency. However, as we have seen in the earlier discussions, such commercial expediency of granting interest free loans is wholly irrelevant because it is the impact of this interrelationship, on account of management, capital and control, which is sought to be neutralized by arm's length price adjustments. This was also not a case in which a capital contribution was deemed to be partly an interest free loan (i.e. for the period till the shares were actually allotted) and partly as capital contribution (i.e. when the subscribed shares were allotted by the subsidiary). Revenue, therefore, does not derive any advantage from these judicial precedents either.

49. In any event, it is not open to the revenue authorities to recharacterize the transaction unless it is found to be a sham or bogus transaction. While there are no specific powers vested in the TPO to recharacterize the transaction, even under the judge made law, such rechracterization can be done by the revenue authorities when

> the transactions are found to be substantially at variance with the stated form. In the present case, there cannot even a suggestion to hold that this is a bogus transaction because admittedly the subscribed shares capital has indeed been allotted to the assessee. The transaction is thus accepted to be genuine in effect.
>
> 50. In view of these discussions, as also bearing in mind entirety of the case, we are of the considered view that the authorities below were in error in treating the payment of share application money, as partly in the nature of interest free loans to the AEs, and, accordingly, ALP adjustment based on that hypothesis was indeed devoid of legally sustainable merits. We delete the impugned adjustment of Rs.19,15,45,943. The assessee gets the relief accordingly. As we have decided this ground of appeal on the fundamental issue that the payment of share application money could not be partly treated as interest free loan to AE, we see no need to deal with other aspects of the matter.
>
> This decision has subsequently been followed by Mumbai Tribunal in Parle Biscuits Pvt. Ltd. V/s DCIT (ITA No.9010/Mum/2010 dated 11/04/2014) and also in Aditya Birla Minacs Worldwide Ltd. V/s DCIT (ITA No.7033/Mum/2012 25/03/2015) wherein similar ratio has been laid down.
>
> 3.5.9 Keeping in the view the facts and circumstances, we delete the impugned TP adjustment as proposed by Ld. TPO."

We have perused the aforesaid order of the Tribunal, and find, that the fact situation pertaining to the issue under consideration viz. transfer pricing adjustment as regards charging of notional interest on the share application money that was given by the assessee to its wholly owned subsidiary company viz. Saudi Ensas Company for Engineering Services WLL, UAE, for which allotment of shares was pending on 31.03.2012, remains the same as was there before the Tribunal in the assesse's own case for A.Y 2009-10 and A.Y 2010-11 in ITA No. 2822/Mum/2017 and ITA No. 2823.Mum/2017. Finding ourselves to be in agreement with the aforesaid view of the Tribunal, we respectfully follow the same. Accordingly, in terms of our aforesaid observations we uphold the deletion of the addition of Rs. 1,81,20,323/- that was made by the A.O/TPO towards charging of notional interest on share application money pending allotment of shares with its wholly owned subsidiary company viz. Saudi Ensas Company for Engineering Services WLL, UAE. The **Grounds of appeal Nos. 1.1 to 1.7** are dismissed.

12. As regards the disallowance made by the A.O u/s 14A r.w Rule 8D of the Act, we find that the only grievance of the revenue is that the CIT(A) had erred in directing the AO not to consider the assets which did not yield dividend income for computation of average value of investment for

making the disallowance u/ s. 14A. On a perusal of the order of the CIT(A), we find that he had concluded as hereinabove after taking cognizance of the order of the **'Special bench'** of the **ITAT, Delhi** in the case of **ACIT, Circle 17(1), New Delhi Vs. M/s Vireet Investments (P) Ltd. (2017) 165 ITD 0027 (Delhi) (SB)**. We have given a thoughtful consideration and finding no infirmity in the aforesaid view so taken by the CIT(A), uphold the same. The **Ground of appeal No. 2** raised by the revenue is dismissed.

13. The appeal of the revenue is dismissed.

14. Resultantly, the appeal of the assesse viz. ITA No. 6612/Mum/2018 is partly allowed, while for the appeal of the revenue viz. ITA No. 7028/Mum/2018 is dismissed.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

| | |
|---|---|
| Sd/- | Sd/- |
| (Pramod Kumar) | (Ravish Sood) |
| VICE PRESIDENT | JUDICIAL MEMBER |

मुंबई Mumbai; दिनांक 30.06.2020

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

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

सत्यापित प्रति //True Copy//

**आदेशानुसार/** BY ORDER,

**उप/सहायक पंजीकार** (Dy./Asstt. Registrar)

**आयकर अपीलीय अधिकरण,** मुंबई / **ITAT, Mumbai**