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

BEFORE SHRI A. D. JAIN, VP AND SHRI RAJESH KUMAR, AM

ITA No. 5295/Mum/2017
(Assessment Year: 2009-10)

Asst. CIT-6(2)(1) R. No.504/563-C, 5th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020	Vs.	M/s. Crompton Greaves Ltd. 6th Floor, CG House, Dr. Annie Besant Road, Worli, Mumbai-400 030
PAN/GIR No. AAACC 2089 A		
(Revenue)	**:**	**(Assessee)**

&

ITA No. 5390/Mum/2017
(Assessment Year: 2009-10)

M/s. Crompton Greaves Ltd. 6th Floor, CG House, Dr. Annie Besant Road, Worli, Mumbai-400 030	Vs.	Asst. CIT-6(2)(1) R. No.504/563-C, 5th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
PAN/GIR No. AAACC 2089 A		
(Assessee)	:	**(Revenue)**

Revenue by	:	Shri A. M. Mittal
Assessee by	:	Shri Pradip Kapasi

Date of Hearing	:	23.09.2019
Date of Pronouncement	:	27.09.2019

O R D E R

Per A. D. Jain, VP:

These are department's appeal and the assessee's appeal, respectively, for Assessment Year ('A.Y.', for short) 2009-10, against the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A)', for short) order dated 22.05.2017.

ITA No. 5390/Mum/2017 - (Assessee's appeal)

2. In this appeal, the assessee has taken the following effective grounds:

1. Disallowance of deduction u/s 35(2AB) of Rs. 42,52,032/-.
1.1 The Honourable CIT(Appeals) erred in confirmation of disallowance of deduction u/s 35(2AB) without appreciating the fact that your appellant was

eligible for weighted deduction based on the Auditors Certificates and Tax Audit Report.

1.2 Without prejudice to above your appellant incurred, the expenditure on Scientific Research in the in house R&D facility approved by the Prescribed Authority being Department of Industrial and Scientific Research.

1.3 Your appellant Prays that, the order of the Honourable CIT (Appeals) be reversed and deduction as claimed by Your appellant u/s 35(2AB) be granted in full.

Depreciation in respect of Opening W.D.V. of Building on account of depreciation disallowed by AO from AY 2004-05 onwards.

2.1 The Honourable CIT(Appeals) has not allowed the depreciation in respect of Building used for the purpose of business but disallowed by AO. From AY 2004-05 onwards and effect for which was remained to be given.

2.3 Your appellant prays that the depreciation of the adjusted wdv of the opening block of the building on account of disallowance of depreciation in respect of user of building for business.

Disallowance of expenditure u/s 14A of Rs. 64 Lakhs as per Rule

3.1 The Honouarble CIT(Appeals) has erred in confirming the disallowance in respect of Rule 8D(2)(iii) being one half percentage of average value of investments , the income from which does not form part of the Total Income . The Honourable CIT (Appeals) has confirmed the disallowance based on the inference that you're appellant has incurred the administrative expenses which were composite and divisible and hence provision for Rule 8D2(iii) were applicable.

3.2 Your appellant has submitted the amount of actual expenditure incurred for earning the exempt income and the disallowance ought be restricted to the same in terms of Section 14(1) of the I.T Act, 1961 and without referring to provisions of Rule 8D2(iii) of the I.T Rules 1962.

3. Apropos ground no.1, the Assessing Officer ('A.O.', for short) noted, after verifying Form Nos. 3CM and 3CL concerning the deduction claimed by the assessee u/s. 35(AB) of the Income Tax Act, 1961 ('the Act', for short), that the eligible amount, as noted by the Department of Scientific and Industrial Research ('DSIR' for short), in Form No. 3CL was less as compared to the deduction claimed by the assessee. The A.O. made the disallowance of Rs.42,52,032/- on this basis. The ld. CIT(A) has confirmed the assessment order on this score, by observing as follows:

7.2 I have carefully perused the assessment order and the submission of the appellant. It is found that during remand hearing, the appellant has not objected to the action of the AO for making disallowance u/s 35(2AB) of the Act. During

appellate proceedings, the appellant stated that the claim of the appellant u/s 35(2AB) is to be allowed in full without any restriction on account of DSIR report in Form No 3CM and 3CL. The appellant relied on the decision of Hon'ble Tribunal in the case of Torrent Pharmaceuticals Ltd (28 CCH 781). The appellant further claimed that the expenditure was fully vouched for and was supported by documentary evidence. The DSIR has not given any reason in support of its action, it is seen that the extent of expenditure was never verified by the AO. The appellant has not noted which expenditure was not considered by the D.S.I.R. Therefore, it cannot be ascertained as to whether the expenditure are properly vouched or not, It is also not clear as to why the DSIR has not allowed the claim of expenditure of the appellant. Therefore, it is held that the decision of Hon'ble 1TAT in the case of Torrent Pharmaceutical Ltd is not directly applicable in the instant situation.

Further, a plain reading of section 35(2AB}(1) would indicate that where a company is engaged in the business of biotechnology or any business of manufacture or production of any article or thing, not being an article or thing specified in the list of the Eleventh Schedule incurs any expenditure on 'Scientific Research' (not being expenditure in the nature of cost of any land or building) on in-house, research and development facility 'as approved by the prescribed authority/ such assessee would be entitled to a deduction of a sum equal to one and half times of the expenditure so-incurred.. Such expenditure incurred should be approved by the authority prescribed under section 35(2AB) read with rules framed thereunder. The authority prescribed to grant such approval under rule 6{1B) of the rules, 1961 is the Secretary, Department of Scientific and Industrial Research.

As per DSIR regulation/ the Prescribed Authority would pass the order after verification of the expenditure. The appellant has not provided any details as to why the DSIR(ie Prescribed authority) has not allowed the expenditure and whether the appellant has raised any objection thereon. Therefore, I do not find any force in the submission of the appellant. Accordingly, ground no 2 of the appeal is dismissed.

4. The ld. Counsel of the assessee has contended that the ld. CIT(A) has erred in confirming the disallowance wrongly made by the A.O., without appreciating that the assessee was eligible for weighted deduction based on the Auditor’s certificates and the tax audit report; that alternatively and without prejudice, the assessee had incurred the expenditure on Scientific Research in the in-house, Research and Development facility approved by the prescribed authority, being the department of Industrial and Scientific

Research, i.e., the DSIR. The written submissions have also been filed, which we shall presently discussing.

5. The ld. Departmental Representative (ld. DR for short), on the other hand, has placed strong reliance on the impugned order. It has been contended that the ld. CIT(A) has correctly undone the A.O.'s action of denying the assessee's weighted deduction of Rs.42,52,032/-, including the amount of Rs.28,34,688/-, being the actual expenditure incurred @ 100% of the expenditure u/s. 35(1)(iv) of the I.T. Act; that the eligible expenditure, as per the DSIR, in Form No. 3CL was lower as compared to the amount claimed by the assessee; that the DSIR had not given any reason in support of its action; that as per the DSIR Regulations, the prescribed authority would pass an order after verification of the expenditure; that the assessee had not furnished the reasons for the DSIR's action and no objection had been filed; that the ld. CIT(A) has correctly distinguished the decision of the Ahmedabad Tribunal in the case of *Torrent Pharmaceuticals Ltd (2009) 28 CCH 781 (Ahd)*; that it remains undisputed that the DSIR had not given any reason in support of its action; that the extent of the expenditure was never verified by the A.O.; that the assessee also has not pointed out as to which expenditure was not considered by the DSIR; that in these facts, the ld. CIT(A) cannot be said to have faulted in holding that it cannot be ascertained as to whether the expenditure was properly vouched or not; that it is also unclear as to why the DSIR did not allow the claim of the expenditure as made by the assessee; that, therefore, as correctly held by the ld. CIT(A), *Torrent Pharmaceuticals Ltd.* (supra) was rightly held to be inapplicable to the facts of the present case.

6. Here it is seen that it is the assessee's stand that it had incurred in-house Scientific Research expenditure (capital and revenue). It had claimed weighted deduction u/s. 35(2)(AB) of the Act, as under:

i. Revenue expenditure of Rs.10,05,03,198/- @ 150% - Rs.15,07,54,797/-.

ii. Capital expenditure of Rs.1,27,94,490/- @ 150% - Rs.1,91,91,735/-.

The assessee, thus, claimed deduction of a sum of Rs.16,99,46,532/-. The details of this expenditure has been filed at Assessee's Paper Book (APB for short), pgs. 93 to 100. It is the claim of the assessee that this expenditure was deductible u/s.35(2AB) of the Act in computing the total income @ 150% of the actual expenditure. The expenditure was incurred for the Kanjurmarg unit of the company; rather, the unit stood approved by the DSIR, in Form No. 3CM, as on 28.08.2008 (APB, pg. 88), as per the requirements of section 35(2AB) of the Act for the period from 01.04.2007 to 31.03.2009. The assessee's Auditor duly certified the genuineness of such expenditure and its eligibility for weighted deduction u/s. 35(2)(AB), as available at APB pgs. 93 to 100, as also by the tax auditor, as evident from APB pgs. 91 ^92.

7. It was the action of the DSIR in issuing Form No. 3CL (APB pgs. 89 & 90), dated 24.08.2010, quantifying the eligible expenditure at Rs.11,04,63,000/-, as against that of Rs.11,32,97,688/-, resulting in a difference of Rs.28,34,688/-, which prompted the A.O. to make the disallowance in question.

8. It is seen that as rightly contended on behalf of the assessee, section 35 of the Act grants deduction for Scientific Research expenditure, under the circumstances prescribed

there-under, on compliance of the conditions laid down in various provisions of section 35. Now, whereas in some cases, like those coming under the provisions of sections 35(1)(i) and 35(2AB), a specific approval of quantum of expenditure, by the prescribed authority, is the pre-requisite for deduction, the provisions of section 35(2AB) requires approval for *Units* and not approval for the *quantum of expenditure.* For ready reference, section 35(2)(AB) reads as under:

> ***Expenditure on scientific research.***
>
> ***35. (2AB)****(1) Where a company engaged in the business of bio-technology or in any business of manufacture or production of any article or thing, not being an article or thing specified in the list of the Eleventh Schedule incurs any expenditure on scientific research (not being expenditure in the nature of cost of any land or building) on in-house research and development facility as approved by the prescribed authority, then, there shall be allowed a deduction of a sum equal to one and one-half times of the expenditure so incurred:*
>
> ***Provided*** *that where such expenditure on scientific research (not being expenditure in the nature of cost of any land or building) on in-house research and development facility is incurred in a previous year relevant to the assessment year beginning on or after the 1st day of April, 2021, the deduction under this clause shall be equal to the expenditure so incurred.*
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> *Explanation.—For the purposes of this clause, "expenditure on scientific research", in relation to drugs and pharmaceuticals, shall include expenditure incurred on clinical drug trial, obtaining approval from any regulatory authority under any Central, State or Provincial Act and filing an application for a patent under the Patents Act, 1970 (39 of 1970).*
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> *(2) No deduction shall be allowed in respect of the expenditure mentioned in clause (1) under any other provision of this Act.*
>
> *(3) No company shall be entitled for deduction under clause (1) unless it enters into an agreement with the prescribed authority for co-operation in such research and development facility and fulfils such conditions with regard to maintenance of accounts and audit thereof and furnishing of reports in such manner as may be prescribed.*
>
> *(4) The prescribed authority shall submit its report in relation to the approval of the said facility to the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General in such form and within such time as may be prescribed.*
>
> *(5) [***]*

> *(6) No deduction shall be allowed to a company approved under sub-clause (C) of clause (iia) of sub-section (1) in respect of the expenditure referred to in clause (1) which is incurred after the 31st day of March, 2008.*

9. The operative phrase here is "*on in-house research and development facility as approved by the prescribed authority …….*", the word "*facility*" has been hereby show us to emphasis the point that it is the unit which requires approval of the prescribed authority under this provision. Further, in the memorandum, explaining the provision of section and the notes on the clauses issued at the time of insertion of section 35(2AB) in the Act, copies of both of which have been filed on record before us by the assessee, it has been clearly provided that the deduction would be available to the assessee's having an approved in-house R & D facility by the prescribed authority. Undisputedly, there is no mention or approval of the quantum of expenditure.

10. Then, as observed by the Ahmedbad Bench of the Tribunal in the case of *Sun Pharmaceutical Industries Ltd. Vs. Pr.CIT (2017) 162 ITD 484* as approved by the Hon'ble Gujarat High Court vide its decision reported at 250 taxmann 270, it has been held that the objective of Form 3CL is limited to the forwarding of the intimation of the approval of the unit; that Form No. 3CL is a mere report for intimation of approval of R & D facility. In this regard, as rightly pointed out, such aspect stands confirmed by sub-rule (7A) of Rule 6 of Income Tax Rules, as within subsisting (now amended w.e.f. 01.07.2016), to provide for quantification of expenditure as well. The Finance Act, 2015 as amended to sub section (3) of section 35 w.e.f. 01.04.2016, providing for furnishing of reports in the manner to be prescribed. It is, thus, w.e.f. 01.04.2016 that the provision has been made for approval of quantum of expenditure, for the first time.

11. Further still, in Pune ITAT decision in the case of *Cummins India Ltd. v. Dy. CIT (2018) 96 Taxmann.com 576 (Pune-Trib.)*, which is a decision directly on the issue at hand, it has been held, *inter alia*, to the fact that though the Rules stipulate the filing of audit report before the prescribed authority by availing the deduction u/s. 35(2AB) of the Act. The provision of the Act prescribed or approved to be granted by the prescribed authority vis-à-vis the expenditure from year to year; that the amendment was brought in by the Income Tax amendment Rules w.e.f. 01.04.2016, wherein, a separate part has been inserted for certifying the amount of expenditure from year to year and the amended Form No. 3CL, thus, lays down the procedure to be followed by the prescribed authority; that prior to the said amendment, no such procedure; methodology was prescribed; and that therefore, in the absence of any such procedure or methodology, the A.O. had erred in curtailing the expenditure and consequent weighted deduction claimed u/s. 35(2AB) of the Act on the summon that the prescribed authority had approved the part of the expenditure in Form No. 3CL.

12. It would also be apt to reproduce here-under the provisions substituted in clause (b) of sub rule (7A) of Rule 6, as brought in by the amendment effective from 01.07.2016 as above: "*The prescribed authority shall furnish electronically its report,- (i) in relation to the approval of the in-house research and development facility in Part A of Room No. 3CL; (ii) quantifying the expenditure incurred on in-house research and development facility by the company during the previous year and eligible for weighted deduction under sub-section (2AB) of section 35 of the Income Tax Act, 1961 in Part B of Form No. 3CL.*"

13. Hitherto, the provision was as follows: "*The prescribed authority shall submit its report in relation to the approval of in-house facility and development facility in Form No. 3CL to the Director General (Income-tax Exemptions) within sixty days of its granting approval.*"

The above also makes it amply clear that prior to the amendment, i.e., upto 30.06.2016, it was not required to quantify the expenditure and it was only w.e.f. 01.07.2016 that this mandate has been put in place.

14. The year under consideration is A.Y. 2009-10 and, for this year, the amendment was not applicable. Therefore, the assessee is right in contending that the non approval of the expenditure claimed by CSIR did not entitle the A.O. to make the disallowance and the ld. CIT(A) to confirm the same.

This does also take care of a without prejudice contentions raised by the assessee, to the fact that deduction of actual expenditure of Rs.28,34,688/- be allowed to the assessee under the provisions of section 35(1)(i) and 35(1)(iv). These provisions of allowing 100% deduction of expenditure on in-house scientific research, irrespective of the approval of the unit and the certification of the expenditure, where the actual expenditure, as in the case of the assessee is verified by the Statutory Auditor and certified by the Independent Auditor and Tax Auditor.

15. The assessee is found correct in contending that the ld. CIT(A) has observed that the extent of the expenditure was never verified by the A.O. Thus, according to the assessee it goes to confirms that the A.O. disallowed the claim without due application of

mind. This contention of the assessee is correct, as evident from the assessment order itself, wherein the ground for the disallowance was the non approval of the expenditure claimed by the DSIR.

16. On behalf of the assessee, another contention has been raised, that the ld. CIT(A) is wrong in observing that during the remand proceedings, the assessee has not objected to the action of the A.O. in making the disallowance u/s. 35(2AB). This, it has been emphasized, that the assessee had always objected to the disallowance before the A.O. as well as the ld. CIT(A). The attention in this regard has been drawn to the grounds taken by the assessee and the submissions raised by the assessee before the ld. CIT(A). It has further been submitted that in the remand proceedings, qua this issue, no enquiry whatsoever had been made by the A.O., notwithstanding the fact that the remand proceedings were proceedings where the assessee was required to press his claim afresh, which could have only be done by way of objecting to the action of the A.O.

17. Be that as it may, the disallowance stands objected to by the assessee before us, which issue we have answered in the preceding paragraphs.

In view of the above, finding merit in ground no. 1 raised by the assessee, the same is hereby accepted to the reversing order passed by the ld. CIT(A) on this issue and deleting the disallowance of Rs.42,52,032/-, made u/s. 35(2AB) of the Act.

18. So far as regarding ground no. 2, the A.O. did not allow the deprecation to the assessee on higher revised opening WDV of the building, which, as per the assessee was required to be increased, by revising it on account of disallowance of depreciation in the

past, particularly for A.Ys. 2004-05 to 2008-09, aggregating to Rs.1,90,42,120/- which stands allowed by the tribunal vide order (APB pgs. 109 to 111) passed in ITA No. 5295/Mum/2017.

19. The ld. CIT(A), by virtue of the impugned order, directed the A.O. to allow the claim for the depreciation on revised opening WDV, rather than, granting the relief to the assessee himself.

20. The grievance of the assessee is that the A.O. disputed the directions of the ld. CIT(A), while passing the order (APB pg. 286) dated 08.02.2018, for giving effect to the ld. CIT(A)'s order, failed to upwardly revise the opening WDV and to allow the higher depreciation to the assessee. The department, per contra, has placed strong reliance on the A.O.'s order dated 08.02.2018, besides relying on the assessment order.

21. Here, it is seen that the assessee claimed deprecation on a part of the building, i.e., 84%, which become disallowable for the period from A.Y's 2004-05 to 2007-08. Since such disallowance was confirmed by the ITAT, as such, the aggregate amount, to the extent of 84% of the amount disallowed by the A.O. i.e., 100% was required to be added to the WDV of the building, as on 01.04.2008, for the year under consideration, this come to an amount of Rs.1,90,42,120/-. Since the tribunal order for A.Ys. 2004-05 to 2007-08, confirming the disallowance, came to be passed on 28.03.2012, in the return of income filed by the assessee on 28.09.2009, it had not been possible for the assessee to have adjusted the opening WDV for claiming higher depreciation. It was under such circumstances, that the claim was made by the assessee in the assessment, which was

reiterated in the appeal. In the remand report (APB pg. 74), the A.O. observed that the contention of the assessee was not acceptable, as the assessee had not made such claim in the return of income, nor had such claim been made in the assessment proceedings.

22. The ld. DR has placed reliance on the assessment order in this regard. However, it has been submitted that the ld.CIT(A) has erred in deleting the addition without appreciating the fact that the assessee company has been showing wrong income from the building called CG house, as business income and claiming depreciation on a part of that building, utilized by the assessee, which claim was never made in the return of income filed by the assessee; and that the ld. CIT(A) has erred in entertaining the fresh claim of depreciation on CG house, whereas the ld. CIT(A) has no power to do so, as held by the Hon'ble Supreme Court in the case of *Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 (SC)*.

23. In his counter, the ld. Counsel of the assessee has argued that the ld. CIT(A) has correctly observed that part of a building CG house was utilized by the assessee for the purpose of its business; that the A.O. having bifurcated the income, there was no need remaining for the claim of the depreciation to have been made; and that the A.O. ought to have allowed higher depreciation to the assessee on upwardly revising the opening WDV, as directed by the ld. CIT(A). It has further been pleaded that since the ITAT order for A.Ys. 2004-05 to 2007-08 is dated 28.03.2012, whereas the assessee filed its return of income on 28.09.2009, there was no occasion for the assessee to have adjusted the opening WDV for claiming the higher depreciation in the return of income itself.

24. The fact that the tribunal order for A.Ys. 2004-05 to 2007-08 confirming the assessment orders for these years, is dated 28.03.2012, which falls much later within the date of the filing of the return by the assessee, i.e., on 28.09.2009, cannot be disputed. That being so obviously, the assessee was not in a position to claim higher depreciation in the return of income by adjusting the opening WDV. There is no provision in law pointed out to us for habiting the assessee from making the claim of such like the present one in the assessment proceedings. Rather, it stands well settled that the claims of depreciation need must be allowed by the A.O. irrespective of whether the assessee has himself made such claim or not. However, there is no dispute about the entitlement of the assessee to claim of the depreciation. The A.O. ought to have allowed the higher depreciation on the direction issued by the ld. CIT(A), which, unfortunately, has not come about. Accordingly, the A.O. is now directed to upwardly revise the opening WDV and to allow the higher deprecation to the assessee on the part of the building CG house, which part was utilized by the assessee for its business purpose. Accordingly, ground no. 2 is accepted and allowed.

25. Coming to the ground no. 3, the A.O. noted that the assessee had claimed exempt income of Rs.1,34,47,794/-. However, no disallowance u/s. 14A of the Act had been made in the computation of the income. The A.O. considered the assessee's explanation that it had not incurred any expenditure for earning the exempt income. However, the A.O. rejected the same, relying on *Dhanuka and Sons 339 ITR 319* (Cal), wherein it was held that the assessee has to show the source of acquisition of shares by producing the material that the shares are acquired from funds available in the hands of the assessee at

the relevant point of time, without taking any benefit of any loan. The A.O. also relied on the decision of the Hon'ble Jurisdictional High Court in the case of Godrej Agrovet Ltd. (Mum.), which is to the fact that Rule 8D of the Rules is applicable from A.Y. 2008-09. The A.O. made the addition, invoking the provisions of section 14A of the Act read with Rule 8D(2)(ii) of the Rules, of Rs.72 lacs and Rs.62 lacs under Rule 8D(2)(iii) of the Rules. It is the disallowance of the amount of Rs.64 lacs which is now in dispute before us, the ld. CIT(A) having confirmed the same by observing as under:

> With respect to the addition on account of 14A r w Rule 8D(2)(iii), it is found that the appellant has claimed various administrative expenses. The appellant has not maintained separate books of accounts to substantiate that no expenditure has been incurred. In my opinion the expression 'expenditure incurred ' in section 14A refers to expenditure on rent, taxes, salaries, interest etc. In the case here, the appellant has incurred administrative expenses which are composite and indivisible. Hence it would be necessary to apportion the expenditure incurred by the appellant. For such apportionment of expense the AO has correctly invoke the provision of sec. 14A(2) r w Rule 8D(iii) and accordingly worked out the disallowance at Rs 64 lacs. Hence, I have no hesitation to confirm the disallowance made u/s. 14A(2) r w Rule 8D(2) (iii) of the Act. Accordingly, ground no. 5 of the appeal is partly allowed.

26. Challenging the order passed by the ld. CIT(A) on this issue, the ld. Counsel of the assessee has contended that the ld. CIT(A) has erred in confirming the disallowance in respect of Rule 8D(2)(iii) being one half percentage of average value of investments, the income from which does not form part of the total income of the assessee; that the ld. CIT(A) has confirmed the disallowance based on the inference that the assessee has incurred administrative expenses which were composite and divisible and that, hence, the provision of Rule 8D(2)(iii) were applicable; that the assessee had submitted the amount of actual expenditure incurred for earning the exempt income, and that the disallowance ought to be restricted to the same in terms of section 14(1) of the Act, without referring to

the provisions of Rule 8D(2)(iii) of the Rules. It has further been contended that the assessee company has not incurred any expenditure for earning the exempt income which is directly credited electronically to the bank account of the company and the investment is managed by the Managers of Mutual Funds, to whom the payment is made by the fund and not by the company; that the expenditure debited to the profit and loss account has been directly incurred for the purpose of earning taxable income in relation to that in the alternative, the disallowance should be restricted to the amount of salary of the treasury Manager, Shri Prashant Baliga, who alone, at the most, could have been said to have looked after the investments, that the salary paid to him for the year amounted to Rs.7,91,181/-; that the investments did not require any expenditure because the investments in subsidiaries is a onetime investment and did not need any expenditure to maintain it; that it was a legacy investment. Reference in this regard has been made to *Nice Bombay Transport (P.) Ltd. v. ACIT (OSD) (2019) 175 ITD 684 (Delhi)(Trib.)*. It has further been contended that a good part of the investments, upto Rs.92.25 crores was made in the past and it included investments in shares of substitute that did not require expenditure; that the investments were mainly in the units of the mutual funds, maintained by the fund Manager of the mutual funds and, therefore, staff members and the assessee was not required to incur any expenditure on the maintenance of the investments; that it was the responsibility of mutual funds to monitor and maintain the investments and the assessee had not say whatsoever in the said activity; that the income, if any, was directly credited to the bank accounts of the assessee electronically and it did not require the incurrence of any expenditure. Reliance has been placed on *Gillette Group India (P.) Ltd. 16 ITR (T) 57 (Del)*, wherein it was held that the disallowance u/s. 14A of

the Act cannot exceed the expenditure actually claimed by the assessee. Still further, the assessee contends that it had given the details of the expenditure incurred to establish that such expenditure was incurred for the assessee's business purposes only and that it was fully allowable. In the alternative, the assessee submits that the expenditure disallowance should be restricted to the amount of salary of the Treasury Manager, namely, Shri Prashant Baliga, who look after the investments for the company, incidentally as a part of his overall treasury work and was paid on a salary of Rs.79,11,811/-. Here, the ld. Counsel of the assessee has relied on the following decisions:

i. *Pradeep Khanna vs. ACIT 953 ITR 2015 (Del)*
ii. *Daga Global, 46 ITR (T) 70 (Mum)*
iii. *Taikisha Engineering India Ltd. 370 ITR 338 (Bom)*
iv. *India Advantage Securities Ltd. 380 ITR 471 (Bom)*
v. *Accel Frontline Ltd. 46 ITR (T) 38 (Chennai-Trib)*

27. As a without prejudice argument, the assessee states that the average investments of Rs.128.54 crores, adopted by the A.O./ld. CIT(A) should be reduced by following:

a) The investments of Rs.163.62 crores in Indian and Foreign Subsidiaries, as stands accepted by the ITAT in its order (APB pg. 147) dated 17.10.2014, passed for A.Y. 2008-09, in the assessee's case, in ITA Nos. 6277 & 6167/Mum/2012.
b) The investment of Rs.30.14 crores in units of debt funds, the income whereof was otherwise liable to taxation under the head of capital gains, which income was not exempt, either u/s.10(38) or section 10(35), or otherwise.

28. As a further alternative, the assessee averse that the average investments of Rs.128.54 crores adopted by the A.O. for applying sub clause (iii) of Rule 8D(2) should

be reduced by, firstly, investments aggregating to Rs.18.89 crores, on which no exempt income was received during the year (reliance placed on *Maxopp Investment Ltd. 402 ITR 640 (SC), Vineet Investments Private Ltd. 188 ITD 1 (Del.)(SB), Reliance Natural Resources Ltd. 166 ITD 385 (Mum.))*; then, it has been requested that the investments should be reduced by those in subsidiaries, aggregating to Rs.163.62 crores including the investments in foreign subsidiary, amounting to Rs.101.33 crores considered to be strategic and excluded from average investment as per tribunal's order (APB pg. 162) for A.Y. 2008-09, it has also been stated that the investment in foreign subsidiary, amounting to Rs.101.33 crores, on which no exempt income was possible and the income, if any, was taxable; that the total investment of Rs.62.29 crores in Indian subsidiary did not produce any exempt income for the year under consideration, that average investments of Rs.18.89 crores in debt funds, on which the capital gain was taxable and it was to be excluded from the average investments. A working in this regard, on the basis of the revised average investments has been filed.

29. It has next been contended that since the A.O. had recorded no finding that expenditure was incurred for earning exempt income, no disallowance under the provisions of section 14A could have been made, whereas in fact, the assessee has not incurred any expenditure whatsoever in computing the dividend income claimed exempt from tax; that this fact, as submitted by the assessee before the A.O. during the assessment proceedings, stands duly recorded in paragraph 11 of the assessment order; that nowhere in the assessment order has the A.O. has observed/recorded, having identified any expenditure incurred for earning exempt income; that there be thus, the

A.O. has squarely failed to discharge his onus on this count. For this proposition, that in the absence of a clear finding of incurring of expenditure for earning the exempt income, no disallowance u/s. 14A is called for. Following decisions have been relied on:

- *Priya Exhibitors (P.) Ltd. 54 SOT 356 (Delhi-Trib)(2012)*
- *Justice Sam P. Bharucha 53 SOT 192 (Mum)*
- *Hero Cycles Ltd. 323 ITR 518 (P&H)*
- *Sun Investment Ltd. 8 ITR (Trib) 33 (Del.)(2011)*

30. It has also been urged on the basis of the assessee that the A.O. did not establish any nexus between the borrowed funds and the investments and that instead of he erroneously assumed that such investments were made wholly out of borrowed funds; that as such, the disallowance requires deletion. Reference has been made to these decisions:

- *K. Raheja Corporation P. Limited*
- *Minda Investment Ltd. 138 TTJ 240 (Delhi) (2011)*
- *Maharashtra Seamless Ltd. 138 TTJ 244 (Delhi) (2011)*
- *SIL Investment Ltd. 54 SOT 54 (Delhi) (2012)*

31. The ld. Counsel of the assessee has contended that last but not the least, without prejudice, the disallowance ought to be, if at all, sustained to the expenditure actually incurred, which is an amount of Rs.7,91,181/- paid as salary to the treasury Manager. For this, reliance has been placed on *Gillette Group India (P.) Ltd.* (supra).

32. On the other hand, the ld. DR placing heavy reliance on the order under appeal on this issue, has contended that it has not been disputed that the assessee has claimed various administrative expenditure, or that the assessee has not maintained separate books

of account, due to which, it does stand substantiated that no expenditure whatsoever was infact incurred; that the administrative expenses incurred by the assessee are composite and indivisible and interlinked. That the A.O. invoked the provisions of section 14A(ii) of the Act r/w Rule 8D(iii) of the Rules, which action cannot be faulted; that the disallowance so worked out at the amount of Rs.64 lacs and as confirmed by the ld. CIT(A), therefore, required to be upheld; there being no merit in the grievance sought to be raised by the assessee in this regard.

33. Here it is seen that the A.O. made the disallowance in question for the reason that in a case where the business is a sole indivisible business, whether taxable as well as exempt income accrue, section 14A gets triggered for disallowing the direct and indirect expenditure incurred in relation to income which did not form part of total income. The A.O. placed reliance on *Dhanuka and Sons* (supra), even in the remand report, the action of disallowing the expenditure was supported. The ld. CIT(A) confirmed the disallowance, observing that no separate books of account for the investment activity stood maintained by the assessee and since the expenditure was composite with indivisible, it was necessary to apportion it in accordance with the provisions of Rule 8D of Rules, disallowing the part thereof.

34. Be considered, it does not stand disputed hitherto that the assessee has all through maintained that no expenditure was incurred to any exempt income. The burden in this regard is that no separate books of account stood maintained, due to which, there was no substantiation of this stand of the assessee. The assertion of the assessee that except for earning the exempt income is, as a practice, directly credited electronically to the bank

account of the company and the payment is made by the Managers of the Mutual Funds, who make the payment directly and manage the investments, has nowhere been rebutted by either of the authorities below or even before us. It has not been called any question that the activity of investment did not require any expenditure.

35. A mere perusal of the assessment order makes it explicit that no finding at all had been recorded by the A.O. as to the incurrence of any expenditure by the assessee for earning exempt income. That being so, the assessee is correct in contending that no disallowance u/s. 14A of the Act was called for. It at all, the salary of Rs.7,91,181/-, paid to the Treasury Manager, Shri Prashant Baliga could be considered for disallowance. This factual assertion of the assessee may be verified at the level of the A.O. and, thereafter, the disallowance may be computed, for which, the issue is remitted to the file of the A.O. Ground no. 3 is decided accordingly.

ITA No. 5295/Mum/2017 – (Revenue's appeal)

36. In this appeal, which is the cross appeal of the department to the assessee's appeal, the following are the effective revised grounds which have been raised:

> *"On the facts and circumstances of case and in law, the Ld.CIT(A) erred in' deleting the addition without appreciating the facts that the Company has been showing rent income from "CG House" as business income and claiming depreciation on part of that building utilised by the assessee which was not claimed in the return of income."*
> *2. "On the facts and. circumstances of case and in law, the Ld.CIT(A) erred in entertaining the fresh claim of depreciation on CG House which was not claimed by the assessee while filing its Return of Income when the CIT(A) has no power to do so in light of Hon'ble Supreme Court decision in the case of Goetze (India) Ltd reported in 284 1TR 323(SQ."*
> *3. "On the facts and circumstances of case and in law, the Ld.CIT(A) erred, inthe disallowance computed by the AO under Rule 8D(2}{ii] of the Income Tax Rules holding that provisions of Rule 8D(2)(ii) are not applicable in the present*

case without appreciating the fact that the assessee failed to -(i) substantiate before the AO that no interest-bearing funds were utilised and (ii) that the Investments are made exclusively out of reserve fund."

4. "On the facts and circuinstances of case and in law, the Ld.CIT(A) erred in directing the AO to allow fresh claim of dividend income u/s, 10(35} of the Act which otherwise is not claim by assessee at the time of filing Return of Income."

4.1 "On the facts and circumstances of case and in law, the Ld.CIT(A) erred in no! appreciating the fact that the additional claim involved fresh examination of fact, as to whether the dividend from Mutual Fund is related to Equity Oriented Mutual Fund or Debt-Oriented Mutual Fund; that as per the decision of NTPC Ltd no such ground can be admitted which calls for fresh examination of facts."

4.2 "On the facts and circumstances of case and in law, the Ld.CIT(A) erred in violation of provisions of Rule 46A of the Income Tax Rules by allowing claim of the assessee on account of dividend income u/s. 10(35) of the Act."

5. "On the facts and circumstances of case and in law, the Ld.CIT(A) erred in partly allowing the claim of death compensation upto Rs.12,25,000/- as against claim of assessee Rs. 13,96,668/-; thereby partly allowing the claim which clearly indicates that the fresh examination of fads is involved in this issue as well"

5.1 "On the facts and circumstances of case and. in law, the Ld.CIT(A) erred in violation of provisions of Rule 46A of the Income Tax Rules by allowing claim of the assessee on account of death compensation."

37. So far as regards to ground nos. 1 & 2, these grounds correspond to, or are relate to ground no. 2 taken in the assessee's appeal. In view of the findings recorded by us while dealing with ground no.2 of the assessee's appeal, ground nos. 1 & 2 raised by the department in the present appeal, no longer survives, they are accordingly rejected.

38. Concerning ground no.3, the ld. DR has contended that the ld. CIT(A) has erred in deleting the disallowance correctly computed by the A.O. under Rule 8D(2)(ii) of the Rules, amounting to Rs.72 lacs; that in this regard, the ld. CIT(A) has erred in holding that the provisions of Rule 8D(2)(ii) are not applicable; that in doing so, the ld. CIT(A) has failed to appreciate the fact that firstly, the assessee had failed to substantiate its assertion before the A.O.; that no interest bearing funds had been utilized, and that the investments had been made exclusively out of the revised funds owned by the assessee.

39. The ld. Counsel of the assessee has placed reliance on the impugned order in this regard also, the tribunal order (APB pgs. 152-163). The assessee's case for A.Y. 2008-09 has been pressed into service.

40. A sum of Rs.72 lacs was disallowed by the A.O. under the provisions of section 14A of the Act read with Rule 8D(2)(ii) of the Rules. The ld. CIT(A) deleted the disallowance, observing as under:

> 10.2 I have carefully perused the assessment order and the submission of the appellant. It is seen that there was sufficient capital and reserve at the disposal of the appellant and this fact was not disputed by the AO. But in view of the decision of Hon'ble Jurisdictional High Court in the case of SBI DHRL Ltd (376 ITR 296) and HDFC Bank Ltd (366 ITR 505) it is seen that the Jurisdictional High Court held that if there is sufficient capital and reserve at the disposal of the appellant then presumption can be taken that the investment has been made out of the non interest bearing fund. Therefore, in view of the Hon'ble Jurisdictional High Court decision, is directed to delete the addition u/s 14A r w Rule 8D (2)(ii) of Rs 72 lacs.

41. Before us, the decisions of the Hon'ble Jurisdictional High Court in the case of *SBI DHFL Ltd. (2015) 376 ITR 296* and *Commissioner of Income-Tax Vs. HDFC Bank Limited 11 (2014)366 ITR 505(Bom)* though not been controverted at the hands of the assessee, much less successfully, wherein, the Hon'ble Jurisdictional High Court has held to the fact that it would be presumed that the investments to the extent of the owners funds or out of interest free funds and that no disallowance u/s.14A read with Rule 8D(2)(ii) can be made. However, on facts similar to those doing the rounds for the year under consideration, in the assessee's own case, for A.Y. 2008-09, the tribunal vide this order dated 17.10.2014 passed in ITA No. 6167/Mum/2012, has held that the investments in shares of the subsidiary companies shall not be included in the value of the average investments for the purpose of Rule 8D. This decision of the tribunal has also not been

shown to have been either reversed on a deal or even stead on appeal or other appropriate proceedings.

42. In view of the above, this issue is also sent back to the file of the A.O. to be re-decided in accordance with the law, particularly in light of *SBI DHFL Ltd. (2015) 376 ITR 296* and *Commissioner of Income-Tax Vs. HDFC Bank Limited 11 (2014)366 ITR 505(Bom)* and the tribunal's order in ITA No. 6167/Mum/2012 (supra) dated 17.10.2014 in assessee's own case for A.Y. 2008-09. Ground no. 3 taken by the department is decided in accordance with these observations.

43. Lastly, insofar as regards to ground nos. 4 & 5, the ld. DR has contended that the ld. CIT(A) is directing the A.O. to allow the fresh claim of the assessee concerning the dividend income (u/s.10(35) of the Act); that this claim had not been made by the assessee while filing the return of income; the ld. CIT(A) has failed to appreciate that this additional claim involved afresh examination of the fact as to whether the dividend from the mutual fund is related to Equity Oriental Mutual Funds or Debt Oriented Mutual Funds; that the ld. CIT(A) has also erred in admitting the additional evidence in direct infractuous of Rule 46 of the I. T. Rules, such additional evidence being the claim of the assessee on account of dividend income u/s. 10(35) of the Act; that the ld. CIT(A) also erred in partly allowing the claim of debt compensation upto Rs.12,25,000/-, as against the assessee's claim of Rs.13,96,668/-, which itself shows that the fresh examination of facts was the prerequisite for such allowance; that on account of such allowing the assessee's claim concerning the debt compensation, again the ld. CIT(A) has erroneously violated the provisions of section 46A of the Income Tax Act, 1961.

44. On this issue, at the outset, it would be appropriate to record the observations made by the ld. CIT(A), as under :

> *12.1 I have carefully perused the assessment order and the submission of the appellant. The appellant has relied on the decision of Hon'ble juridication 1TAT in the case of APL India(L) Ltd 58 SOT 41 (URO) Mumbai) and also referred to the decision of Hon'ble ITAT Cochin in the case of Apollo Tyres 60 SOT 1. The decision was found favourable to the appellant in the case of APL India (P) Limited it is held that appellant authorities is not barred to entertain the fresh claim as observed by the Apex Court in the case of Goetze (India) Ltd (284 ITR 323).*
> *Further, it is found that the Hon'ble Mumbai ITAI, in the case of Jay Bharat Co-op. Housing Society Ltd reported at 125 ITD 90 (MUM.), wherein it is held as under :-*
> *Through Goetze (India) Ltd.'s case (supra) the Apex Court had made emphatically clear that there was no provision under the Act to make an amendment to the return of income by modifying an application at the assessment stage without revising the return. In that case, the assessee had raised a claim through letter during the assessment proceedings without filing a revised return. The Assessing Officer did not entertain the same. The Commissioner (Appeals) reversed the order of the Assessing Officer, but the Tribunal conformed it. The High Court also upheld the order of the Tribunal. Then the assessee went to the Apex Court and the Apex Court categorically held that in the Act, there is no provision to amend the original return of income through an application without filing a revised return during the course of assessment proceedings. [Para 11]*
> *in the instant case, the Assessing Officer had passed an order following the judgment of the Apex Court in the case of Goetze (India) Ltd. ('supra / Now the question arose: could the Tribunal pass any order and direct the Assessing Officer to adjudicate the claim of the assessee which was entertained by the Assessing Officer in the light of the judgment of the Apex Court ? The answer was certainly no. If the Tribunal passed such an order, it would certainly be against the spirit of the judgment of the Apex Court. Moreso, it is a settled position of law that when a particular act or a power cannot be exercised directly by an authority, that act cannot be done indirectly under the garb of directions of the appellate authority. It was, therefore, held that since the Assessing Officer had passed an order pursuant to the judgment of the Apex Court, the order of the Assessing Officer or the Commissioner (Appeals) who had confirmed the order, could not be disturbed or set aside in order to provide an opportunity to the assessee to prove his claim. [Para 13]*
> *So far as admission of this ground was concerned, it was held that since this issue required a proper verification of facts and the relevant facts were not available on record or in the assessment proceedings, it could not be admitted. If one would admit the said ground, then it would go back to the Assessing Officer for verification and the order for directing the Assessing Officer to verify the facts and*

adjudicate the claim of the assessee would again be against the spirit of the Supreme Court's judgment. It was, therefore, to be held that the claim of the assessee with regard to doctrine of mutuality, could not be entertained at the instant stage. In the light of these facts, there was no infirmity in the order of the Commissioner (Appeals) and the same was to be confirmed. [Para 14],".

Also in the case of Orissa Rural Housing Development Corpn. Ltd. reported at 17 taxmann.com 186 (Orissa), wherein it is held that "Whether an assessee can revise his return of income by way of filing a revised statement of income after filing original return other than by way of filing revised return as contemplated under section 139(5)?

it is quite possible and natural that in submitting a return, some bona fide omission or wrong statement may have occurred. In order to obviate this possibility the legislature has made provisions in section 139(5) enabling an assessee to furnish a revised return. Thus, the assessee has a right to file revised return if he discovers any omission or any wrong statement in the original filed return. Such a revised return can be furnished at any time before the expiry of one year from the end of the relevant assessment year or the completion of the assessment, whichever is earlier. Thus, the statute provides safeguard to an assessee in case he discovers any omission or wrong statement in his original return to file a revised return. The further requirement is that this omission or wrong statement in the original return must be due to bona fide inadvertence or mistake on the part of the assessee. [Para

There is a distinction between a revised return and a correction in the originally filed return. If an assessee files an application for correcting a return already filed or for making some amendments therein, it would not certainly mean that he has filed a revised return. Such a petition is not recognized under the Income-tax Act. The basis of assessment is the return filed by the assessee. If a revised return is filed under section 139(5} the assessment can be completed only on the basis of revised return and not otherwise. [Para 13]

Where an assessee, following mercantile system of accounting, furnishes a return of income on the basis of accrued income, the filing of a revised statement of income, on the ground that such interest income had not been received during the relevant previous year, is of no avail. In absence of the revised return as provided under section 139(5), the Assessing Officer is bound to make assessment on the basis of original return. Further, a change over from mercantile system to cash system is not permissible by filing a revised return much less a revised statement of income. [Para 14]

There is no provision under the income-tax Act to enable an assessee to revise his income by way of filing a revised statement of income as has been done by the assessee. In the instant case, a revised statement of income was filed on 8-12-2008 before the Assessing Officer after commencement of assessment proceedings. If such revised statement of income is accepted, then the very purpose of enacting section 139(5) for filing revised return shall be frustrated and provision of said section becomes redundant. During the relevant time, as the assessee had

maintained the accounts on mercantile basis, it was bound to file the returns on that basis, [Para 15]
The Assessing Officer has no power to entertain fresh claim made by the assessee after filing of the original return otherthan by filing of revised return. [Para 16]"
In view of the decision referred by the appellant and as noted above, I am of the considered view that if the mistake in apparently verifiable and does not require any in depth verification , investigation, then the claim should be entertained. In the instant case the AO has not verified the claim of the appellant, the appellant has submitted the copy of mutual fund statement from which it s apparently verifiable that the dividend earned from mutual funds are exempt income. Therefore, AO is directed to allow the claim of the appellant.
With respect to the claim of death compensation, the claim is verifiable relating to Rs. 12,25,000/- and not Rs. Rs 13,40,080/- as claimed. The copy of bank account is submitted wherein Rs. 12,25,000/- has been debited to Medicare Services Club on 13.2.2009. So, Rs. 12,25,000/- is deleted. The balance addition of Rs. l,15,080/- (Rs. 13,40,080-Rs. 12,25,000) is confirmed. Therefore, the claim of death compensation is partly allowed. Accordingly, ground nos 7 & 8 are partly allowed.
13. Ground no 9 of the appeal: The ground no 9 of the appeal relates to the non granting of credit to the TDS certificate to the extent of Rs 70,33,561. The assessment order is silent on the issue of granting of TDS certificate. Therefore, AO is directed to verify the claim of TDS and allow the same as per Act. Ground no 9 of the appeal is partly allowed.

45. So, evidently, the claim made by the assessee cannot be shut out, in view of the Hon'ble Supreme Court decision in the case of *Goetze (India) Ltd. v. CIT [2006] 284 ITR 323 (SC),* as considered by the Mumbai ITAT in the case of *APL India(L) Ltd 58 SOT 41 (URO) (Mumbai)* and also referred to in the decision of the ITAT Cochin in the case of *Apollo Tyres 60 SOT 1 (Cochin)*, holding that the appellate authorities are not debarred to entertain the fresh claim. No decision contrary to the said decisions, as referred to by the ld. CIT(A) amongst others. Therefore, it cannot be said that the ld. CIT(A) committed any error in entertaining the claim made by the assessee. The ld. CIT(A) has correctly adjudicated the matter in not finding any error therein, the same is confirmed. Accordingly ground nos. 4 & 5 are rejected.

46. In the result, the assessee's appeal in ITA No. 5390/Mum/2017 is allowed in part and the Revenue's appeal in ITA No. 5295/Mum/2017 is dismissed.

Order pronounced in the open court on 27.09.2019

Sd/-	Sd/-
(Rajesh Kumar) Accountant Member	(A. D. Jain) Vice President

Mumbai; Dated : 27.09.2019
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai