आयकर अपीलीय अधिकरण, अहमदाबाद।

IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, AHMEDABAD
(THROUGH VIRTUAL COURT)
BEFORESHRI RAJPAL YADAV, VICE PRESIDENT
And SHRI WASEEM AHMED, ACCOUNTANT MEMBER

Sl. No(s)	ITA No(s)	Asset. Year(s)	Appeal(s) by Appellant vs. Respondent	
			Appellant	Respondent
1.	11/Ahd/2013	2009-10	Gujarat Urja Vikas Nigam Ltd., Sardar Patel Vidyut Bhavan, Race Course Circle, Baroda-390007 PAN No. AACCG2861L	Deputy Commissioner of Income Tax Circle-1(1), Baroda
2.	37/Ahd/2013	2009-10	The DCIT, Circle-1(1), Baroda	Gujarat Urja Vikas Nigam Ltd. Race Course Circle, Alkapuri, Baroda-390007 PAN No. AACCG2861L
3.	3103/Ahd/2014	2009-10	Gujarat Urja Vikas Nigam Ltd., Sardar Patel Vidyut Bhavank, Race Course Circle, Baroda-390007 PAN No. AACCG2861L	Deputy Commissioner of Income Tax Circle-1(1), Baroda

Assessee by :	Shri M. K. Patel & Shri M. J. Shah AR's
Revenue by :	Shri Virendra Ojha, CIT DR

सुनवाई की तारीख/Date of Hearing : 03.09.2020
घोषणा की तारीख /Date of Pronouncement : 22.10.2020

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

In this bunch of appeals two appeals have been filed by the Assessee and one appeal has been filed by the Revenue for A.Y. 2009-10which are arising from the separate order of the Ld. CIT(A)-I Baroda dated 29.10.2012 & 19.09.2014, in the assessment proceedings under Section143(3) & under

Section 250 r.w.s. 143(3)of the Income Tax Act, 1961for A.Y. 2009-10 (in short "the Act").

First we take up ITA No. 11/Ahd/2013for the A.Y. 2009-10(Assessee's Appeal):-

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

"1.0 The Learned Commissioner of Income Tax (Appeals) erred in law and on facts has restricted the additions made under Section 14A of the I T Act, 1961 to 50,85,00,000/- considering the same as attributable to exempt dividend income. It is submitted that the disallowance is uncalled for and be directed to be deleted.

2.0 The Learned Commissioner of Income Tax (Appeals) has erred in law and on facts has set aside the additions of Rs.4,44,00,000/- being Guarantee Fees paid to the Government of Gujarat in consideration of it issuing the guarantee for various unsecured loans with the direction to re-verify the claim despite the fact that the documents establishing the facts were submitted at the time of appeal hearing.

3.0 The Commissioner of Income Tax (Appeals) has erred in law and on facts has set aside the addition with respect to the prior period expense of Rs.21,47,000/-with the direction to re-verify the claim despite the fact that the documents establishing the facts that the same is a credit entry and already included in the Net Profits considered for computing the taxable income were submitted at the time of appeal hearing.

4.0 The Learned Commissioner of Income Tax (Appeals) has erred in law and on facts in confirming the disallowance of depreciation amounting to Rs.1,21,06,721/- on the basis that certain items included under the head computers do not qualify for depreciation @ 60% under the Income Tax Act, 1961.

5.0 The Learned Commissioner of Income Tax (Appeals) has erred in law and on facts in confirming the enhancement of Book Profit computed under Section 115JB of the Income Tax Act, 1961 by Rs.50,85,00,000/- on account of disallowance made under Section 14A of the Income Tax Act, 1961.

6.0 The Learned Commissioner of Income Tax (Appeals) erred in law and on facts has dismissed the ground relating to the initiation of penalty proceedings under Section 271(1)(c) of the I T Act.

7.0 The Learned Commissioner of Income Tax (Appeals) has erred in law and on facts in confirming the charging of interest under Section 234B, 234C and 234D of the Income Tax Act, 1961.

8.0 The appellant craves leave to add to, alter, delete or modify any of the grounds of appeal either before or at the time of hearing of this appeal."

3. The first issue raised by the assessee is that the Learned CIT (A) erred in restricting the addition of Rs.50,85,00,000/- out of the total addition of Rs. 238,20,40,627/- made by the AO under the provisions of Section 14A read with Rule 8D of Income Tax Rule though the assessee has not incurred any expenditure in the earning of dividend income.

4. The facts in brief are that the assessee in the present case is a limited company and engaged in the business of purchase and sale of electricity. The assessee in the year under consideration declared dividend income of Rs.1,116.61 lakhs on the investments which was shown as on 1st April 2008 and 31st March 2009 at Rs.5,58,204.74 lakhs and Rs.6,64,856.04 lakhs respectively in its balance sheet. The assessee at the same time has claimed the deduction on account of interest expenses amounting to Rs.13,122.56 Lacs in the year under consideration on the borrowed fund amounting to Rs.3,28,754.64 lakhs.

4.1 However, the assessee during the assessment proceedings claimed that it has not incurred any expenditure in the earning of the dividend income. But the AO disregarded the contention of the assessee by observing that the own fund of the assessee is less than the investment and therefore it can be inferred that the borrowed fund has been utilized in the investments which have generated the dividend income. Accordingly, the AO invoked the provisions of Section 14A read with Rule 8D and made the disallowance of the following expenses:

"S.No.	*Particulars*	*Amount*
i.	*Direct expenses*	*NIL*
ii.	*Interest expenses*	*₹21,879.34432 Lacs*
iii.	*Administrative expenses*	*₹3,057.65195 Lacs*
		₹24,937.01627 Lacs"

5. However, the AO found that the assessee has not offered the dividend income in the profit and loss account and no exempted income was claimed. Accordingly, the AO reduced the amount of dividend income of Rs.1,116.61 lakhs from the disallowance made under Section 14A read with Rule 8D and the balance amount of Rs.238,20,40,627/- was added to the total income of the assessee.

6. Aggrieved assessee preferred an appeal to the Learned CIT (A) who has partly allowed the appeal filed by the assessee after making the reference to the order of his predecessor for the Assessment Year 2008-09. The relevant finding of the Learned CIT (A) is placed on pages 12 to 15 of his order.

7. Being aggrieved by the order of Learned CIT-A, both the assessee and the Revenue are in appeal before us. The assessee is in appeal against the confirmation of the addition made by the AO for Rs.50,85,00,000/- whereas the Revenue is in appeal against the deletion of the addition made by the AO.

8. The Learned AR before us submitted that the Learned CIT (A) has followed the decision of his predecessor pertaining to the Assessment Year 2008-09 which was carried before the ITAT in ITA Nos. 837 and 899/AHD/2012, both by the assessee and the Revenue. However, the ITAT was pleased vide order dated 22nd June 2016 to set aside the issue to the file of the AO for fresh adjudication. Accordingly, the Learned AR before us pleaded that the matter for the year under consideration can also be set aside to the file of the AO for fresh adjudication.

9. On the contrary, the Learned DR raised no objection if the matter is set aside to the file of the AO for fresh adjudication in accordance to the provisions of law.

10. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, there is no ambiguity that the Learned CIT (A) has decided the issue on hand after relying on the order of his predecessor for the Assessment Year 2008-09 which was subsequently set aside by the ITAT for fresh adjudication. The relevant finding of the ITAT reads as under:

> *"8. On the other hand, ld. DR supported the orders of lower authorities.*
>
> *9. We have heard the rival contentions and perused the material on record. In these grounds raised by the assessee and the Revenue challenge the action of ld. CIT(A). We observe that an addition of Rs.152.46 crores was sustained, made by ld. Assessing Officer which was sustained to Rs.61.46 crores by ld. CIT(A) and, therefore, assessee has raised the ground against the sustained addition of Rs.61.46 crores whereas Revenue has challenged the deletion of Rs.91 crores out of the disallowance u/s 14A of the Act.*
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> *10. In ITA No.1874/Ahd/2010 vide its order dated 20.6.2014 the Tribunal adjudicated the issue relating to disallowance u/s 14A and held as under :-*
>
> *7. We have heard the rival submissions and perused the orders of lower authorities and materials available on record. The undisputed facts of the case are that the Assessing Officer found that the assessee has earned tax free dividend income of Rs 1283.95 lakhs and that the assessee has claimed interest expenditure of Rs 18,325.41 lakhs. The assessee has not attributed any expenditure towards earning of exempt dividend income. Therefore, by invoking the section 14A read with Rule 8D he made disallowance of Rs 197.80 crores. We find that a similar issue had come up before this Tribunal in assessee's own case in the immediately preceding Assessment Year 2006-07 wherein the Tribunal restored the matter back to the file of the Assessing Officer for adjudication afresh by observing as under:*
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> > *"2. At the outset, our attention has been drawn on an additional ground of appeal raised by the Revenue Department reads as under:*
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> > *"1(a) On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition ofRs.187.97 crores u/s 14A of the Act on account of interest attributable to investment in shares without appreciating the fact that in view of Section 106 of the Indian Evidence Act, it was up to the assessee company to adduce evidence that all the borrowings were used for the purposes of business and its is assessee' s own surplus fund that were invested in the shares and deposits*

earning exempted income, and, even in case of mixed funds, the disallowance of interest could be made."

1(b) As an alternate plea, the Id. CIT(A) erred in not upholding the addition u/s. 14A on account of interest attributable to investment in shares to the extent in view of provisions of section 14A read with Rule 8D. "

3. Learned DR has pleaded that an addition of Rs. 187.97 crores which was made u/s 14A was deleted by learned CIT(A), however, it was not adjudicated as per the grounds of appeal. Learned DR has also argued that the assessee was required to adduce evidence that all the borrowings were used for the purpose of the business and the assessee's own surplus funds were invested in the shares. Learned DR has also informed that in A.Y. 2007-08, the addition of similar nature was upheld by learned CIT(A). He has thus pleaded that the issue being legal in nature which has emerged from the facts already on record, therefore, the additional ground deserves to be admitted for adjudication.

4. After hearing both the sides, the additional ground of the Revenue Department is hereby admitted for adjudication. At the outset, it is worth to mention that the impugned addition of Rs.18796.82 lacs was made by the AO without having any discussion in respect of the applicability of Section 14A of the IT Act. Likewise, learned CIT(A) has also not discussed the applicability of the provisions of Section 14A of IT Act, however, after considering the merits of the case, deleted the addition. With this clarification, we have examined the facts and the issue as emerged from the corresponding assessment order passed u/s. 143(3), dated 26.12.2008. It was noted by the AO that the assessee had claimed a huge amount of interest expenditure of Rs. 19360.59 lacs, as per the following bifurcation.

	(Rs. in lacs)
Particulars	*Amount*
Interest on Term Loans	*8981.35*
Working Capital	*8184.50*
Others	*677.63*
Bank Charges & Guarantee Fees	*591.65*
19435.13	
Less: Interest Capitalized	*74.54*
	19360.59

4.1 At the same time, it was also found by the AO that the assessee had made the investment of Rs.5,47,709.74 lacs on which dividend earned was at Rs.508.18 lacs. The AO's objection was that on one hand the assessee has diverted the huge funds towards such investment having exempted income and on the other hand borrowed huge funds of Rs.3,46,272.51 lacs on which claimed interest of Rs. 19360.59 lacs. Therefore, the AO was of the view that the assessee had diverted the borrowed funds for earning exempted income. The assessee's contention was that the investment during the year was only Rs.102.32 lacs and rest of the investment was made in the earlier years. According to the AO, if the assessee had not made such investment either in the year under consideration or in earlier years then the assessee would not have been required to borrow interest bearing loans. The AO has placed reliance upon the case of H.R Sugar Factory, 187 ITR 366 (Aid) for the legal proposition that the assessee could have otherwise avoided its liability of

interest by not giving interest free funds to its group concerns. The addition in the question was thus made by the AO in the following conclusion.

> *"In view of the above discussion and provision of law, the interest attributable to the investment is not allowable expenditure. The assessee was required to give the rates of interest paid to various sources. The assessee vide its reply did not furnish the rates of interest paid. It simply submitted that loans from various banks with varying interest rates were obtained. During the year under consideration, the market rate of interest was 12%. Therefore, interest at the rate of 12% works out to Rs.65725.17 lacs on investments of Rs.547709.74 lacs. However, the assessee has claimed interest expenditure of Rs.19360.59 lacs and has shown interest income of Rs.55.59 lacs and dividend income of Rs.508.18 lacs. Hence, against the interest expenditure of Rs.19360.59 lacs assessee has grown interest and dividend income of Rs.563.77 lacs. Thus, net disallowance is made of Rs.18796.82 lacs."*

5. Being aggrieved the matter was carried before the First Appellate Authority who has decided the issue in assessee's favour in the following manner:

> *"Thus, the only test to be applied is that of "commercial expediency". In the instant case, it is seen that no investment was made by the assessee company by using borrowed funds.The entire investment, except minor investment of Rs.11.25 lacs was inherited in the demerger exercise. The investment in shares was due to the restructuring carried out at the behest of GOG. The investments were in the form of shares of subsidiary companies as pan of the financial restructuring plan approved by the Government of Gujarat which was integral to the demerger. This was clearly commercially expedient for the appellant company. The business itself was viable only under the plan of restructuring, which required the company to have cross-holdings in the unbundled companies of GEB. In fact, the appellant became the holding company of the generating and transmission companies. Looking to the facts and circumstances of the case, I am of the opinion that there was no diversion of borrowed funds for non-business purposes. Accordingly, the addition of Rs. 18796.82 lacs is directed to be deleted."*

6. With this factual background, we have heard both the sides. Learned DR has primarily placed reliance on a decision of respected Special Bench of ITAT Mumbai in the case of ITO V/s. Daga Capital Management Pvt. Ltd., 117 ITD 169 (Mum) (SB). Learned DR has also pleaded that in one of the assessment year, i.e., in A.Y. 2007-08 learned CIT(A) had sustained the same nature of addition. From the facts of the case, we have noted that there was re-structuring according to which erstwhile GEB was demerged into seven different companies. Post restructuring; the assessment year under consideration is the first year of operation of the assessee company. On one hand, those were the facts which were relied upon by the learned CIT(A). However, on the other hand, the AO has reproduced some of the replies of the assessee through which it was claimed that the said investment was not made by the assessee company out of the borrowed funds but from the consumers, contribution and subsidiaries. There was a reference of the annual accounts of the year 2005-06. The assessee has also informed that during the year

under consideration the assessee company had invested only a sum of Rs.11.25 lacs. Rest of the investments were the share capital of the subsidiary companies as per the terms of the Financial Restructuring Plan approved by the Government of Gujarat. We have noted that the learned CIT(A) has granted relief only on the ground that the assessee company had become the holding company and the investments were in the form of shares of subsidiary companies which was an integral part of the demerger arrangement. Therefore, it was nothing but commercial decision.

6.2 According to us, the issue has been mixed up by the Revenue Department. The first step should be to examine the scheme of demerger and thereafter the issue could have been streamlined. As per the definition of "demerger" prescribed u/s.2(19AA) means; the transfer pursuant to a scheme of arrangement by a demerged company of its one or more undertakings to any resulting company in such a manner that all the property of the undertaking/unit being transferred by the demerged company immediately before the demerger, which becomes the property of the resulting company by virtue of the demerger. Therefore, it was necessary for the AO to examine the balance sheet of the demerged company and the position of the accounts of the undertaking which is demerged with the resulting company. The AO has to examine the liabilities related to the said undertaking whether being transferred under the scheme of arrangement which were in existence immediately before the demerger. The AO has to examine the value of the property in the books of accounts immediately before the demerger which was transferred. The AO has also to examine the financial position of the "resulting company", as defined u/s.2(41A) of IT Act. In general, an undertaking of the demerged company is transferred in a demerger scheme and as a result a resulting company comes into existence. The resulting company in consideration of such transfer of an undertaking ofthe demergerd company issues shares to the share holders of the demerged company. Therefore, the responsibility of the "resulting company" was also required to be ascertained by the AO. This is the first aspect, which was not examined by the AO and the order of the Revenue Authorities are silent on this subject.

6.3 Next question is about the huge amount of interest expenditure claimed by the assessee. The AO is required to examine first the correctness of the claim. Whether the interest on term loans, bank charges and guarantee fees were in respect of the business of the assessee. Thereafter, the AO is also required to give a clear finding about the borrowings made by the assessee on which the said interest was paid. The next step is that the AO has to examine the sources of the funds which were invested for earning the dividend income. If the source of such investment is out of the interest bearing borrowings, then only the question of disallowance of interest would arise, otherwise not. On the other hand, the claim of the assessee is that there were sufficient non interest bearing reserves or surplus available. The AO is required to investigate the correctness of the claim that whether the assessee had sufficient non interest bearing fund available and in what form those were utilized by the assessee. If the assessee is in a position to demonstrate that the non-interest bearing funds have actually been invested to earn exempted income then the assessee's claim is legally correct. Thereafter, the question of the invocation of Section 14A comes into play. As far as the applicability of the decision of Special Bench is concerned the same now stood covered by the decision of Hon'ble Bombay High Court pronounced in the case of Godrej and Boyce, 328 ITR 81 (Bom). For

the sake of completeness herein below reproduced a portion of an ITAT order viz., Aditya Midcals as follows:

"5. With this brief background, we have examined the facts of the case as also the law pronounced in this regard.

6. As far as the Assessing Officer's action is concerned, the disallowance has been made on the basis of a calculation of the proportionate interest alleged to be attributable to the investment earning exempted dividend income. It is also to be noted that while doing so for the years under consideration the A.O. has not followed the past method of calculation of the disallowance. As per AO it was seen that the working of disallowance was wrong because while calculating the proportionate interest attributable to dividend income the ratio of dividend income and total sales have been taken though there was no direct relation between the two. The Assessing Officer had thus made the calculation after taking into account the proportion of the interest on the ratio between the investment in shares and total assets including investment in shares. Apart from this, there is nothing in the assessment order which can establish the nexus of utilization of borrowed interest-bearing funds diverted towards investment in debentures. But there are other discussions in this very assessment order wherein the provisions of section 36(l)(iii) of the Act have also been touched upon. The Assessing Officer was expected to correlate the said discussion with the exempted dividend income u/s. 10(33) of the Act. As far as the law pronounced in this regard is concerned, first of all, we have to follow a latest decision of Hon'ble Bombay High Court pronounced in the case of Godrej & Boyce Mfg. Co.Ltd. Mumbai vs. Dy.CIT in Income tax Appeal No.626 of 2010 and Writ Petition No.758 of 2010 order dated 12/08/2010, { now reported as 328 ITR 81(Bom) } wherein the Hon'ble High Court has upheld the constitutional validity of section 14A of the I.T. Act, 1961 and held that the Assessing Officer should determine as to whether the assessee has incurred any expenditure (direct or indirect) in relation to dividend income and/or income from mutual fund which do not form part of the total income as contemplated U/S.14A of the I.T. Act, 1961. It has also been directed that the Assessing Officer can adopt a reasonable basis for effecting the apportionment. It has also been observed by the Hon'ble Court that while making that determination, the Assessing Officer should provide a reasonable opportunity to the assessee of producing its accounts and material having a bearing on the facts and circumstances of the case.

6.1. In this judgement at the end, the Hon'ble Court has also recapitulated the conclusion and pronounced that a finding is required whether the investment in shares is made out of own funds or out of borrowed funds. A nexus is required to be established between the investments and the borrowings. In section 14A of the Act expenditure incurred in relation to exempted income is to be disallowed only if the Assessing Officer is satisfied with the expenditure claimed by the assessee pertaining to the said exempt income. Rather, the Court was very specific that in case, no such exercise was carried out by the Assessing Officer then the matter is to be remanded back for afresh investigation. It has also been made clear that the proviso to section 14A of the Act was effective from 2001-02. The Hon'ble Court has also pointed out the importance of Rule 8D of the I.T.Rules, 1962. It was made clear that sub-section (1) to section 14A was inserted with retrospective effect from 01/04/1962, however, sub-sections (2) & (3) were made applicable with effect from 01/04/2007. The proviso was inserted with retrospective effect from 11/05/2001 ,

however Rule 8D was inserted by the Income Tax (Fifth Amendment), Rules, 2008 by publication in the Gazette dated 24/03/2008; reproduced below:-

"a) The ITAT had recorded a finding in the earlier assessments that the investments in shares and mutual funds have been made out of own funds and not out of borrowed funds and that there is no nexus between the investments and the borrowings. However, in none of those decisions was the disallow ability of expenses incurred in relation to exempt income earned out of investments made out of own funds considered. Moreover, under Section 14A, expenditure incurred in relation to exempt income can be disallowed only if the assessing officer is not satisfied with the correctness of the expenditure claimed by the assessee. In the present case, no such exercise has been carried out and, therefore, the Tribunal was justified in remanding the matter.

b) Section 14A was introduced by the Finance Act 2001 with retrospective effect from 1 April 1962. However, in view of the proviso to that Section, the disallowance thereunder could be effectively made from assessment year 2001-2002 onwards. The fact that the Tribunal failed to consider the applicability of Section 14A in its proper perspective, for assessment year 2001 -2002 would not bar the Tribunal from considering disallowance under Section 14A in assessment year 2002-2003.

c) The decisions reported in Sridev Enterprises (supra), Munjal Sales Corporation (supra) and Radhasoami Satsang (supra) holding that there must be consistency and definiteness in the approach of the revenue would not apply to the facts of the present case, because of the material change introduced by Section 14A by way of statutory disallowance in certain cases. There, the decisions of the Tribunal in the earlier years would have no relevance in considering disallowance in assessment year 2002-2003 in the light of Section 14A of the Act.

73. For the reasons which we have indicated, we have come to the conclusion that under Section 14A(1) it is for the Assessing Officer to determine as to whether the assessee had incurred any expenditure in relation to the earning of income which does not form pan of the total income under the Act and if so to quantify the extent of the disallowance. The Assessing Officer would have to arrive at his determination after furnishing an opportunity to the assessee to produce its accounts and to place on the record all relevant material in support of the circumstances which are considered to be relevant and germane. For this purpose and in light of our observations made earlier in this section of the judgment, we deem it appropriate and proper to remand the proceedings back to the Assessing Officer for a fresh determination.

Conclusion:

74. Our conclusions in this judgment are as follows;

i) Dividend income and income from mutual funds falling within the ambit of Section 10(33) of the Income Tax Act 1961, as was applicable for Assessment Year 2002-03 is not includible in computing the total income of the assessee. Consequently, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to such income which does not form part of the total income under the Act, by virtue of the provisions of Section 14A(1);

ii) The payment by a domestic company under Section 115O(1) of additional income tax on profits declared, distributed or paid is a charge on a component of the profits of the company. The company is chargeable to tax on its profits as a distinct taxable entity and it pays tax in discharge of its own liability and not on behalf of or as an agent for its shareholders. In the hands of the shareholder as the recipient of dividend, income by way of dividend does not form part of the total income by virtue of the provisions of Section 10(33). Income from mutual funds stands on the same basis;

iii) The provisions of sub sections (2) and (3) of Section 14A of the Income Tax Act 1961 are constitutionally valid;

iv) The provisions of Rule 8D of the Income Tax Rules as inserted by the Income Tax (Fifth Amendment) Rules 2008 are not ultra vires the provisions of Section 14A, more particularly sub section (2) and do not offend Article 14 of the Constitution;;

v) The provisions of Rule 8D of the Income Tax Rules which have been notified with effect from 24th March, 2008 shall apply with effect from Assessment Year 2008-09;

(vi) Even prior to Assessment Year 2008-09, when Rule 8D was not applicable, the Assessing Officer has to enforce the provisions of sub section (1) of Section 14A. For that purpose, the Assessing Officer is duty bound to determine the expenditure which has been incurred in relation to income which does not form part of total income under the Act. The Assessing Officer must adopt a reasonable basis or method consistent with all the relevant facts and circumstances after furnishing a reasonable opportunity to the assessee to place all germane material on the record;

vii) The proceedings for Assessment year 2002-03 shall stand remanded back to the Assessing Officer. The Assessing Officer shall determine as to whether the assessee has incurred any expenditure (direct or indirect) in relation to dividend income / income from mutual funds which does not form part of the total income as contemplated under Section 14A. The Assessing Officer can adopt a reasonable basis for effecting the apportionment. While making that determination, the Assessing Officer shall provide a reasonable opportunity to the assessee of producing its accounts and relevant or germane material having a bearing on the facts and circumstances of the case."

6.4 Due to the decision of the Hon'ble Bombay High Court, it is legally correct to refer this issue back to the stage of the AO to be decided de novo as per the guidelines of the Hon'ble Court. The outcome of the above discussion is that the "Additional Ground" raised by the Revenue may be treated as allowed but only for statistical purpose."

8. In the absence of any distinguishing features pointed out by the Departmental Representative, facts being identical, respectfully following the precedent we restore this issue back to the file of the Assessing Officer for adjudication afresh with the same directions as given by the Tribunal in the Assessment Year 2006-07 in the above quoted order. Needless to mention that he shall allow reasonable and proper opportunity of

hearing to the assessee before adjudicating the issue. Thus, this ground is allowed for statistical purpose.

11. We further observe that Rule-8D of the IT Rules came into effect from Asst. Year 2008-09 with respect to provisions of section 14A of the Act which reads as follows :-

Sec. 14A. Expenditure incurred in relation to income not includible in total income.—
(1)For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.
(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.
(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act:
***Provided** that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001.'*

*2. **New Rule 8D :***

2.1 In exercise of the powers given in S. 14A(2) C.B.D.T. has issued a Notification No. S.O. 547(E) on 24-3-2008 (299 ITR (ST) 88). This notification amends the Income-tax Rules by insertion of a new Rule 8D providing for a "Method for determining amount of expenditure in relation to income not includible in total income". Reading this Rule it is evident that the Rule provides for disallowance of not only direct expenditure incurred for earning the exempt income but also for disallowance of proportionate indirect expenditure. This is clearly contrary to the main objective with which S. 14A was enacted.

2.2 Broadly stated, the new Rule 8D provides as under :

(i) The method prescribed in the Rule is to be applied only if the AO is not satisfied with :

(a) The correctness of the claim of expenditure incurred for earning the exempt income made by the assessee or

(b) The claim made by the assessee that no expenditure has been incurred for earning exempt income.

*(ii) The method prescribed in the Rule states that the expenditure in relation to income which does not form part of the total income shall be the **aggregate of the following amounts** :*

(a) The amount of expenditure directly relating to income which does not form part of total income.

(b) In the case of interest on borrowed funds which is not directly attributable to any particular income or receipt, the amount computed in accordance with this following formula :

$$\frac{A \times B}{C}$$

A = Amount of interest, other than the amount of interest which is directly attributable to the exempt income stated in (a) above.

B = The average of value of investment, income from which ***does not or shall not form part*** *of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the relevant accounting year.*

C = The average of total assets as appearing in the balance sheet of the assessee, on the first day and the last day of the relevant accounting year. The term 'Total Assets' means total assets as appearing in the balance sheet excluding the increase on account of revaluation of assets but including the decrease on account of revaluation of assets.

(c) An amount equal to ½ % of the average of the value of investment, income from which ***does not*** *or* ***shall not form part*** *of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the relevant accounting year.*

12. We also observe that ld. Assessing Officer applied the facts and figures of the assessee company into the method provided under Rule 8D of the IT Rules because assessee was having an average investment of Rs.5529.57 crores , interest paid during the year at Rs.131.22 crores and exempt income of Rs.249 crores. Going through these figures ld. Assessing Officer felt appropriate to applying the method of Rule 8D but did not look into the following facts :-

(i) As on 1.7.205 when the company was given a balance sheet duly notified by the State Govt., the company had total investment of Rs.5580.20 crores considering all investment in subsidiary companies at Rs.5336.43 crores, investment in other companies at Rs.243.69 crores and balance in petty investment.

(ii) Opening balance of investment as on 1.4.2007 stood at Rs.5477.16 crores.

(iii) Few investments were made during Financial Year 2005-06 to 2007-08 and in subsidiary companies and funds for the same were partly received from State Government as equity and remaining from net profit earned.

(iv) Interest expenditure of Rs.131.32 crores represents mostly the interest paid on bill discounting of IPPs and working capital loan from banks which are specifically meant for the business purpose; and

(v) Total exempt income earned by assessee during the year stood at Rs.249 crores.

13. We observe that ld. Assessing Officer has made disallowance u/s 14A of the Act without examining the facts referred above which were very crucial to reach at the final disallowance u/s 14A of the Act. There are series of judgments of the co-ordinate benches that the disallowance u/s 14A of the Act should not exceed the exempt income earned during the year and also decisions wherein the disallowance u/s 14A of the Act on account of interest expenditure are held to be incorrect if the assessee has sufficient equity and general reserve to cover the investments.

14. We are, therefore, of the view that applying the decision of the co-ordinate bench in assessee's own case in ITA No.1874 & 1821/Ahd/2010 for Asst. Year 2007-08 is dated 20.6.2014 the matter is set aside to the file of Assessing Officer to examine the facts and figures of the case in the light of our observations made above in order to arrive at a final conclusion as to whether disallowance u/s 14A is to be made and if so, then the amount thereof which in no case should exceed the exempted income earned by assessee during the year under appeal. It is needless to mention that ld. Assessing Officer shall allow reasonable and sufficient opportunity of hearing to the assessee before adjudicating the same. These grounds of assessee and the Revenue are allowed for statistical purposes.

15. Now we take ground no.3 of assessee's appeal which reads as below :-

3.0 The learned Commissioner of Income Tax (Appeals) has erred in law and on facts in confirming the enhancement of Book Profit computed under section 115JB of the Income Tax Act, 1961 by Rs.61,45,72,000/- on account of disallowance made under section 14A of the Income Tax Act, 1961.

16. At the outset ld. AR submitted that this ground relates to the disallowance under section 14A of the Act due to which book profit u/s 115JB was enhanced by ld. Assessing Officer and the fate of this ground depends on the decision to be taken for ground no.1 raised by them."

10.1 As the facts of the case on hand are identical to the facts of the case as discussed above which has been set aside to the file of the AO for fresh adjudication as per the provisions of law by the ITAT as discussed above. Respectfully following the order of this Coordinate Bench in the own case of the assessee, we set aside the issue on hand to the file of the AO for fresh adjudication in terms of the finding of the ITAT in its own case for the Assessment Year 2008-09 *(Supra)* as well as in accordance to the provisions of law. Hence, the ground of appeal of the assessee and the Revenue are allowed for the statistical purposes.

11. The second issue raised by the assessee is that the Learned CIT (A) erred in allowing the deduction of Rs.4,44,00,000/- being guarantee fees paid to the Government of Gujarat after necessary verification as directed by his predecessor for the Assessment Year 2008-09.

12. The assessee during the assessment proceedings contended that it has been paying guarantee commission to the government of Gujarat year after year on the loan outstanding at the beginning of the year. As such, the government of Gujarat stands as a guarantor for such loan raised by the assessee. , Furthermore, there is no benefit of enduring nature accruing to it on the payment of guarantee commission to the government of Gujarat.

13. However, the AO was of the view that there was the restructuring of the loan, rescheduling of repayment loan schedule, reduction in interest over a long period of time exceeding 5 years. Thus, the AO concluded that, the restructuring of loan, guarantee by the government of Gujarat, has resulted enduring benefit to the assessee. Accordingly, the AO treated the guarantee commission as capital expenditure and disallowed the same. Hence, the AO added the same to the total income of the assessee.

14. Aggrieved assessee preferred an appeal to the Learned CIT (A) who has allowed the appeal of the assessee subject to the direction to verify that such guarantee commission was not connected with the capital work in progress wherein the impugned loans were utilized as held by his predecessor for the Assessment Year 2008-09. The relevant finding of the Learned CIT (A) stands as under:

> *"4.2. Similar issue was involved in appeal No. CAB/1/152/101-11 in appellant's own case for A.Y. 2008-09. My predecessor had observed as follows in his appellate order dated 3.2.2012.*
>
> *"I have considered facts of the case and appellant's submissions. Guarantee fees was an annual recurring expenditure incurred by the appellant (Guarantee fees was payable to Government of Gujarat every year in respect of loans taken by appellant and guaranteed by Government of Gujarat. As held by Hon'ble Supreme Court in the case of India Cements Ltd. 60 ITR 52 (SC), loan cannot be treated as asset or advantage resulting in enduring benefit. Guarantee fees paid to Government of Gujarat was in connection with raising of loans and enduring benefit or advantage could not be said to have resulted by taking such loans. Only if the assets acquired out of such loans were not put to use till the end of*

previous year, i.e. 31.3.2008, guarantee fees to such extent, i.e. in respect of such loans only needs to be capitalized as cost of such asset. Appellant has certified that guarantee fees was paid in respect of loans for acquisition of capital assets which were put to use prior to 1.4.2007. Guarantee fees of Rs. 4,44,00,000/- is directed to be allowed as revenue expenditure, subject to verification by the Assessing Officer of the certificate filed during appellate proceedings, i.e. loans on which guarantee fees was paid were utilized for construction of power plants at that time and there was no capital work-in-progress in respect of such loans during F.Y.2008-09."

4.3 The A.O. is directed to follow the directions issued by my predecessor for the A.Y. 2008-09 in the year under consideration too."

15. Being aggrieved by the order of the Learned CIT (A), both the assessee and Revenue are in appeal before us. The assessee is in appeal against the direction of the Ld. CIT-A for allowing the guarantee commission after necessary verification as discussed above whereas the Revenue is in appeal against the finding of the ld. CIT-A that the guarantee fees is not resulting any enduring benefit to the assessee.

16. The Learned AR before us submitted that the ITAT in the own case of the assessee for the Assessment Year 2008-09 in ITA Nos. 837 & 899/AHD/2012 dated 22nd June 2016 has decided the issue in favor of the assessee.

17. On the other hand, the Learned DR contended that the fact whether such guarantee fees was paid with respect to the loan which was utilized for the capital working progress which was not put to usein the year under consideration is to be verified. Accordingly, if that be so, the amount of guarantee commission needs to be capitalized.

18. Both the Learned AR and DR vehemently supported the order of the authorities below to the extent favorable to them.

19. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, there is no ambiguity that the Learned CIT (A) has decided the issue on hand after relying on the order of his predecessor for the Assessment Years 2008-09 which was also subsequently upheld by the ITAT in ITA No. 899/AHD/2012 vide order dated 22nd June 2016. The relevant finding of the ITAT reads as under:

> *"38. We have heard the rival contentions and perused the material on record and gone through the decision referred and relied upon by both the parties. Through this ground Revenue has challenged the action of ld. CIT(A) deleting the disallowance of guarantee fees at Rs.4.76 crores.*
>
> *39. We observe that ld. AR has referred and relied on the decision of the co-ordinate bench in the case of Gujarat Energy Transmission Corpn. Ltd. (supra), wherein similar issue regarding the claim of guarantee fees paid to Government of Gujarat has been dealt with by the Tribunal as to whether the guarantee fees is an expenditure of capital in nature or revenue in nature and has observed as under :-*
>
> *35. We find that the Tribunal in its order dated 8.5.2015 cited supra has held as under:*
>
> > *"6. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below. We find that the ld.CIT(A) decided these issues in paras- 5.2 & 5.3 and 6.2 respectively by observing as under:-*
> >
> > > *"5.2. I have considered the submissions of the ld.AR and the facts of the case. The issue relating to whether an item of expenditure lies in the capital or the revenue field has exercised the courts in numerous cases. From an analysis of such cases a few guiding principles/tests can be identified. One of the important tests for categorizing any expenditure as capital in nature is whether the laying out of the impugned expenditure results in the acquisition of creation of any new asset. Where no such asset is created, it would be indicative of an expenditure which was not capital in nature. Another test relates to the principle of "enduring benefit". "Enduring benefit" may be in the form of long lasting use of an asset or the acquisition of a right to exploit certain commercial processes, etc. In the instant case, the assessee did not acquire any right to exploit a commercial technology or process, and neither was the benefit "enduring", since the payment of guarantee commission was an annual charge. The benefit derived from payment of such commission thus lasted for exactly one year only. Such ITA No.704 and 761/Ahd/2012shortlived benefit cannot be categorized as "enduring". Hence, I am inclined to the view that the payment of guarantee commission was a revenue expenditure. 5.3. Further, the jurisdictional Bench of ITAT had occasion to consider the allowability of guarantee commission paid to a Director of the company in respect of loans taken from the bank. In the case of Himalaya Machinery Pvt.Ltd. (ITA*

No.738/Ahd/2009) for AY 2006-07, the Tribunal held, vide order dt.5.6.2009, following the decision of the Rajasthan High Court in CIT v. Metalising Equipment Co.Pvt.Ltd., 8 DTR 12, that the payment of commission for guaranteeing repayment of loan was allowable as revenue expense. In the instant case, the loan has been guaranteed by the Government of Gujarat. Hence, quite apart from the other sound reasons for treating the expenditure as revenue, it would be unrealistic to say that the appellant company could derive any undue advantage or collateral benefit by making such payment to the GOG. In view of the totality of the circumstances, I am of the opinion that the AO was not justified in treating the payment of guarantee commission (Rs.8,39,04,550/-) as capital in nature. The addition is directed to be deleted. 6.2. I have considered the submissions of the ld.AR and the facts of the case. The jurisdictional Bench of ITAT has held in the case of Shri Rama Multi Tech vs. ACIT, 92 TTJ 568, that in determining the nature of expenditure incurred for obtaining loan, it is irrelevant to consider the purpose of loan. The amount spent on stamp duty, lawyer fees, etc. for obtaining loan secured by charge on its fixed assets is a revenue expenditure, because the transactions were entered into directly to facilitate the business of the company and payment of consultancy charges was made on ground of commercial expediency.In India Cements Ltd. vs. CIT, 60 ITR 52, the Supreme Court had also held that the expenditure incurred for securing the use of money for a certain period was revenue expenditure. In the instant case, the assessee has secured the loan by creating a charge (hypothecation of its assets). Hence the ratio of the above mentioned two cases would squarely apply. Accordingly, it is held that the AO was not justified in making the disallowance of Rs.45,24,582/-, which is directed to be deleted."

6.1 The ld.CIT(A) has followed the decision of the Tribunal passed in ITA No.738/Ahd/2009 for AY 2006-07 in the case of Himalaya Machinery Pvt.Ltd., dated 5.6.2009 and in the case of Shri Rama Multi Tech vs. ACIT reported at 92 TTJ 568.

6.2. The ld.CIT-DR could not distinguish the facts of the case, therefore we do not see any reason to interfere with the order of the ld.CIT(A), same is hereby upheld. Thus, these two grounds raised in the Revenue's appeal are rejected."

36. DR could not point out any good reason as to why the above quoted order of the Tribunal should not be followed for the year under consideration. In the absence of distinguishing features being pointed out by the DR, and the facts being identical, respectfully following the above quoted decision of the Tribunal, we confirm the order of the CIT(A), and dismiss this ground of appeal of the Revenue.

40. We are of the view that the issue raised in this ground is squarely covered by the decision of co-ordinate bench referred above in the case of Gujarat Energy Transmission Corpn. (supra) and respectfully following the same, we find no reason to interfere with the order of ld. CIT(A) and uphold the same. This ground of Revenue is dismissed."

20. As the facts of the case on hand are identical to the facts of the case as discussed above, we are incline to uphold the finding of the Ld. CIT-A.

21. Before parting, it is important to note that the revenue was in appeal in the immediate preceding Assessment Year i.e. 2008-09 before us on the following grounds of appeal:

> *"On the facts and in the circumstances of the case and in law, the ld. CIT (Appeals) erred in deleting the addition on account of disallowance of claim of guarantee fees of Rs. 4.76 crores without appreciating that the disallowance was made as the same are enduring nature in the assessee's business."*

21.1 The above ground of appeal raised by the Revenue for the Assessment Year 2008-09 in ITA No. 899/AHD/2012 was dismissed by the ITAT vide order dated 22nd June 2016 which has been elaborated in the preceding paragraph. What flows from the conjoint reading of the order of the Learned CIT (A) and the ITAT for the Assessment Year 2008-09 as discussed above is that there was no enduring benefit accrued to the assessee out of guarantee fees paid by it to the government of Gujarat. As such the finding of the ITAT has to be seen in the context of the ruling of the AO and the Learned CIT (A) for the Assessment Year 2008-09. In fact, the Learned CIT(A) for the assessment Year 2008-09 held that there was no benefit accrued to the assessee which is in the enduring nature but directed the AO to verify whether such guarantee fees relates to the capital work in progress and if that be so, the same needs to be capitalized.

22. However, the assessee did not prefer any appeal against the order of the Learned CIT(A) for the Assessment Year 2008-09. In other words, the assessee was not aggrieved by the direction of the Learned CIT (A) to verify the claim of the assessee whether such guarantee fees relates to the capital work in progress for the Assessment Year 2008-09. But the assessee for the

year under consideration has challenged the direction of the Learned CIT (A) to verify whether such guarantee fee relates to the capital working progress. As the assessee did not challenge such direction of the Learned CIT(A) for the assessment Year 2008-09 before the ITAT, it implies that such direction has reached to its finality for that assessment year. Therefore, there was no dispute for the ITAT for the Assessment Year 2008-09 for the direction issued by the Learned CIT(A). Accordingly, it cannot be inferred that the order of the Learned CIT(A) for the Assessment Year 2008-09 has merged with the order of the Learned ITAT insofar the direction issued by the Learned CIT(A) to verify the claim of the assessee for the guarantee fees whether such fees relates to the capital work in progress. Accordingly, it cannot be said that the issue raised by the assessee is a covered issue by the order of the ITAT in the own case of the assessee for the Assessment Year 2008-09 as contended by the ld. AR for the assessee. In view of the above and after considering the facts in totality, the grounds of appeal of the assessee and the Revenue are dismissed.

23. The next issue raised by the assessee is that the Learned CIT-A erred in allowing the deduction of Rs.21.47 Lacs after necessary verification despite having all the requisite details before him.

24. The AO during the assessment proceedings found that the assessee has claimed deduction of the prior period expenses amounting to Rs.21.40 lakhs which were not allowable for deduction in the year under consideration for the simple reason that the assessee, based on mercantile system of accounting, should have claimed the deduction of such expenses in the year to which it relates. Accordingly, the AO disallowed the same and added to the total income of the assessee.

25. On appeal before the ld. CIT-A, the assessee submitted that amount of Rs.21.47 Lacs represents the credit entries which were offered to tax by crediting the profit and loss account. Accordingly, further addition of Rs.21.47 Lacs will lead to the double addition to the total income of the assessee. The Learned CIT(A) after considering the submission of the assessee deleted the addition made by the AO subject to the verification of the claim made by the assessee as discussed above.

26. Being aggrieved by the order of the Learned CIT(A) the assessee is in appeal before us.

27. The Learned AR before us reiterated the contention as made before the Learned CIT(A). On the contrary, the Learned DR vehemently supported the order of the authorities below.

28. We have heard the rival contentions of both the parties and perused the materials available on record. Indeed, the onus lies on the assessee to furnish the requisite details in support of its claim. As such, we do not find any infirmity in the direction of the Learned CIT(A) for allowing the deduction for the item of the addition made by the AO after necessary verification. Accordingly, we do not find any merit in the ground of appeal raised by the assessee. Hence, the ground raised by the assessee is dismissed.

29. The next issue raised by the assessee is that the Learned CIT(A) erred in confirming the order of the AO by sustaining the disallowance of Rs.1,21,06,721/- on account of depreciation not eligible at the rate 60% being computers.

30. The AO during the assessment proceedings found that the assessee has treated certain value of the plant and machinery i.e. Rs.2,69,03,826/- as computers and claimed depreciation at the rate of 60% on such plant and machinery. As per the AO, the assessee is eligible to claim depreciation at the rate of 15% on the computerized plant and machinery and not 60% on the same. On question, the assessee could not substantiate its claim for depreciation at the rate of 60% based on documentary evidence. Accordingly, the AO disallowed the excess depreciation (more than 15%) amounting to Rs.1,21,06,721/- and added the same to the total income.

31. Aggrieved assessee preferred an appeal to the Learned CIT(A) who has confirmed the order of the AO by placing reliance on the order of his predecessor for the Assessment Year 2008-09. The relevant extract of the order is reproduced as under:

> *"6.2. Similar issue was involved in appeal No. CAB/1/152/10-11 in appellant's own case for A.Y. 2008-09. My predecessor had observed as follows in his appellate order dated 3.2.2012.*
>
> *"I have considered the facts of the case and appellant's submissions. Assessing Officer has not held that entire expenditure incurred, i.e. addition towards computer assets was not of capital nature. Appellant's submissions in this regard are therefore not relevant. The dispute is regarding rate of depreciation applicable on such assets. As per 60% rate of depreciation as prescribed in New Appendix-I of Income tax Rules. The assets on which Assessing Officer did not allow 60% depreciation rate were furniture and fixtures, i.e. panels, racks etc. and assets such as recorder machines, LCD projectors, electrical works, air conditioning, public address system, cost towards AMC and ATC etc. Assets of these kinds can neither be said to be "computers" nor "computer software" per-se. Depreciation at the rate of 60% was not applicable on such assets and the Assessing Officer rightly allowed depreciation at rate applicable to blocks of furniture and fixtures and normal plant and machinery. Disallowance of excess claim of depreciation of Rs. 1,21,06,721/- is confirmed."*
>
> *6.3 Following the decision in the preceding year i.e. A.Y. 2008-09, the disallowance of Rs. 1,21,06,721/- made in the year under consideration is also confirmed."*

32. Being aggrieved by the order of the Learned CIT(A) the assessee is in appeal before us.

33. The Learned AR before us submitted that the ITAT in the own case of the assessee for the Assessment Year 2008-09 in ITA No. 837 and 899/AHD/2012 vide order dated 22nd June 2016 has set aside the issue to the file of the AO for fresh adjudication as per the provisions of law. Accordingly, the Learned AR before us pleaded that the matter for the year under consideration can also be set aside to the file of the AO for fresh adjudication as per the provisions of law.

34. On the other hand, the Learned DR raised no objection if the matter is set aside to the file of the AO for fresh adjudication as per the provisions of law.

35. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, there is no ambiguity that the Learned CIT (A) has decided the issue on hand after relying on the order of his predecessor for the Assessment Years 2008-09 which was subsequently set aside to the AO for fresh adjudication by the ITAT in ITA No. 899/AHD/2012 vide order dated 22nd June 2016. The relevant finding of the ITAT reads as under:

> *"24. We have heard the rival contentions and perused the material on record. Through this ground, assessee is aggrieved with the disallowance of depreciation of Rs.9174986/- claimed on the computers. We find that during the assessment proceedings assessee has himself submitted the revised computation of depreciation on the computers and has agreed that depreciation has been claimed excess by Rs.9174986/-. Thereafter the matter which was almost closed due to the submission made by assessee, was revived back by the assessee by raising ground against this addition before ld. CIT(A) and gave various details and documents supporting the ground that depreciation disallowed needs to be re-worked as various types of expenditure which are fully allowable during the year are included in addition of block of assets, computers and similarly there are various machines which are actually eligible for depreciation @ 60% have been subjected to depreciation @ 15% only.*

We further observe that ld. CIT(A) has looked into this aspect and has open the way for examining the relates facts towards calculation of correct depreciation in the block of assets relating to computers by way of observing the related facts in his decision.

25. We are, therefore, of the view that in the given circumstances this issue needs to go back to the file of ld. Assessing Officer for re-examination and calculation of depreciation on computers in the light of submissions made by assessee before ld. CIT(A) after giving sufficient and reasonable opportunity to the assessee for providing necessary details so as to arrive at the correct amount of depreciation on computers for which the assessee is eligible. Accordingly this ground is allowed for statistical purposes."

36. As the facts of the case on hand are identical to the facts of the case as discussed above, we are incline to set aside the issue to the file of the AO for fresh adjudication as per the provisions of law and in the light of the direction issued by the ITAT for the Assessment Year 2008-09 which is reproduced here in above. Hence, the ground of appeal of the assessee is allowed for the statistical purposes.

37. The next issue raised by the assessee is that the Learned CIT(A) erred in confirming the order of the AO by sustaining the addition of Rs.50.85 crores disallowed under the provisions of Section 14A read with Rule 8D while determining the income under the provisions of MAT.

38. The AO during the assessment proceedings has made the disallowance of Rs.50.85 crores in determining the income under normal computation of income under the provisions of Section 14A read with Rule 8D of Income Tax Rule. The AO made the addition of the same disallowance while determining the income of the assessee under the provisions of Section 115JB of the Act.

On appeal before the Learned CIT(A), the order of the AO was confirmed by the Learned CIT (A).

39. Being aggrieved by the order of the Learned CIT(A) the assessee is in appeal before us.

40. The Learned AR before us contended that disallowance made under the provisions of Section 14A read with Rule 8D under normal computation of income cannot be added to the income determined under the provisions of MAT.

41. On the other hand, the Learned DR vehemently supported the order of the authorities below.

42. We have heard the rival contentions of both the parties and perused the materials available on record. The AO in the instant case has made the disallowance u/s 14A r.w.r. 8D of the Income Tax Rules for Rs.50.85 crores while determining the income under normal computation of income. Further, the AO while determining the income under Minimum Alternate Tax (MAT) as per the provisions of Section 115JB of the Act, has added the disallowance made under the normal computation of Income under Section 14A r.w.r. 8D of Income Tax Rule for Rs.50.85 crores in pursuance to the clause (f) of Explanation 1 to Section 115JB of the Act.

43. However, we note that in the recent judgment of Special Bench of Hon'ble Delhi Tribunal in the case of ACIT vs. Vireet Investment Pvt. Ltd. reported in 82 Taxmann.com 415 has held that the disallowances made u/s 14A r.w.r. 8D cannot be the subject matter of disallowances while determining the book profit u/s 115JB of the Act. The relevant portion of the said order is reproduced below:

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

44. The ratio laid down by the Hon'ble Tribunal is squarely applicable to the facts of the case on hand. Thus, it can be concluded that the disallowance made under Section 14A r.w.r. 8D cannot be resorted while determining the expenses as mentioned under Clause (f) to Explanation 1 to Section 115JB of the Act.

45. However, it is also flawless that the disallowance needs to be made with respect to the exempted income in terms of the provisions of Clause (f) to Section 115JB of the Act while determining the book profit. In holding so, we draw support from the judgment of Hon'ble Calcutta High Court in the case of CIT Vs. Jayshree Tea Industries Ltd. in GO No.1501 of 2014 (ITAT No.47 of 2014) dated 19.11.14 wherein it was held that the disallowance regarding the exempted income needs to be made as per the Clause (f) to Explanation-1 of Sec. 115JB of the Act independently. The relevant extract of the judgment is reproduced below:-

> *"We find computation of the amount of expenditure relatable to exempted income of the assessee must be made since the assessee has not claimed such expenditure to be Nil. Such computation must be made by applying clause (f) of Explanation 1 under Section 115JB of the Act. We remand the matter for such computation to be made by the Learned Tribunal. We accept the submission of Mr. Khaitan, Learned Senior Advocate that the provision of Section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to Section 14A of the Act."*

Given above, we hold that the disallowances made under the provisions of Sec. 14A r.w.r. 8D of the IT Rules, cannot be applied to the provision of Sec. 115JB of the Act as per the direction of the Hon'ble Calcutta High Court in the case of CIT Vs. Jayshree Tea Industries Ltd. (Supra).

46. Now the question arises to determine the disallowance as per the clause (f) to Explanation-1 of Sec. 115JB of the Act independently. In this regard, we note that there is no mechanism/ manner given under the Clause (f) to Explanation-1 of Sec. 115JB of the Act to workout/ determine the expenses with respect to the exempted income. Therefore, in the given facts &circumstances, we feel that ad-hoc disallowance will serve the justice to the Revenue and assessee to avoid the multiplicity of the proceedings and unnecessary litigation. Thus, we direct the AO to make the disallowance of 1% of the exempted income as discussed above under Clause (f) to Explanation-1 of Sec. 115JB of the Act. We also feel to bring this fact on record that we have restored other cases involving identical issues to the file of AO for making the disallowance as per the Clause (f) to Explanation-1 of Sec. 115JB of the Act independently. But now we note that there is no mechanism provided under the Clause (f) to Explanation-1 of Sec. 115JB of the Act to make the disallowance independently. Therefore, our action for restoring back the issue to the file of AO would unnecessarily cause further litigation. Thus,in the interest of justice and fair play we limit the disallowance on an ad-hoc basis @ 1 % of the exempted income as per the Clause (f) to Explanation-1 of Sec. 115JB of the Act. Thus, the ground of appeal of the assessee is partly allowed.

47. The issues raised by the assessee in ground No. 6, 7 and 8 either are premature to decide, consequential or general in nature, therefore, we dismiss the same as infructuous. Hence, the grounds of appeal of the assessee are dismissed.

48. In the result, the appeal filed by the assessee is partly allowed for the statistical purposes.

Coming to the ITA No. 37/AHD/2013(Revenue's Appeal) (A.Y. 2009-10):-

49. Revenue has raised the following grounds of appeal:

> "*1. On the facts and in the circumstances of the case and in law, the Id.CIT(Appeals) erred in directing the Assessing Officer to re-work the disallowance U/S.14A read with rule 8D after verifying the working capital loans and investments in equity shares made during the year in the equity shares of subsidiary companies and investments made in other companies without appreciating that the disallowance made by the Assessing Officer was as per the formula given in 8D for deriving proportionate interest disallowance.*
>
> *2. On the facts and in the circumstances of the case and in law, the Id.CIT(Appeals) erred in deleting the addition on account of disallowance of claim of guarantee fees of ^ 4.44 crores without appreciating that the disallowance was made as the same are enduring nature in the assessee's business.*
>
> *3. On the facts and in the circumstances of the case and in law, without following the ratio taken in the decision of Id.CIT(A) in the case of M/s.Dakshin Gujrat Vij Co. Ltd. and other subsidiary companies of the assessee, the Id. CIT(A) erred in deleting the addition of ? 3550 lacs being 15% of capital grant received by the assessee which was neither reduced from the cost of capital assets nor offered portion of it as revenue receipts as treatments of grants/ subsidies given by the subsidiary companies in their accounts, but taken to 'reserve and surplus' account and utilized in investment activities.*
>
> *4. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in directing the Assessing Officer to treat the interest income of ? 547.36 lacs as business income instead of income from other sources without appreciating that the nature of the income is of purely interest and not from any activities of business or profession.*
>
> *5. The appellant craves leave to add to, amend or alter the above grounds as may be deemed necessary.*"

50. The first issue raised by the Revenue is that the Learned CIT(A) erred in deleting the addition made by the AO under the provisions of Section 14A read with Rule 8D of Income Tax Rule.

51. At the outset we note that the issue raised by the Revenue has already been adjudicated by us along with the ground of appeal of the assessee in the preceding paragraph bearing No. 10 of this order. Respectfully, following the

same, we set aside the issue to the file of the AO for fresh adjudication as per the provisions of law. Thus, the ground of appeal is allowed for statistical purposes.

52. The second issue raised by the Revenue is that the Learned CIT(A) erred in deleting the addition made by the AO for Rs.4.44 crores on account of guarantee fees representing the enduring benefit to the assessee.

53. At the outset we note that the issue raised by the Revenue has already been adjudicated by us along with the ground of appeal of the assessee in the preceding paragraph bearing No.19 to 22 of this order. Respectfully, following the same, we uphold the finding of the Learned CIT(A). Hence, the ground of appeal of the Revenue is dismissed.

54. The third issue raised by the Revenue is that the Learned CIT(A) erred in deleting the addition made by the AO for Rs.3550 lakh being 15% of the grant received by the assessee of Rs.25000 lakhs.

55. The assessee in the year under consideration has received a grant of Rs.25,000 lakhs from the government of Gujarat which has been shown under reserve and surplus in the balance sheet which was utilized by acquiring the shares of the subsidiary companies. However, the AO was of the view that the grant received from the Government of Gujarat is either towards the revenue account or capital expenditure. But the assessee has not furnished the necessary details about the receipt of the grant by the assessee in the year under consideration from the Government of Gujarat. Accordingly, the AO was of the opinion that 15% of the grant and subsidies should be offered to tax out of every yearend balance. Accordingly, the AO worked out sum of

Rs.3750 lakh being 15% of 25,000 lakhs and added the same to the total income of the assessee.

56. On appeal, the assessee submitted that the grant received by it from the Government of Gujarat was utilized for making investment in other distribution companies for the implementation of Jyoti Gram Yojna. As such, the grant received by it from the Government of Gujarat was converted into share capital. Accordingly, the assessee contended that there cannot be any addition of Rs.3750 lakh being 15% of the grant credited in the year under consideration under the head reserve and surplus.

57. The Learned CIT(A) after considering the submission of the assessee deleted the addition made by the AO by observing as under:

> *"7.2 I have considered the facts of the case and appellant's submissions. The appellant has received the capital grant for making investments in equity capital of subsidiary companies. Since the appellant has not acquired any fixed assets, on which depreciation has been claimed, hence such grants cannot be reduced from the cost of fixed assets of the appellant company. In the circumstances, the disallowance of Rs. 37,50,000/- made by the A.O. of the 15% of the capital grants is not correct. Accordingly, the same is deleted."*

58. Being aggrieved by the order of the Learned CIT(A) the Revenue is in appeal before us.

59. Both the Learned DR and the AR before us vehemently supported the order of the authorities below to the extent favourable to them.

60. We have heard the rival contentions and perused the materials available on record. At the outset we note that, the tribunal in the own case of the assessee involving identical facts and circumstances has decided the issue in

favour of the assessee in ITA No. 1988/AHD/2015 for the Assessment Year 2010-11. The relevant extract is reproduced as under:

> *"28. We have heard the rival contention and produced the material on record on this issue. During assessment, the assessing officer has stated that the assessee has not received the grant or subsidy during the year but was of the view that the subsidy or grant which was received in earlier years were to be taken to the revenue or to be reduced from the cost of assets. Therefore, the assessing officer has estimated 15% of grant of Rs. 2500 lacs which worked out at Rs. 3750 lacs as income of the assessee. The Id. CIT(A) has deleted the aforesaid addition holding that the assessee has not acquired any fixed assets on which depreciation has been claimed, therefore ,such grants cannot be reduced from cost of fixed asset of the assessee company. With the assistance of Id. authorized representatives, we have gone through the material on record pertaining to the submission of the assessee stating that the assessee has not received any grant during the year and the grants received originally from the Govt. of Gujarat were apportioned against the subsidiary companies on appropriate basis. In F.Y. 2007-08, the State Government vide various GRS decided to convert the grant given during the F.Y. 2005-06 to 2007-08 for implementation of Jyoti Gram Yojna (JGY) into equity share capital. Accordingly, the total grants received during the aforesaid financial years were allocated among the four distribution companies for implementation of the aforesaid scheme of the State Government. In view of the above facts and circumstances, we do not find any infirmity with the decision of the Ld. therefore, the aforesaid grants received cannot be treated as income of the assessee company. Accordingly , this ground of the appeal is dismissed."*

60.1 As the facts of the case are identical to the facts of the case as discussed above, respectfully following the same, we do not find no merit in the grounds of appeal raised by the Revenue. Hence, the ground of appeal of the Revenue is dismissed.

61. The next issue raised by the Revenue is that the Learned CIT(A) erred in treating the interest income of Rs.547.36 Lacs as business income instead of income from other sources.

62. The assessee in the year under consideration has shown interest income on the advances/loans to the staff, interest on other loans and advances, interest on Unscheduled Interchange pool account amounting to Rs.547.36 Lacs which was treated as income from the business activities. However, the

AO disregarded the contention of the assessee by observing that the impugned income does not relate to the business activities of the assessee and, therefore, the same has to be treated as income under the head other sources.

63. On appeal, the Learned CIT (A) held that impugned interest income of Rs.547.36 Lacs represents income from the business by observing as under:

> *"8.2 I have considered the facts of the case and appellant's submissions. So far as interest income from UP Pool account is concerned, from the details submitted by the appellant, it is evident that this income is being derived from business activity of the appellant and not on account of investment of surplus fund available with it. Hence, this income is in the nature of income from business and A.O. is directed to tax it accordingly. Similarly, the interest earned from loans to staff and other loans are in the nature of business income as they are being derived in the course of carrying out of business activity and not on account investment of surplus funds. Hence, the A.O. is directed to tax this interest income also as business income."*

64. Being aggrieved by the order of Learned CIT (A), the revenue is in appeal before us.

65. Both the Learned DR and the AR before us vehemently supported the order of the authorities below to the extent favourable to them.

66. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that, the tribunal in the own case of the assessee involving identical facts and circumstances has decided the issue in favour of the assessee in ITA No. 3358/AHD/2015 for the assessment year 2008 -09. The relevant extract is reproduced as under:

> *"10. We have heard the rival contentions and perused the material on record on this issue. The assessing officer has treated the aforesaid income under the head income from other sources without controverting the submission of the assessee on the basis of which it was claimed that these income were of the nature of business income as elaborated in para seven of this order. The ld. CIT(A) has decided the issue in favour of the assessee stating that this issue was decided in favour of the assessee for assessment year 2009-10. During the course of appellate proceedings, the Revenue has failed to controvert the aforesaid contention and the findings of the ld. CIT(A),therefore after considering the material fact*

that interest earned on loan and advances from deposit placed with Mega Power Project towards its sharing of power and interest of UL pool account received from M/s. Power Grid Corporation India Ltd were directly related to the business of the assessee therefore, this ground of appeal of the Revenue stands dismissed."

67. As the facts of the case are identical to the facts of the case as discussed above, respectfully following the same, we do not find any merits in the grounds of appeal raised by the Revenue. Hence, the ground of appeal of the Revenue is dismissed.

68. In the result, the appeal filed by the Revenue is partly allowed for statistical purposes.

Coming to the ITA No.3103/AHD/2014(Assessee's Appeal) A.Y. 2009-10:-

69. The assessee has raised the following grounds of appeal:

"1.0 The learned Commissioner of Income Tax (Appeals) has confirmed the effect given by the Assessing Officer in respect of the Disallowance under section 14A of the I T Act.

The learned Commissioner (Appeals) ought to have appreciated that amount of interest expenditure for the purpose of computing the disallowance under section 14A was directed to be considered at Rs.21,92,00,000/- as against the amount of Rs.30,82,00,000/- considered by the Assessing Officer while passing order giving to the CIT(A)'s order.

2.0 The learned Commissioner (Appeals) has erred in law and facts in confirming the charging of interest under section 234B, 234C and 234D of the Income Tax Act, 1961 on tax liability computed under section 115JB of the Income Tax Act, 1961.

3.0 The appellant craves leave to add to, alter, delete or modify any of the grounds of appeal either before or at the time of hearing of this appeal."

70. The first issue raised by the assessee is that Learned CIT(A) erred in confirming the order of the AO by sustaining the disallowance under the provisions of Section 14A read with Rule 8D of Income Tax Rule.

71. At the outset we note that the identical issue was raised by the assessee and the Revenue in ITA Nos. 11 and 37/AHD/2013 which we have set aside to the file of the AO for fresh adjudication as per the provisions of law. For the detailed discussion please refer the paragraph bearing no. 10 of this order. Respectfully, following the same we set aside the issue in hand to the file of the AO for fresh adjudication as per the provisions of law. Hence, the ground of appeal of the assessee is allowed for the statistical purposes.

72. The other issue raised by the assessee are either consequential or general in nature. Therefore, we dismiss the same as infructuous.

73. In the result, the appeal filed by the assessee is allowed for the statistical purposes.

74. In the combined result,

(i) ITA No. 11/Ahd/2013- Assessee's appeal is allowed for statistical purposes.

(ii) ITA No. 37/Ahd/2013- Department's appeal is partly allowed for statistical purposes.

(iii) ITA No. 3103/Ahd/2014- Assessee's appeal is allowed for statistical purposes.

Order pronounced in the Court on the 22nd October,2020 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 22/10/2020
TANMAY, Sr. PS

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

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

आदेशानुसार/BY ORDER,

सत्यापित प्रति //True Copy **उप/सहायक पंजीकार** (Dy./Asstt.Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad