<u>आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।</u>

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.1892 & 1893/Mum/2017

(**निर्धारण वर्ष /** Assessment Year : 2009-10 & 2012-13)

ACIT 9(3)(2) 418, 4th floor, Aayakar Bhavan, Mumbai-400020	**<u>बनाम</u>**/ v.	M/s. Gini & Jony Ltd. A-601, Citi Point, Andheri Kurla Road, Andheri (E), Mumbai-400059,
	स्थायी लेखा सं./ PAN : AAACG1295N	
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by :	Shri A.M. Mittal, CIT-DR
Assessee by:	Shri. Gaurav Kabra

सुनवाई की तारीख **/Date of Hearing : 23.07.2018**
घोषणा की तारीख **/Date of Pronouncement : 21.08.2018**

<u>आदेश / ORDER</u>

PER RAMIT KOCHAR, Accountant Member:

These two appeal, filed by Revenue, being ITA No. 1892 & 1893/Mum/2017 for Assessment year's(AY) 2009-10 and 2012-13 respectively , are directed against separate appellate order's both dated 23.12.2016 passed by learned Commissioner of Income Tax (Appeals)-16, Mumbai (hereinafter called "the CIT(A)"), the appellate proceedings had arisen before learned CIT(A) from separate assessment orders both dated 28.03.2015 passed by learned Assessing Officer (hereinafter called "the AO") one u/s 147 r.w.s.143(3) of the Income-tax Act, 1961 (hereinafter called "the Act")

for AY 2009-10 & second assessment order for AY 2012-13 passed by the AO u/s 143(3) of the 1961 Act .

2. First ,we shall take up the appeal of the Revenue for AY 2012-13. The grounds of appeal raised by Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

"1. 'Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 24,29,583/- u/s 37 of the Income-tax Act by treating the VAT paid as alleged penalty for violation of law?"

2. "Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition made by the AO on account of penalty levied by the Sales Tax Department for violation of law committed by assessee, which qualifies u/s 37 of the Income-tax Act ?"

3. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in granting relief to assessee u/s 14A of the Income-tax Act, 1961 by holding that no exempt income was earned during the year under consideration. Therefore no disallowance can be made u/s 14A of the Income-tax Act?"

4. "Whether on the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in granting relief to assessee u/s 14A of the Income-tax Act, 1961 without appreciating the fact & legal position taken by Hon'ble Bombay High Court in Writ Petition No. 785 of 2010 in ITXA 626/10, in the case of Godrej Boyce Manufacturing Co. Ltd?"

5. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in ignoring the fact assessee had incurred expenses against earning exempt income as per provisions of section 14A of the Income-tax Act, 1961 read with Rule 8D of Income-tax Rules, 1962?"

6. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the CBDT Circular No. 5 of 2014 dated 11/02/2014 wherein it has been clarified that the term "includible" in the heading of Section 14A of the Act and the heading of Rule 8D of Income-tax Rules, 1962, indicates that for invoking disallowance u/s 14A, it is not material that the assessee should have earned exempt income during the financial year under consideration?"

The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the ACIT 9(3)(2) be restored.
The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."

3. The brief facts of the case are that the assessee is engaged in the business of manufacturing and marketing of textiles, garments and fashion accessories.

4. There are two issues which are subject matter of dispute between rival parties in this appeal filed by Revenue before the tribunal. The first issue concerns itself with disallowance of alleged VAT penalty of Rs. 24,29,583/- and second issue concerns itself with disallowance of Rs.1,28,59,715/- u/s 14A of the 1961 Act read with Rule 8D of the Income-tax Rules, 1962. The learned CIT(A) granted relief with respect to both these issues and hence Revenue is aggrieved which is manifested by filing this appeal before tribunal.

5. **VAT penalty:** The first issue concerns itself with disallowance of VAT penalty of Rs. 24,29,583/- paid by the assessee under Maharashtra Value Added Tax, 2002 (in short "MVAT Act, 2002), as is alleged by the AO in its assessment order . It was observed by the AO from Tax Audit Report filed by the assessee that the assessee had paid penalty of Rs. 24,29,583/- which was not disallowed by the assessee itself in the return of income filed with Revenue while computing income chargeable to income-tax within provisions of the 1961 Act . The AO asked the assessee to explain the same as to why the said amount be not disallowed, vide latter dated 23.03.2015, as under:-

"It is seen from Clause 17(e) of Tax Audit Report in Form No..3CD that the Accountant had certified that there was a penalty of Rs.24,29,553/- *which is to be disallowed as per Income Tax Provisions. However no such disallowance is made in the Computation of Income. In this context furnish the details of such penalty and show-cause why the same, should not be added to income returned."*

In reply the assessee submitted that the penalty was paid to buy peace with the Sales Tax Department on the amount of tax for bogus purchases. The AO observed that this was a penalty levied by Sales Tax Department for violation of law committed by the assessee which need to be disallowed u/s. 37 of the 1961 Act and which also was certified by the Chartered Accountant in the tax audit report , this led to the additions to the tune of Rs. 24,29,583/- to the income of the assessee by way of disallowance of the said amount of penalty by the AO , vide assessment order dated 28.03.2015 passed by the AO u/s 143(3) of the 1961 Act for AY 2012-13.

6. Aggrieved by the assessment order dated 28.03.2015 passed by the AO u/s 143(3) of the 1961 Act, the assessee filed first appeal with learned CIT(A). The assessee vide written submissions filed before learned CIT(A) submitted that this amount was paid as interest u/s. 30(2) and 30(4) of the MVAT Act , 2002 . It was submitted that the AO mistook the same as penalty although the same was towards interest as provided under MVAT Act, 2002. It was also submitted that the assessee was visited by a team of officers including Assistant Commissioner of Sales Tax(Inv-10), Enforcement Branch, Mumbai in the last week of September 2011 . It was submitted that though the investigation was carried out by VAT authorities for purchases and after detailed scrutiny it was brought to the notice of the assessee that certain purchases and sale invoices were not genuine and they were in-fact accommodation entries. It was submitted that investigation officer directed the assessee to file revised returns and show the liability in respect of such invoices as if these invoices were not genuine. The assessee submitted that due to withdrawal of VAT input tax credit/set off , the assessee had to pay interest of Rs. 27,43,480/- under the provisions of Section 30(2) and 30(4) of the MVAT Act , 2002. It was submitted that the due to such VAT reversal by way of withdrawal of input-tax credit, the amount paid was on account of

interest and penalty. The assessee extracted relevant provision of MVAT Act, 2002 before learned CIT(A) and submitted as hereunder:-

> "(4) *If-(a) after the commencement of –*
> *(i) audit of the business of the dealer in respect of any period, or*
> *(ii) inspection of the accounts, registers and documents pertaining to any period, kept at any place of business of the dealer, or*
> *(iii) entry and search of any place of business or any other place where the dealer has kept his accounts, registers, documents pertaining to any period or stock of goods,*
> *(b) in consequence of any intimation issued under sub-section (7) of section 63,*
> *the dealer files one or more returns or, as the case may be, revised returns in respect of the said period, then he shall be liable to pay by way of interest, in addition to the amount of tax, if any, payable as per the return or, as the case may be, revised return, a sum equal to 25 per cent of the additional tax pay able as per the return or, as the case may be, revised return.}*
>
> *Following amendments were made to Sec.30(4) of MVAT Act vide "Trade Cir.No.22 T 0/2009":*
>
> ***"Interest @25% on additional tax liability - Addition of Section 30(4):-***
> *(a) Under the VAT system.....*
> *(b) Therefore, now it is provided that a dealer would be liable to pay an additional interest @25% on the additional tax payable, as per the return or the revised return and such interest shall be levied if a dealer files one or more return(s) (which was overdue) or revised return(s) under any of the following circumstances:-*
>
> *(i) after the commencement of the business audit, or (ii) inspection of the accounts, registers and documents, kept at anyplace of business of the dealer, or (iii) entry and search of any place of business etc., or (iv) in consequence of the intimation sent under section 63(7).*

The assessee further submitted before learned CIT(A) as under:

> ***It is further clarified that:***
> *(i) This interest shall be in addition to any other interest leviable under other provisions of the Act. (ii) The 25% interest shall be calculated on the additional tax payable as per return (which was overdue) or as the case may be revised return, filed after the commencement of any of the aforesaid proceedings or the intimation in respect of periods under Audit, Inspection, Search etc. 4(iii) In case if revised return is filed after the commencement of any of the proceedings referred above or in consequence of intimation; the interest @25%*

shall be calculated on the difference between the liability as per revised return and the original return or fresh return or as the case may be revised return filed earlier for that period, (iv) it may be noted that in a case, where dealer fails to file one or more returns before the commencement of proceedings, then 25% interest shall be calculated on entire amount of tax payable as per return(s) so filed, (v) This interest shall not be applicable in the cases where the refund gets reduced, (vi) If the dealer files one or more returns (which were overdue) or a revised return on or after 1st July 2009as a result of any of the aforesaid proceedings or in consequence with the intimation sent, then it is mandatory to pay interest @25 per cent on the tax found due as per such return or revised return (vii) If the dealer does not agree with the observations and tax liability shown in the intimation and thereby decides not to file the return or revised liability, then assessment proceedings would be initiated which may attract penalty u/s.29(3) at 100% of the tax found due. (vii) In case a dealer files revised return and pays 25% interest u/s.30(4), then penalty u/s. 29(3) shall not be levied, (ix) The overdue return means a return which is due but filed after the commencement of the proceedings stated in (b) above, (x) It is hereby clarified that the proceedings in case of Business Audit shall be deemed to have been commenced on the date on which dealer has received the letter from the concerned officer seeking the apportionment for the Business Audit or on the date of receipt of Form-603 whichever is earlier, (xi) In case of search and entry, from the date of taking entry for such search or as the case may be issuing the notice in Form 603 whichever is earlier."

From a reading of the above section, it will be evident that the word 'penalty' is not used anywhere in the Act. It is clearly an additional interest on additional tax liability to be paid by the assessee in certain circumstances. Such interest is basically compensatory in nature, which is backed by the following case laws:-

In 'Mahalakshmi Sugar Mills Co. V Commissioner of Income Tax - (2008) - TMI -58; Supreme Court the Apex Court was dealing with section 10(2}(xv) of the Indian Income Tax Act, 1961, which is identical to section 37 of the Income Tax Act. In the said case, the assessee had been held liable to pay interest under the U.P. Sugarcane Cess Act because of delayed payment of cess. The U.P. Act also provided that penalty could also be levied under such circumstances. The Apex Court, in this case, held that the interest payable on an arrear of cess under section 3(3) is in reality part and parcel of the liability to pay cess. It is an accretion to the cess. The arrear of cess carries interest; if the cess is not paid within the prescribed period a larger sum will become payable as cess. The enlargement of the cess liability is automatic under section 3(3). No specific order is necessary in order that the obligation to pay interest should accrue. The liability to pay interest is certain as the liability to pay

cess. As soon as the prescribed date is crossed without payment of cess, interest begins to accrue. It is not a penalty for which provision has been separately made by section 3(5). Nor is it a penalty within the meaning of section 4, which provides for a criminal liability and a criminal prosecution. The penalty payable under section 3(5) lies in the discretion of the collection officer or authority. In the result it was held that the interest paid for the delayed payment of the cess is an expenditure laid out wholly for the purpose of business and hence deductible.

In 'Triveni Engineering Works Limited V. Commissioner of Income Tax' ~ 2008 - TMI - 28540 - Allahabad High Court, a Full Bench of the Allahabad High Court held that the interest payable on arrears of sugarcane purchase tax is part and parcel of the liability of tax and hence deductible.

In 'Prakash Cotton Mills P. Ltd. V. Commissioner of Income Tax' 2008 - TMI - 5409 - Supreme Court, the Apex Court held that whenever any statutory impost paid by an assessee by way of damages or penalty or interest is claimed as an allowable expenditure under Sec.37(1) of the Income Tax Act, the assessing authority is required to examine the scheme of the provisions of the relevant statute providing for payment of such impost notwithstanding the nomenclature of the impost as given by the statute, to find whether it is compensatory or penal in nature. The authority has to allow deduction under Section 37(1} of the Income Tax Act, wherever such examination reveals the concerned impost to be purely compensatory in nature. Wherever such impost is found to be a composite nature, that is, partly of compensatory nature and partly of penal nature, the authorities are obligated to bifurcate the two components of the impost and give deduction to that component which is compensatory in nature and refuse to give deduction to that component which is penal in nature.

In 'Lachmandas Mathurdas V. Commissioner of Income Tax' -2008 - TMI - 6074 - Supreme Court the question before the Apex Court was whether interest paid on arrears of sales tax is penal or compensatory. The Apex Court held that the said amount was an allowable deduction since it was compensatory in nature.

The Apex Court in 'Swadeshi Cotton Mills Co. Ltd. V. Commissioner of Income Tax' - 2008 - TMI - 5683 - Supreme Court was dealing with the question as to whether damages paid for delayed payment of employees contribution to employees' provident fund was compensatory or penal. The court following the judgement in ' Prakash Cotton Mills Ltd.' - 2008 - TMI -54QQ - Supreme Court remitted the matter to the High Court for reconsideration in the light of the observation made therein.

In 'Commissioner of Income Tax V. H. P. State Forest Corporation' - 2000 (Q) TMI X24 - HIMACHAL PRADESH HIGH

COURT the assessee is an undertaking of H.P. Government. The trees to be felled are handed over by the Forest Department to the Forest Corporation, The Corporation pays royalty to the State Government at rates which are finalized by the Pricing Committee constituted by the State Government. The Corporation is liable to pay interest on belated payment of royalty and other amounts payable to the Corporation. The Forest Department is liable to pay sales tax on royalty but in actual fact this amount is actually deposited by the Forest Department in favour of the Corporation. The assessee claimed deduction of the amounts paid as interest on royalty, sales tax etc. The Assessing Officer rejected the claim of the assessee which was also upheld by the Commissioner of Income Tax (Appeals). The Tribunal allowed the appeal and hence the Revenue filed this present appeals before the High Court.

The Court framed the question whether the deduction is permissible or not. Both sides have referred to a number of decisions. The Revenue contended that clause 18G of the lease deed clearly lays down that in case the Corporation does not pay the sales tax on the due date it shall be liable to pay the penalty at 18% per annum. Since in the agreement 'the payment is described as penalty the same cannot be held to be compensatory in nature and must be held to be penal in nature. The Tribunal is not agreeable to the contentions of the Revenue. It relied on the judgement of Supreme Court in 'Prakash Cotton Mills P. Ltd.,' (supra) in which the Apex Court held that the Assessing Officer must determine whether the same is compensatory or penal in nature. It further held that taxing statutes normally have two impost for delayed payment. One is the imposition of interest, which is automatic and the second is the imposition of penalty for which only notice is automatic for the delayed period, the imposition is compensator in nature. In the present case no doubt the word 'penalty' has been used in clause 18G but if the lease deed is read and the provisions of the HP General Sales Tax Act together, it is apparent that the parties to the lease deed decided that though the sales tax in fact was to be deposited by the State it would be deposited on its behalf by the assessee. If the same was not paid the dealer became liable to pay simple interest at 12% per annum for the delay of one month and thereafter 18% per annum till the default continues.

The Tribunal held that it is more than obvious that this interest was not payable by way of penalty but by way of compensation to compensate the State for the interest which it would have been liable to pay under Section 17A."

The learned CIT(A) observed from the provisions of Section 30(4) of the MVAT 2002 that no where the word 'Penalty' is mentioned in the said Section and it is only an additional tax liability which cannot be disallowed u/s. 37 of the 1961 Act and the learned CIT(A) allowed the

claim of the assessee and deleted the additions as were made by the AO in its assessment order dated 28.03.2015 passed u/s 143(3), vide appellate order dated 23.12.2016 passed by learned CIT(A). Thus, in nut-shell the assessee succeeded before learned CIT(A) as the appeal of the assessee was allowed by learned CIT(A).

7. The Revenue is aggrieved by the relief granted by learned CIT(A) and has now come in an appeal before the tribunal. The Ld. DR opened the arguments by stating that as per Section of 37 of 1961, Act, penalty is not allowable as deduction while computing income under the provisions of the 1961 Act and it was submitted that provisions of Section 30(2) and 30(4) of MVAT Act, 2002 which stipulate interest on VAT defaults is nothing but penal in nature and the said interest cannot be allowed as deduction while computing income under the provisions of the 1961 Act keeping in view provision of section 37 of the Act. It was submitted that the assessee made bogus purchases which were in the nature of accommodation entries which were detected by investigation wing of MVAT authorities and the input credit/set off as was claimed by the assessee was reversed under the direction of investigation wing. The learned DR brought to our attention provision of Section 30(2) and 30(4) of the Maharashtra VAT Act,2002 and vehemently argued that this interest is in the nature of the penalty and Enforcement Wing had carried out a survey and this interest of 25% by way of additional tax is to be paid as the assessee claimed wrong input tax credit /set off on account of bogus purchases being accommodation entries for which penalty is infact levied u/s 30(4) of MVAT Act, 2002 and it is penal in nature being on account of infringement of law due to wrong claim of VAT input tax credit on purchases and was set off against output tax payable by the assessee depriving VAT authorities to their legitimate dues of VAT. Thus, the prayers were made by learned DR to uphold assessment order as was passed by the AO and to set aside the appellate order passed by learned CIT(A).

On the other hand Ld. Counsel for the assessee submitted that its merely an interest on delayed payment of VAT and is not a penalty as per Maharashtra VAT Act, 2002. Our attention is again drawn to provisions of Section 30(2) and 30(4) of MVAT Act, 2002. Our attention was also drawn to para 6.3.3 and 6.3.4 of learned CIT(A) appellate order dated 23.12.2016. Thus, the learned AR made prayers for upholding the appellate order passed by learned CIT(A).

8. We have considered rival contentions and perused the material on record including case laws relied upon. We have observed that the assessee is engaged in the business of manufacturing and marketing of textiles, garments and fashion accessories. There was a search and survey operations conducted by the Enforcement Branch of the Maharashtra VAT Authorities against the assessee in the last week of September 2011. During the course of search and survey operations conducted by the Enforcement Branch of Maharashtra VAT Authorities, it transpired that the assessee indulged in alleged bogus purchases by way of accommodation entries wherein the assessee had wrongly claimed input tax credits on these alleged bogus purchases and these inadmissible input tax-credits was set off by the assessee against its output VAT liabilities which led to short payment of output tax by the assessee to MVAT authorities in the return of VAT originally filed by the assessee. The MVAT authorities during the course of search and survey operations while it was underway directed assessee to file revised return of VAT after removing alleged bogus inadmissible input-tax credit set off towards output tax liabilities towards VAT as originally claimed by the assessee and to pay additional tax arising from such withdrawal along with interest as stipulated u/s 30(2) and 30(4) of the MVAT Act, 2002. At this stage , the assessee had two choices either to contest these allegations of availment of wrong input tax credit by entering into litigation with MVAT department and the other option was to file revised return under MVAT Act, 2002 while search and survey operations were still underway after paying

additional tax as well paying interest as stipulated u/s 30(2) and 30(4) of the 1961 Act. The assessee chose not to enter litigation with MVAT department as it wanted to buy peace and end litigation under the MVAT Act, 2002 and chose second option of paying additional tax which was earlier underpaid due to alleged wrong claim of input tax credit availed on alleged bogus purchase bills , which additional tax is now paid along with payment of interest u/s 30(2) and 30(4) of the MVAT Act, 2002. This interest liability u/s 30(4) was computed @ of 25% on additional tax payable by the assessee due to withdrawal of wrong inadmissible claim of input tax credit of VAT on alleged bogus purchases. The interest was also paid u/s. 30(2) of the MVAT Act, 2002 by the assessee while filing revised return when search and survey operations were underway, which was by way of simple interest on the amount of VAT which the assessee failed to deposit in time within prescribed due date under MVAT Act, 2002 while filing return of VAT originally as it claimed inadmissible and wrong credit and set off of input tax credit on alleged bogus purchases against output VAT tax which led to underpayment of VAT. It is profitable at this stage to reproduce extract of relevant provisions of the statute as are contained in Section 30(2) and 30(4) of the MVAT Act, 2002, as under:

"*Chapter VI*

PENALTY AND INTEREST

"29 ***

30. Interest payable by a dealer or person:-

(1) A dealer who is liable to pay tax in respect of any year, and who has failed to apply for registration or has failed to apply for registration within the time as required by or under this Act, shall be liable to pay by way of simple interest, in respect of each of such years, in addition to the amount of tax payable in respect of such year, a sum calculated at the prescribed rate on the amount of such tax for each month or part thereof for the period commencing on the 1st April of the respective year to the

date of the payment of tax. The amount of such interest shall be calculated by taking into consideration the amount of, and the date of, such payment, when the payment is made on different dates or in parts or is not made. When, as a result of any order passed under this Act, the said amount of tax is reduced, the interest shall be reduced accordingly and where the said amount is enhanced, 1[the interest on the enhanced amount shall be calculated mutatis-mutandis upto the date of such order]:

Provided that, in respect of any of such years, 2[the amount of interest payable] under this sub-section shall not exceed the amount of tax found payable for the respective year.

(2) A registered dealer who has failed to pay the tax within the time specified by or under this Act, shall be liable to pay by way of simple interest, in addition to the amount of such tax, a sum calculated at the prescribed rate on the amount of such tax for each month or paid thereof after the last date by which he should have paid such tax:

Provided that, in relation to the tax payable according to 3[the return, fresh return or as the case may be], 4[fresh return or revised return], the said dealer shall, notwithstanding anything contained in any other provision of this Act, be deemed not to have paid the amount of such tax within the time he is required by or under the provisions of this Act to pay it if he has not paid the full amount of such tax on or before the last date prescribed for furnishing of such return and accordingly, if he has not paid the full amount of such tax or has paid only the part of the amount of such tax by such date, he shall be liable under this clause for payment of interest after such date on the full or part, as the case may be, of the amount of tax which has not been paid by such date and where a dealer has furnished a 4[fresh return or revised return] and the amount of tax payable as per the 4[fresh return or revised return] exceeds the amount of tax payable as per the original return, then for the purposes of this sub-section, the dealer shall be deemed to have been required to pay the excess amount of tax at the time he was required to pay the tax as per the original return and accordingly he shall be liable to pay interest under this sub-section on the said excess amount of tax.

4a[Provided further that, in case a dealer files an annual revised return, as provided under clause (b) or, as the case may be, clause (c) of sub-section (4) of section 20, then the interest shall be payable on the excess amount of tax, as per such

annual revised return, from the dates mentioned in column (2) of the Table, till the date of payment of such excess amount of tax.

TABLE

Registration status in the year for which annual revised return is filed *(1)*	*Interest to be computed from* *(2)*
(a) *Dealer, holding certificate of registration for whole year.*	*1st October of the year, to which the annual revised return relates.*
(b) *Certificate of registration granted, effective from any date up to the 30th September of the year to which revised return relates.*	*1st October of the year, to which the annual revised return relates.*
(c) *Certificate of registration cancelled, effective on any date after the 30th September of the year to which revised return relates.*	*1st October of the year, to which annual revised return relates.*
(d) *Certificate of registration granted, effective from any date after the 30th September of the year to which revised return relates.*	*effective date of registration.*
(e) *Certificate of registration cancelled, effective on any date prior to the 30th September of the year to which revised return relates.*	*effective date of cancellation of registration.]*

(3) In the case of a registered dealer, in whose case, any tax other than the tax on which interest is leviable under sub-section (2) has remained unpaid upto one month after the end of the period of assessment, such dealer shall be liable to pay by way of simple interest, 5[a sum calculated at the prescribed rate on the amount of such tax] for each month or part thereof from the date next following the last date of the period covered by an order of assessment till the date of the order of assessment and where any payment of such unpaid tax whether in full or part is made on or before the date of the order of assessment, the amount of such interest shall be calculated by taking into consideration the amount and the date of such payment. If, as a result of any order passed under this Act, the said amount of tax is reduced, then the interest shall be reduced accordingly and where the said amount is enhanced, then interest on the enhanced amount shall be

calculated mutatis mutandis up to the date of such order from the said date next.

6[(4) If,-
(a) after the commencement of,-

(i) audit of the business of the dealer in respect of any period, or

(ii) inspection of the accounts, registers and documents pertaining to any period, kept at any place of business of the dealer, or

(iii) entry and search of any place of business or any other place where the dealer has kept his accounts, registers, documents pertaining to any period or stock of goods,

(b) in consequence of any intimation issued under sub-section (7) of section 63, the dealer files one or more returns or, as the case may be, revised returns in respect of the said period, then he shall be liable to pay by way of interest, in addition to the amount of tax, if any, payable as per the return or, as the case may be, revised return, a sum equal to 25 per cent. of the additional tax payable as per the return or, as the case may be, revised return.]

7[Provided that, interest under this sub-section shall not be payable on account of the additional tax liability arising due to non-production of declarations or, as the case may be, certificates:

Provided further that, if the amount of tax paid as per revised return is less than ten per cent. of the aggregate amount of tax paid as per the original returns, in respect of the corresponding period, then no interest under this sub-section shall be payable.

Explanation.- For the purpose of this sub-section the expressions,-
"tax paid as per original returns" shall be deemed to include the amount of tax paid, as per the revised returns, filed before the commencement of proceedings specified in clause (a) or before the receipt of intimation specified in clause (b) of sub-section (4);

"tax paid" shall mean the amount of tax paid by such person or dealer, after the adjustment of set-off.]

We have also at the same time observed that under MVAT Act, 2002 there is a separate provision for imposition and levying of Penalties u/s. 29 of the MVAT Act, 2002 for various infraction/defaults in complying with various provision(s) of MVAT Act, 2002 which is a Section immediately preceding to Section 30 of MVAT Act, 2002 levying interest under the MVAT Act, 2002. The said Section 29 of MVAT Act, 2002 is also reproduced hereunder in its entirety:-

> *"29. Imposition of penalty in certain instances:-*
> *1[(1) ***]*
> *1[(2) ***]*
> *1a[(2A) While or after passing any order in respect of any dealer under any provisions of this Act, it appears to the Commissioner that, the dealer has failed to apply for registration as required under this Act or has carried on business as a dealer without being registered in contravention of the provisions of this Act, then the Commissioner may, after giving the dealer a reasonable opportunity of being heard, impose upon him, by way of penalty, a sum equal to the amount of tax payable by the dealer for the period during which he has carried on business as a dealer without being registered in contravention of the provisions of this Act.]*
>
> ***(3) 2[While or after passing any order] under this Act, in respect of any person or dealer, the Commissioner, on noticing or being brought to his notice, that such person or dealer has concealed the particulars or has knowingly furnished inaccurate particulars of any transaction liable to tax or has concealed or has knowingly misclassified any transaction liable to tax or has knowingly claimed set-off in excess of what is due to him, the Commissioner may, after giving the person or dealer a reasonable opportunity of being heard, by order in writing, impose upon him, in addition to any tax due from him, a penalty 2a[not exceeding the amount of tax due but not less than twenty five per cent. of] the amount of tax found due as a result of any of the aforesaid acts of commission or omission.***
>
> *(4) Where any person or dealer has knowingly issued or produced any document including a false bill, cash memorandum, voucher, declaration or certificate by reason of which any transaction of sale or purchase effected by him or any other person or dealer is not liable to be taxed or is liable to be taxed at a reduced rate or incorrect setoff is liable to be claimed on such transaction, the Commissioner may, after giving, the person or dealer a reasonable opportunity of being heard, by order in writing,*

impose on him in addition to any tax payable by him, a penalty equal to the amount of tax found due as a result of any of the aforesaid acts of commission or omission.

3[(5) Where a dealer has sold any goods and the sale is exempt, fully or partly, from payment of tax by virtue of any provision contained in sub-section (3), (3A), (3B) or (5) of section 8, and the purchaser fails to comply with the conditions or restrictions subject to which the exemption is granted, then the Commissioner may, after giving the said purchaser a reasonable opportunity of being heard, impose penalty on him equal to one and a half times the tax which would have become payable on the sale if the said exemption was not available on the said sale.]

(6) Where, any person or dealer contravenes the provision of section 86, so as to have the quantum of tax payable by him to be under-assessed, the Commissioner may, after giving the person or dealer a reasonable opportunity of being heard, by order in writing, impose on him, in addition to any tax payable by him a penalty equal to half the amount of tax which would have been under-assessed or 4[one thousand rupees], whichever is more.

(7) Where, any person or dealer has failed without reasonable cause to comply with any notice in respect of any proceedings, the Commissioner may, after giving the person or dealer a reasonable opportunity of being heard, by order in writing, impose on him, in addition to any tax payable by him, a penalty equal to 5[five thousand rupees].

5a[(7A) In case of a dealer, who has filed late return on or after the 1st August 2012, and has also paid the late fee, under sub-section (6) of section 20, the penalty in respect of such return, if any, imposed under sub-section (8) of this section, as it existed, shall not be recovered.]

*6[(8) * * *]*

*(9) 7[(a) * * *]*

*7[(b) * * *]*

(c) Where a dealer has filed a return 8[***] and such return is found to be not 9[complete and self consistent], then the Commissioner may, after giving the dealer a reasonable opportunity of being heard, impose on him, by order in writing, a penalty of rupees one thousand. The levy of penalty shall be without prejudice to any other penalty which may be imposed under this Act. 10[(10) Where a person or dealer has collected any

sum by way of tax in contravention of the provisions of section 60,—

1. he shall be liable to pay a penalty not exceeding two thousand rupees, and

2. in addition, any sum collected by the person or dealer in contravention of section 60 shall be forfeited to the State Government.

If the Commissioner, in the course of any proceeding under this Act or otherwise, has reasons to believe that any person has become liable to a penalty or forfeiture or both penalty and forfeiture of any sum under this sub-section, he may serve on such person a notice in the prescribed form requiring him on a date and at a place specified in the notice to attend and show cause why a penalty or forfeiture or both penalty and forfeiture of any sum as provided in this sub-section should not be imposed on him. The Commissioner shall thereupon hold an inquiry and shall make such order as he thinks fit. When any order of forfeiture is made, the Commissioner shall publish or cause to be published a notice thereof for the information of the persons concerned giving such details and in such manner as may be prescribed.]

11[(11) No order levying penalty under the foregoing provisions of this section shall be passed in respect of any period after 12[eight years] from the end of the year containing the said period.]

13[(11A) Notwithstanding anything contained in sub-section (11), penalty under this section may be imposed while passing an order under this Act.]

*14[(12) **********]*

(13) For the purposes of this section, Commissioner includes any appellate authority appointed or constituted under this Act.

Now the moot question before us is whether this interest payable u/s 30(2) and 30(4) of MVAT Act, 2002 is compensatory or penal in nature. If it is held to be compensatory in nature , then interest payable on these statutory dues by way of VAT shall be allowable as deduction while computing income chargeable to income-tax under the head of income 'Profits and Gains of Business or Profession', while if on the other hand the same is held to be penal in nature then the same cannot be allowed as deduction while computing income from

business keeping in view provisions of Explanation 1 to Section 37(1) of the 1961 Act . It is also profitable at this stage to reproduce the provisions of Section 37(1) of the 1961 Act read with Explanation 1 , which reads as under:-

> " **General.**
>
> **37.** (1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 [***] and not being in the nature of capital expenditure or personal expenses of the assessee, laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".
>
> [[*Explanation 1.*]—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.]
>
> ***
>
> ***"

The assessee is claiming that the interest paid u/s 30(2) and 30(4) of MVAT Act, 2002 to be compensatory in nature and claiming that the same be allowed as business deduction while computing income from business but the Revenue is claiming the same to be penal in nature being hit by explanation 1 to Section 37(1) of the 1961 Act and not allowable as business deduction. We are also conscious of the fact that nomenclature or description used by law makers in the statute is not decisive of its true nature and character and the fact whether the said levy is compensatory or penal in nature is to be decided after going through various provisions of the statute and to see the intentions of law makers behind placing of such provisions in the statute. This interpretation of the statute is well settled legal proposition which has been so held by catena of judgments of Hon'ble Superior Courts which case laws are also cited in preceding para's of this order and are not repeated here. We have also carefully gone

through the provision of section 29 and 30 of the MVAT Act 2002. We have observed that Section 29 of the MVAT Act ,2002 prescribes penalties for various offences/defaults under MVAT Act, 2002 , while section 30 of MVAT Act, 2002 which is immediately succeeding Section to Section 29 of MVAT Act, 2002 deals with the interest for various delays in making payment of VAT . We have observed that Section 30(2) of the MVAT Act, 2002 stipulates payment of simple interest in case VAT is not paid within due date as prescribed under MVAT Act, 2002 . However, Section 30(4) of MVAT Act, 2002 prescribes interest which is in addition to interest payable u/s 30(2) of MVAT Act, 2002 and is to be paid after commencement of some special event such as audits, inspection, survey , search etc under MVAT Act, 2002 by MVAT authorities and the statute has given dealer an opportunity to come clean and end litigation with MVAT department by coming forward by filing return or revised returns by paying not only additional tax which the dealer earlier did not pay in original return but also the dealer is burdened with the by additional liability of paying simple interest u/s 30(2) of MVAT Act, 2002 for delay in payment of VAT beyond due date as prescribed under MVAT Act, 2002 and also further payment by way of interest @25% of such additional tax which is termed by legislature as 'interest' within provisions of Section 30(4) of the MVAT Act, 2002 . It is also provided in Section 30(4) of the MVAT Act, 2002 that if the additional tax paid in return or revised return filed after commencement of such stipulated special event is less than 10% of the tax paid as per original return , then the dealer will not be burdened with this interest @25% of additional tax which also indicates that this interest u/s 30(4) of MVAT Act, 2002 is penal in nature as the right to recover this penal interest is waived by MVAT Act,2002 for minor infraction of law. It is pertinent to mention that this interest provided u/s 30(4) of the MVAT Act, 2002 is in addition to the interest payable u/s 30(2) of the MVAT Act, 2002. It is also pertinent to mention that if the assessee would have chosen to litigate under these circumstances then in the adverse

situation and eventuality of the assessee losing out the legal battle with MVAT authorities, not only the assessee would have been burdened with the additional tax owing to underpayment of VAT while filing VAT return originally and with interest u/s 30(2) of MVAT Act, 2002 for withholding/ delay in payment of VAT beyond prescribed due date under MVAT Act, 2002 but the assessee in such adverse eventuality of losing out the legal battle with MVAT authorities would have also been additionally visited and burdened with Penalty as is stipulated u/s 29(3) of the MVAT Act, 2003 which shall not be less than 25% but which may extend to 100% of the additional tax sought to be concealed or evaded by the assessee. Thus, it is very clear that the lawmakers have provided for a mandatory penal interest by virtue of provisions of Section 30(4) of the MVAT Act, 2002 to the tune of 25% of the tax sought to be evaded although nomenclature 'interest' is used in MVAT Act, 2002 which is in-fact penal in nature having germane to infraction of law while filing of original return of VAT which led to under payment of VAT originally. The reason is not far to seek as the liberty of paying 25% of additional tax u/s 30(4) of the MVAT Act, 2002 of its own even after commencement of special event such as audit, inspection, survey and search etc is given by way of one more opportunity to the dealer to come clean voluntarily after the commencement of audit , inspection , survey , search etc. as stipulated u/s 30(4) of the MVAT Act, 2002 by paying this penal interest computed @25% of tax sought to be evaded in addition to paying up the tax sought to be evaded and interest u/s 30(2) of MVAT Act, 2002 towards delayed payment of VAT which interest u/s 30(2) is compensatory in nature . It is also pertinent to mention that before special event commences as is stipulated u/s 30(4) by way of audit, inspection, survey and seizure etc. and the dealer observes that there is some omission or incorrect statement in original return of VAT filed with MVAT authorities, the dealer can always come forward and file revised returns after complying with stipulated conditions u/s 20(4) of the MVAT Act, 2002 , for which there is only stipulation to pay

interest u/s 30(2) of the MVAT Act,2002 for delayed payment of VAT apart from paying additional tax liability u/s 20(5) of MVAT Act, 2002 which was originally short paid due to such omission or incorrect statement in the original return filed with the MVAT authorities and no further interest such as stipulated u/s 30(4) of the 1961 Act is stipulated under the aforesaid circumstances of filing revised return voluntarily by the dealer. Thus, since this interest u/s 30(4) of MVAT Act, 2002(which is in addition to interest payable u/s 30(2)) had genesis to correcting earlier infraction of law by giving of an opportunity to the dealer to come clean after commencement of certain special events such as audit, inspection, search , survey etc. by allowing filing of revised return to cover up the tax earlier evaded/short paid which was earlier not paid/ withheld from department due to infraction of law by way of filing incorrect return of VAT originally , the nomenclature used by lawmakers in MVAT, 2002 is 'interest' instead of 'penalty' to keep up with the spirit of an opportunity granted by statute itself to the dealers by way of fresh opportunity to come clean and to end litigation but the fact remains that it has its germane to the infraction of law committed by dealer whether knowingly or not earlier while the original return of VAT was filed with MVAT authorities as the said return was filed with incorrect tax liability determined, wherein the MVAT authorities were deprived of their legitimate dues of VAT due to such wrong claim in the original return filed with MVAT authorities. It is also pertinent to mention that this interest u/s 30(4) of MVAT Act, 2002 @25% of additional is penal in nature because once the audit, inspection,survey , search etc. starts , then it is very difficult for the dealer to get away with any concealment or incorrect filing of particulars in the return of VAT originally filed and hence being cornered with the commencement of special event, an opportunity is provided in the statute itself to come clean otherwise the dealer will be burdened later with penalty as provided u/s 29(3) of the MVAT Act which can extend to 100% of the tax evaded. So, the fact remains that this is penal interest to come

clean from the infraction of law earlier committed whether knowingly or not while filing original return of VAT under MVAT Act,2002. The assessee in the instant case came after the commencement of search and survey operation being conducted against assessee in the last week of September 2011 by MVAT authority came forward to file revised return by withdrawing inadmissible and wrong credit of input tax credit set off against output VAT payable in order to come clean and buy peace with MVAT department with a view to end litigation and the assessee also paid compensatory interest u/s 30(2) to MVAT department for delay in payment of this additional tax under MVAT computed from the original due date of payment of this MVAT liability due to availment of wrong input tax credit on alleged bogus purchases till the said additional tax liability of VAT was paid to MVAT department and the assessee also paid penal interest u/s 30(4) of the MVAT Act,2002 in terms of the scheme of the Act to buy peace and to end litigation as also to safeguard against possible levy of penalty u/s 29(3) of the MVAT Act, 2002 which would in any case be minimum 25% but which could extend to 100% of the tax so evaded in the event of having adverse outcome of litigation with MVAT department. This levy of interest u/s 30(4) of the MVAT Act, 2002 has germane to detection of short payment of VAT by way of concealment or furnishing of inaccurate particulars of income in the original return of VAT filed with MVAT department due to infraction of law , which is detected after commencement of such special events such as audit, inspection, survey , search under MVAT Act, 2002 either at behest of dealer or by the team of MVAT authorities conducting such special event . The fact remains that one more opportunity is provided to the dealer to come clean and buy peace with MVAT department by filing revised return by paying additional tax, interest u/s 30(2) and also u/s 30(4) of MVAT Act, 2002. This levy of interest u/s 30(4) being in addition to interest u/s 30(2) of MVAT Act, 2002 , penalises the dealer for filing wrong returns earlier in violation of MVAT Act , 2002 leading to short payment of taxes to MVAT department depriving them

of their legitimate dues of statutory impost, which interest in our considered view as is provided u/s 30(4) of MVAT Act, 2002 is in the form of penalising the dealer for such infraction/violation of law while filing original return of VAT with MVAT authorities which earlier led to short collection of taxes due to these wrong claims filed in the VAT returns. While on the other hand the levy of interest u/s 30(2) of MVAT Act, 2002 is simple interest for delaying or withholding the payment of VAT beyond the prescribed due date from MVAT authorities and has germane to compensate MVAT department for withholding of their dues of tax being unpaid within stipulated time as prescribed in the statute and this levy of interest u/s 30(2) is compensatory in nature . Thus, we hold that the ld. CIT (A) has rightly concluded that the interest payable u/s 30(2) of MVAT Act, 2002 is not penal in nature but rather it's compensatory in nature for delaying / withholding payment of VAT beyond the time prescribed under MVAT Act , 2002 and is an allowable deduction as business deduction for withholding statutory dues from the MVAT department. But so far as interest u/s 30(4) of the MVAT Act, 2002 is concerned , in our considered view, the learned CIT(A) erred in holding the same to be compensatory in nature while in our considered view , interest paid by the assessee u/s 30(4) of MVAT Act, 2002 which is in addition to interest payable u/s 30(2) of MVAT Act, 2002 is penal in nature and cannot be allowed as business deduction keeping in view provisions of Explanation 1 to Section 37(1) of the 1961 Act, vide our detailed discussions and reasoning as set out above. Our view is strengthened by the fact that interest u/s 30(4) of MVAT Act, 2002 is in addition to interest payable u/s 30(2) of MVAT Act, 2002 which is held by us to be compensatory in nature and secondly in case the assessee choses path of litigation with MVAT authorities wherein additional tax liability had arisen after commencement of audit, inspection, survey , search instead of filing revised return along with payment of this interest u/s 30(4) in addition to additional tax and interest u/s 30(2) of MVAT Act, 2002, then in the eventuality of the assessee losing out in the legal

battle with MVAT Authorities , the assessee will , inter-alia, be visited with penalty u/s 29(3) of MVAT Act, 2002 which shall be not less than 25% of the amount of tax found to be evaded and which may extend to 100% of the said tax so sought to be evaded apart from interest u/s 30(2) and additional tax so sought to be evaded. Thus, by asking assessee to pay this interest @25% of additional tax u/s 30(4) of MVAT Act,2002 voluntarily while filing revised return along with additional tax and compensatory interest u/s 30(2) of MVAT Act, 2002, after commencement of special stipulated event such as audit, inspection,survey and search etc , the lawmakers have chosen to end the path of litigation despite the fact there was infraction of law earlier in filing original VAT return and this interest is nothing but penal in nature although nomenclature used is 'interest'. This is the reflection of State Litigation Policy to allow dealers to come clean by paying voluntarily this penal interest u/s 30(4) of MVAT Act, 2002 under specified circumstances and not to litigate matter further for such infraction of law provided compliance as stipulated u/s 30(4) of MVAT Act, 2002 are undertaken. This is undertaken as part of State Litigation Policy to preserve resources by reducing litigation with the dealers who want to come clean and settle with State by fulfilling the stipulated conditions but the fact remains that this interest u/s 30(4) is penal in nature being levied for infraction of law earlier by evading taxes earlier . The lawmakers in our considered view have not used nomenclature of 'penalty' and instead used the word 'interest' in Section 30(4) because an opportunity is given by the statute itself to the dealers to come clean voluntarily once events like audit, inspection, search , survey etc as stipulated u/s 30(4) of MVAT Act, 2002 commences and thereafter liability for additional tax arose. This reflected that the lawmakers did not intended to use harsh word 'penalty' in the statute itself against such dealers who wanted to come clean with a view to buy peace even post commencement of special events such as audit, inspection, survey , search etc by paying up additional tax, interest u/s 30(2) and 30(4), as the word used in

Section 30(4) is instead 'interest' . The Penalty is defined as punishment imposed for violation of law, rule or contract while interest is to compensate for use of money. The State of Maharashtra is considered to be business friendly state and this gesture of using word 'interest' as against 'penalty' is reflection of the trust reposed by State in business community as every error or wrong claim in the original return may not be intentional and knowingly made to evade taxes and it could be due to an unintentional error while interpreting law or due to ignorance of law etc. . It is also well settled proposition of law that ignorance of law is not an excuse and dealer has to be cautious and well versed with law before filing its VAT returns. It is also pertinent to mention that before special event commences as is stipulated u/s 30(4) by way of audit, inspection, survey and seizure etc. , and the dealer observes that there is some omission or incorrect statement in original return of VAT filed with MVAT authorities, the dealer can always come forward and file revised returns after complying with stipulated conditions u/s 20(4) of the MVAT Act, 2002, for which there is only stipulation to pay interest u/s 30(2) of the MVAT Act,2002 for delayed payment of VAT apart from paying additional tax liability u/s 20(5) of MVAT Act, 2002 which was originally short paid due to such omission or incorrect statement in the original return filed with the MVAT authorities and no further interest such as stipulated u/s 30(4) of the 1961 Act is stipulated under the aforesaid circumstances of filing revised return voluntarily by the dealer before the commencement of audit, inspection ,search , survey etc. . This also clearly indicates that no penal interest as is provided u/s 30(4) of MVAT Act, 2002 is levied in every filing of revised return due to omission or commission in the original return of VAT and it is only whence the special events such as audit, inspection, survey , search etc commences and the dealer is or is likely to be cornered and then at that stage the dealer comes forwards and files revised return , it is burdened with further penal interest as is contained in Section 30(4) of the MVAT Act, 2002. The lawmakers in

Section 30(4) of MVAT Act, 2002 has also stated that if the additional tax is less than 10% of the tax paid originally vide filing original VAT return, the dealer will not be visited with this interest u/s 30(4) of the MVAT Act, 2002 meaning thereby that the State is willing not to penalise the dealers due to minor infraction of law. Thus, after going through the relevant provisions of the MVAT Act, 2002 and other material on record, we have no hesitation to hold that interest paid by the assessee u/s 30(4) of the MVAT Act, 2002 is penal in nature as it has its germane to infraction of law by the dealer while filing original return of VAT and the interest paid u/s 30(4) of MVAT Act, 2002 cannot be allowed as deduction while computing income under the head 'Profits and Gains of Business or Profession' keeping in view Explanation 1 to Section 37(1) of the 1961 Act. This ground filed by the Revenue is partly allowed. The AO is directed to bifurcate the payments as between interest paid by the assessee u/s 30(2) and 30(4) of the MVAT Act, 2002 respectively and allow interest paid u/s 30(2) of MVAT Act, 2002 as deduction from income computed under the head 'Profits and Gains of Business or Profession' , while interest paid by the assessee u/s 30(4) of MVAT Act, 2002 shall be disallowed while computing income chargeable to tax under the head 'Profits and Gains of Business or Profession'. We order accordingly.

9. The second issue concerned itself with disallowance of expenditure to the tune of Rs. 1,28,59,715/- u/s. 14A of the 1961 Act r.w.r. 8D of the Income-tax Rules, 1962. The AO during the course of assessment proceedings u/s 143(3) r.w.s. 143(2) of the 1961 Act observed from the annual accounts that the assessee had made investment in shares/mutual funds, the dividend income of which is exempt u/s 10 of the 1961 Act. The AO asked the assessee to furnish complete details of exempt income earned along with details of expenditure incurred in relation to earning of an exempt income . It was also asked by the AO to give working of disallowance of expenditure within provisions of Section 14A of the 1961 Act r.w.r. 8D

of the 1962 Rules and explain why said provisions be not invoked to make disallowance of expenditure incurred in relation to earning of an exempt income. The assessee submitted that it has not incurred any expenditure in relation to investments made in shares/mutual funds for earning an exempt income. The AO observed that assessee had made investments in the shares/mutual funds which have potential of earning an income in the form of dividend which is exempt from tax. The AO observed that despite the assessee not earning exempt income during the relevant previous year , still disallowance u/s 14A of the 1961 Act is required to be made as the investments in shares made by the assessee are capable of generating exempt income. For this proposition, the AO relied on CBDT circular no. 5/2014. It was observed by AO that investments decisions in present market scenario need constant analysis and efforts. It was observed that whether stocks are held as stock-in-trade or strategic investments in subsidiaries etc. , Section 14A of the 1961 Act shall apply.The AO also relied upon decision of Hon'ble Special Bench of the Delhi-tribunal in the case of Cheminvest Limited v. ITO reported in 317 ITR 86 (AT-Delhi) and other decisions to come to conclusion that disallowance of expenditure incurred in relation to earning of an exempt income is required to be made u/s 14A of the 1961 Act. The AO observed that the assessee has not submitted any details as to that no part of interest bearing funds were used for making investments in Shares/Mutual funds and hence it was held that mixed funds were used for making investments in Shares/Mutual Funds and hence it was observed by the AO that disallowances of interest expenditure has to be made u/s 14 of the 1961 Act. The AO invoked provisions of Section 14A of the 1961 Act r.w.r. 8D of the 1962 Rules and accordingly the AO made disallowance of expenditure to the tune of Rs. 1,28.59,715/- incurred in relation to earning of an exempt income, vide assessment order dated 28.03.2015 passed by the AO u/s 143(3) of the 1961 Act, by observing as under:-

" 8.4 In view of the above discussion, the disallowance' u/s .l4A is required to be made in the case of Assessee Company. Considering the totality of the facts of the case, the computation of disallowance to be made u/s.14A is required to be made as per Rule-8D of I.T.Rules. In accordance with the aforesaid Rule, the computation of disallowance to be made u/s. 14A in the case of assessee company is as under:-

The disallowance u/s.14A/Rule 8D shall be aggregate of the following		Amount (Rs.)
1. Amount of expenses directly related to such income	*	Nil
2. Amount of the interest expenses indirectly attributable to such income, in accordance with the formula AxB/C, where A. Total interest expenditure minus direct interest expenditure on such income 197222797 – Rs. Nil = 197222797 (A) B. Average of such investment on the first and last day of previous year 154839923+154839923 =154839923 (B) 2 C. Average of total assets on first and last day of previous year 2816408353+2237238713 =2526823533 (C) 2 AxB/C		1,20,85,515
3. 0.5% of the 'B' above		7,74,200
Total disallowance U/S.14A		1,28,59,715

10. Aggrieved with the decision of the AO which culminated into an assessment order dated 28.03.2015 passed by the AO u/s 143(3) of the 1961 Act for AY 2012-13, the assessee filed first appeal with learned CIT(A) who considered the submissions of the assessee and came to conclusion that in case no exempt income is earned by the assessee during the previous year relevant to the impugned assessment year , no disallowance can be made of the expenditure incurred within provisions of Section 14A of the 1961 Act .The learned CIT(A) relied upon decision of Hon'ble Delhi High Court in the case of Cheminvest Ltd. (ITA 749/2014) and decision of Mumbai-tribunal in the case of Daga Global Chemicals Limited v. ACIT in ITA no. 5592/Mum/2012 to arrive at that decision and consequently deleted the additions to the tune of Rs. 1,28,59,715/- as were made by the AO u/s 14A of the 1961 Act r.w.r. 8D of the 1962 Rules, vide appellate order dated 23.12.2016 passed by learned CIT(A).

11. Aggrieved by the relief granted by learned CIT(A), the Revenue has come in an appeal before the tribunal. The Ld. DR relied upon assessment order passed by the AO . The Ld DR submitted that even if there is no exempt income earned during the relevant year still disallowance of expenditure u/s 14A are to be made which are incurred in relation to earning of an exempt income keeping in view provisions of Section 14A of the 1961 Act. The ld. AR on the other hand submitted that there is no exempt income earned by the assessee during the relevant previous year and hence no disallowance of the expenditure can be made u/s. 14A of the 1961 Act. The learned counsel relied upon decision of Hon'ble Delhi High Court in the case of Cheminvest Ltd. v. CIT in ITA 749/2014 vide judgment dated 02.09.2015 reported in (2015) 378 ITR 33(Del.) and decision of Hon'ble Delhi High Court in the case of Joint Investments Private Ltd. v. CIT in ITA no. 117 of 2015 vide judgment dated 25.02.2015 reported in (2015) 372 ITR 694(Del.).

12. We have considered rival contentions and perused the material on record including cited case laws. We have observed that the assessee had made investments in Shares/Mutual Funds which are capable of earning an exempt income albeit no exempt income was earned during the previous year relevant to the impugned assessment year under consideration before us. Thus, it is an un-disputed fact between rival parties that the assessee has not received any exempt income during the relevant previous year to the impugned assessment year under consideration before us. We shall proceed based on the above undisputed fact between rival parties. The AO invoked provision of Section 14A of the 1961 Act and made disallowance of Rs. 1,28,59,715/- under Rule 8D(2)(ii) and(iii) of the 1962 Rules . The learned CIT(A) deleted the additions relying on the decision of Hon'ble Delhi High Court in the case of Cheminvest Ltd.(supra) . We have observed that Hon'ble Delhi High Court has held in the case of Cheminvest Limited(supra) held that in case no exempt income is

received by the tax-payer during relevant year under consideration, no disallowance of expenditure u/s 14A of the 1961 Act is warranted. We are reproducing the relevant extract of decision of Hon'ble Delhi High Court in the case of Cheminvest Limited(supra) , as under:

> *"23. In the context of the facts enumerated hereinbefore the Court answers the question framed by holding that the expression 'does not form part of the total income' in Section 14A of the envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year."*

The Hon'ble Delhi High Court in the case of Joint Investments Private Limited (supra) held that disallowance of expenditure incurred in relation to earning of an exempt income cannot exceed an exempt income. The relevant extract of the decision of Hon'ble Delhi High Court in the case of Joint Investments Private Limited(supra) is reproduced hereunder:

> ***"9.*** *..... By no stretch of imagination can s. 14A or r. 8D be interpreted so as to mean that the entire tax exempt income is to be disallowed. The window for disallowance is indicated in s. 14A, and is only to the extent of disallowing expenditure "incurred by the assessee in relation to the tax exempt income". This proportion or portion of the tax exempt income surely cannot swallow the entire amount as has happened in this case."*

The Hon'ble Bombay High Court in the case of Pr. CIT v. Ballarpur Industries Limited reported in 2016(TMI)TMI 1039 has approved the proposition of Hon'ble Delhi High Court in the case of Cheminvest Limited(supra) that in the absence of an exempt income , no disallowance of expenditure can be made u/s 14A of the 1961 Act.

We would also like to refer to the dismissal of Revenue's SLP by Hon'ble Supreme Court in the case of CIT v. Chettinad Logistics Private Limited in SLP(Civil) Diary no. 15631 of 2018 vide orders dated 02-07-2018 reported in (2018) 95 taxmann.com 250(SC) , which SLP

arose against decisions of Hon'ble Madras High Court holding that in the absence of an exempt income no disallowance of expenditure can be made within the provisions of Section 14A of the 1961 Act. The relevant extract of the decision of Hon'ble Madras High Court in the case of CIT v. Chettinad Logistics Private Limited reported in (2017) 80 taxmann.com 221(Mad. HC) from which aforesaid SLP arose, is reproduced hereunder:-

*"**7.** It is, in this background, that the Tribunal remanded the matter to the Assessing Officer, so as to reach a conclusion as to whether investments had been actually made, in sister concerns of the Assessee, out of interest free funds, albeit, for strategic purposes.*

***8.** According to us, this exercise, in the given facts which emerge from the record, was clearly unnecessary, as the CIT(A) had returned the finding of fact that no dividend had been earned in the relevant assessment year, with which, we are concerned, in the present appeal.*

***9.** In our opinion Section 14 A of the Act, can only be triggered, if, the Assessee seeks to square off expenditure against income which does not form part of the total income under the Act.*

***9.1** The legislature, in order to do away with the pernicious practice adopted by the Assessees', to claim expenditure, against income exempt from tax, introduced the said provision.*

***10.** In the instant case, there is no dispute that no income i.e., dividend, which did not form part of total income of the Assessee was earned in the relevant assessment year.*

***10.1** Therefore, to our minds, the addition made by the Assessing Officer by relying upon Section 14 A of the Act, was completely contrary to the provisions of the said Section.*

***10.2** Mr.Senthil Kumar, who appears for the Revenue, submitted that the Revenue could disallow the expenditure even in such a circumstance by taking recourse to Rule 8D.*

***10.3** According to us, Rule 8D, only provides for a method to determine the amount of expenditure incurred in relation to income, which does not form part of the total income of the Assessee.*

***10.4** Rule 8 D, in our view, cannot go beyond what is provided in Section 14 A of the Act.*

***11.** Furthermore, we may note that a similar argument was sought to be advanced by the Revenue in the matter concerning, Redington (India) Ltd. v. Addl. CIT [2017] 77 taxmann.com 257 (Mad.)which was, subject matter of T.C.A.No.520 of 2016.*

11.1 *A Co-ordinate Bench of this Court, vide judgment dated 23.12.2016, rejected the plea of the Revenue advanced in that behalf.*

11.2 *As a matter of fact, a perusal of the judgment would show that the Revenue had sought to argue that because exempt income could be earned in future years, therefore, recourse could be taken to the provisions of Section 14A of the Act, to disallow expenditure. In other words the stand taken by the Revenue was irrespective of the fact whether or not income was earned in the concerned assessment year expenditure under Section 14A could be disallowed against anticipated income.*

11.3 *Pertinently, the Division Bench in Redington (India)Ltd. (supra) case has repelled this precise argument.*

12. *The Division Bench, in our view, quiet correctly held that, the computation of total income, in terms of Section 5 of the Act, is made qua real income and not, vis-a-vis, notional income.*

12.1 *The Division Bench went on to hold that Section 4 of the Act brings to tax, that income, which is relatable to the assessment year in issue. The Division Bench, thus, held that where no exempt income is earned in the previous year, relevant to the assessment year in issue, provisions of Section 14 A of the Act, read with Rule 8 D could not be invoked.*

12.2 *While coming to this conclusion, the Division Bench also took note of the aforementioned Circular, issued by the Board.*

12.3 *The reasoning of the Division Bench is contained in the following part of the judgment:*

"4. The admitted position is that no exempt income has been earned by the assessee in the financial year relevant to the assessment year in issue. The order of assessment records a finding of fact to that effect. The issue to be decided thus lies within the short compass of whether a disallowance in terms of s.14A of the Act read with Rule 8D of the Rules can be contemplated even in a situation where no exempt income has admittedly been earned by the assessee in the relevant financial year.

7. Per contra, Sri. T. Ravikumar appearing on behalf of the revenue drew our attention to the marginal notes of s.14 A pointing out that the provision would apply not only where exempted income is 'included' in the total income, but also where exempt income is 'includable' in total income.

8. He relied upon a Circular issued by the Central Board of Direct taxes in Circular No.5 of 2014 dated 11.2.2014 to the effect that s.14A was intended to cover even those situations whether there is a possibility of exempt income being earned in future. The Circular, at paragraph 4, states that it is not necessary for exempt income to have been included in the income of a particular year for the disallowance to be triggered. According to the Learned Standing Counsel, the provisions of s.14A are

made applicable, in terms of sub section (1) thereof to income 'under the act' and not 'of the year' and a disallowance under s.14A r.w.Rule 8D can thus be effected even in a situation where a tax payer has not earned any taxable income in a particular year.

9. We are unable to subscribe to the aforesaid view. The provisions of section 14A were inserted as a response to the judgments of the Supreme Court in Commissioner of Income Tax v. Maharashtra Sugar Mills Limited [1971] 82 ITR 452 and Rajasthan State Ware Housing Corporation v. Commissioner of Income-tax [2002] 242 ITR 450 in terms of which, expenditure incurred by an assessee carrying on a composite business giving rise to both taxable as well as non-taxable income, was allowable in entirety without apportionment. It was thus that s.14A was inserted providing that no deduction shall be allowable in respect of expenditure incurred in relation to the earning of income exempt from taxation. As observed by the Supreme Court in the judgment in the case of Commissioner of Income-tax v. Walfort Share and Stock Brokers (P) Ltd. [2010] 326 ITR 1

'.... The mandate of s.14A is clear. It desires to curb the practice to claim deduction of expenses incurred in relation to exempt income against taxable income and at the same time avail of the tax incentive by way of an exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income.'

10. The provision this is clearly relatable to the earning of actual income and not notional or anticipated income. The submission of the Department to the effect that s.14A would be attracted even to exempt income 'includable' in total income would entail the assessment of notional income, assumed to be exempt in the future, in the present assessment year. The computation of total income in terms of s.5 of the Act is on real income and there is no sanction in law for the assessment of admittedly notional income, particularly in the context of effecting a disallowance in connection therewith.

11. The computation of disallowance in terms of Rule 8D is by way of a determination involving direct as well as indirect attribution. Thus, accepting the submission of the Revenue would result in the imposition of an artificial method of computation on notional and assumed income. We believe this would be carrying the artifice too far. (emphasis is ours)"

13. *Mr.Senthil Kumar, seeks to distinguish the judgment in Redington (India) Ltd. case (supra) based on the fact that Rule 8D had not kicked-in by AY 2007-08, which was the AY being considered in the said case.*

14. *According to us, this was not the argument, put forth, before the Division Bench. As a matter of fact, the Revenue relied heavily on Rule 8D.*

14.1 *Mr.Ravikumar, who appeared for the Revenue, in that matter and who is present in this Court, informs us that he had in fact argued that the Rule was clarifactory in nature and would apply retrospectively,*

and that, the Division Bench, therefore, discussed the impact of Rule 8D of the Rules.

15. *However, it is, our view, as indicated above, independent of the reasoning given in Redington (India) Ltd. case (supra) that Rule 8D cannot be read in a manner, which takes it beyond the scope and content of the main provision, which is, Section 14 A of the Act.*

15.1 *Therefore, as adverted to above, Rule 8D, cannot come to the rescue of the Revenue.*

15.2 *In any event, the Tribunal, via, the impugned judgment has remitted the matter to the Assessing Officer.*

15.3 *Therefore, for the foregoing reasons, we are of the view, that no interference is called for qua the impugned judgment.*

16. *To our minds, questions of law, which could have arisen are already covered by the judgment of a Co-ordinate Bench of this Court rendered in Redington (India) Ltd. case (supra).*

17. *The appeal is accordingly, dismissed. However, there shall be no order as to costs."*

Respectfully following the ratio of aforesaid decision of Hon'ble High Courts including decision of Hon'ble Jurisdictional High Court and also taking note of dismissal of Revenue' SLP by Hon'ble Supreme Court in the case of CIT v. Chettinad Logistics Private Limited(supra), we uphold the well reasoned order of Ld. CIT(A) on the proposition that if no exempt income is earned by the assessee during the previous year relevant to the impugned assessment year , no disallowance u/s 14A of the 1961 Act is called for and we dismiss the appeal of Revenue on this short ground only. Thus, Revenue fails on this ground. We order accordingly.

13. Thus , appeal of the revenue in ITA no. 1893/Mum/2017 for AY 2012-13 is partly allowed as indicated above.

ITA No. 1892/Mum/2017 for AY 2009-10

14. The only issue which arise for our determination in Revenue's appeal in ITA no. 1892/Mum/2017 for AY 2009-10 is disallowance of expenditure to the tune of Rs.1,74,92,035/- u/s 14A of the 1961 Act by the AO vide assessment order dated 28.03.2015 passed by the AO

u/s 143(3) r.w.s. 147 of the 1961 Act, which disallowance of expenditure was later deleted by learned CIT(A) vide appellate order dated 23.12.2016 on the grounds that the assessee had not earned any exempt income during the year under consideration and hence no disallowance u/s 14A r.w.r. 8D of the 1962 Rules is warranted. The factual matrix of the AY 2009-10 is similar to the factual matrix as was prevailing for AY 2012-13 . Hence, our above decision in ITA no. 1893/Mum/2017 for AY 2012-13 shall apply mutatis mutandis to the grounds raised by Revenue concerning disallowance of expenditure u/s 14A of the 1961 Act to appeal in ITA no. 1892/Mum/2017 for AY 2009-10. Thus, Revenue fails on this grounds concerning disallowance of expenditure u/s 14A of the 1961 Act read with Rule 8D of the 1962 Rules on the short ground that if no exempt income is received during relevant year under consideration, no disallowance u/s 14A is called for. We order accordingly.

15. In the result , appeal of the Revenue in ITA no. 1892/Mum/2017 for AY 2009-10 is dismissed.

16. In the result, appeal of the Revenue in ITA No. 1893/Mum/2017 for AY 2012-13 is partly allowed as indicated above, while appeal of the Revenue in ITA no. 1892/Mum/2017 for AY 2009-10 is dismissed.

Order pronounced in the open court on .08.2018.

आदेश की घोषणा खुले न्यायालय में दिनांकः 21-08-2018 को की गई ।

Sd/-	Sd/-
(C.N. PRASAD)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, dated: 21.08.2018

Nishant Verma
Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI