IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER &
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No. 79/Mum/2015
(**Assessment Years: 2009-10**)

S. Vinodkumar Diamonds, Pvt Ltd., Off No. BW 3010, Bharat Diamond Bourse, Bandra (E), Mumbai – 400051	**बनाम**/ Vs.	DCIT – 5(3), Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAICS514N		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से / **Appellant by** :	Shri P.J. Pardiwala, Senior Advocate with Sh. Madhur Aggarwal Advocate
प्रत्यर्थी की ओर से/**Respondent by** :	Shri Uodol Raj Singh, Sr-DR

सुनवाई की तारीख / **Date of Hearing**	30/07/2020
घोषणा की तारीख /**Date of Pronouncement**	03/08 /2020

आदेश / O R D E R

PER PAWAN SINGH- JM:

1. This appeal by the assessee is directed against the order of Commissioner of income Tax-15 [Ld. CIT(A)], Mumbai, dated 10.10.2014 for the assessment year (A.Y.) 2009-10. The assessee has raised the following grounds of appeal:

A. Grounds relating to transfer pricing adjustment:

1 In the facts and circumstances of appellant's case and in law, the learned CIT(A) grossly erred in not holding that the order of learned Transfer Pricing Officer ('Ld. TPO') u/s 92CA(3) of the Income-tax Act, 1961 ('Act') and consequential assessment order of learned Assessing Officer ('Ld. AO') is bad in law and void ab initio, because it is not in compliance with the mandatory provisions of law as the Ld. TPO did not issue any written show cause notice as required in terms of proviso to section 92C(3) of the Act for his proposal to make transfer pricing adjustment in respect of notional interest on export receivables by the appellant from its Associated Enterprises ('AEs').

2 In the facts and circumstances of appellant's case and in law, the learned CIT(A) grossly erred in upholding that delayed realisation of export sale proceeds is a separate and independent international transaction under section 92B of the Act independent of the international transaction of sale of cut and polished diamonds to AEs.

3 In the facts and circumstances of appellant's case and in law, the learned CIT(A) grossly erred in upholding upward transfer pricing adjustment of Rs.151,01,456/- u/s 92 of the Act towards notional interest on delayed realisation of export receivables by the appellant from its AEs.

3.1 Ld. CIT(A) failed to appreciate the uniformity of act of appellant of not charging interest from AEs as well as Non-AEs customers for delay in realisation of export proceeds and hence assessee's practice of not charging interest on delayed realisation of export proceeds from AEs shall be treated as arm's length practice, more so when average delay from AE is only 39 days as compared to average delay of 44 days from Non-AEs.

3.2 Ld. CIT(A) failed to appreciate the business practices adopted by players of the diamond industry in which the appellant operates.

3.3 Ld. CIT(A) failed to appreciate that the appellant is entitled to the favourable adjustment and set off for negative notional interest for the cases where the appellant has received the export proceeds from the AEs before the due dates.

3.4 Ld. CIT(A) failed to appreciate that the appellant is entitled to the favourable adjustment and set off for notional interest payable by the appellant to the AEs on delayed import payments against the alleged notional interest chargeable to the AEs.

3.5 Ld. CIT(A) failed to appreciate that the appellant has also delayed in its imports payments to its AEs upon which the AEs have not charged interest to the appellant and hence this policy is on reciprocal basis.

4 In the facts and circumstances of appellant's case and in law, the learned CIT(A) grossly erred in upholding the impugned transfer pricing adjustment on hypothetical and notional basis without any material on record to demonstrate that there has been under charging of real income, more so when the PLI of the appeallant after impugned transfer pricing adjustment is higher than PLI of comparables.

5 In the facts and circumstances of appellant's case and in law, the learned CIT(A) grossly erred in not allowing the benefit of arm's length range of +/- 5% provided in proviso to section 92C(2) of the Act.

B. Other grounds:

6 Ld. CIT(A) erred in confirming disallowance of mark to market loss of Rs. 2,86,03,245/- on account of outstanding forward contracts at year end by following his predecessor in earlier year.

7 Without prejudice to above, the Ld. CIT (A) erred in not allowing the mark to market loss on contracts of Rs. 402,96,635/- disallowed in assessment of A.Y. 2008-09 even when according to his own admission, such losses are allowable upon maturity of the contracts.

8 Ld. CIT(A) erred in confirming disallowance Rs. 32,62,934/- u/s. 14A of the Act read with Rule 8D(2)(ii) and (iii) of the Income Tax Rules, 1962, without establishing any nexus between the exempt income earned and the expenditure incurred by the appellant and by not following the Jurisdictional High court case of CIT vs. HDFC Bank Ltd. (ITA No.:330 of 2012).

---

2. Brief facts of the case are that the assessee is a company, engaged in the business of manufacturing, selling and marketing of cut and polished diamonds. The assessee filed its return of income for the A.Y 2009-10 on 29.09.2009, declaring income of Rs. 7,86,19,210/- under the normal provisions of the Act. Along with the return of income, the assessee furnished a report in Form–3CEB and reported following

international transactions with its associated enterprises (AE).

Sr. No	*Description of Transaction*	*Amount*	*Most Appropriate Method used*
1	*Purchase of raw Materials*	*76,83,74,820*	*TNMM*
2	*Purchase of Polished diamonds*	*34,05,32,235*	*TNMM*
3	*Sale of cut and polished diamonds*	*484,15,19,543*	*TNMM*

3. Consequent upon reporting of international transaction of more than Rs. 15 Crore, the assessing officer (AO) made reference to the transfer pricing officer (TPO) for computation of arms length price (ALP) of the said transactions.
4. During the transfer pricing adjustment proceeding the TPO further noted that there is delay in realization of sales receivable from AEs and as well as none AEs. The TPO vide show cause notice dated 15.11.2012 asked the assessee to furnish notional interest working on all export receivable from AEs, where, which were beyond the notional credit period of business. The assessee filed its reply dated 09.11.2012 and 12.11.2012 and contended that there is no standard practice in the diamond industry, and the assessee does not charge interest to the customer be it AE or none AE for the payment beyond the normal credit period. No interest is

recovered from delay in none AEs customers as well. The practice of not recovering interest from AEs customer for delay payment is an ALP.

5. In without prejudices contentions the assessee also furnished notional interest working adopting interest cost @ 6.60%. The assessee also furnished the working of notional interest of all export receivable from AEs beyond the normal credit period of the business, considering the 'negative interest adjustment' for the cases in which AEs have made payments to the assessee long before the due date of payment and hence as per the assessee there was negative notional interest credited.. The contention of the assessee was accepted by TPO, the TPO suggested an adjustment of Rs. 1.51 crore on account of interest on export receivable in its report dated 29.11.2012. On receipt of report of TPO the AO included adjustment suggested by TPO in assessment order.
6. The AO on perusal of profit and loss account noted that assessee has debited an amount of Rs. 2.86 crore as loss on forward contract. The assessee was asked to submit the details and show caused as to why the said losses should not be disallowed. The AO took his view that losses are notional losses and are settled after close to the financial years. The assessee furnished its reply

dated 29.01.2013. In the reply the assessee contended that the assessee entered in to foreign currency forward contract with respect to receivable/ payable from its export / import orders in order to hedge against the risk of foreign currency fluctuation. The AO after considering the explanation of the assessee disallowed the said loss on account of forward contract by taking view that the contracts have been settled after close of financial year. The AO also followed the order for earlier year (AY 2008-09) wherein similar disallowance was made.

7. The AO, further, noted that assessee has shown dividend income of Rs. 1.62 lakhs as dividend income. The assessee was asked to furnish the details of expenditure incurred for earning such exempt income. The assessee filed its reply and contended that no expenses are incurred for earning such exempt income and hence no disallowance u/s 14A of the Act called for. The assessee also contended that during this relevant year the assessee had not made any new investment. The investments made in the past were out of the assessee's own fund. Further, there are no indirect expenses for the purpose of earning dividend income during the year nor there is any use of fund borrowed during the year. The assessee in this without prejudices contentions furnished making of disallowances u/s 14A

of the Act @ 0.5% of average value of exempt investment. Thus, the assessee offered disallowance u/s 14A of Rs. 2.49 lakhs. The contention of the assessee was not accepted by the AO, the AO disallowed the interest expenses of Rs. 30,13,853/- and indirect expenses @ 5% of average value of investment (that by assessee in its without prejudices contention). Thereby, the AO disallowed total of Rs. 32,62,934/- u/s 14A of the Act while passing the draft assessment on 10.05.2013. Copy of draft assessment was served upon the assessee.

8. The assessee exercise its option to file before the CIT(A). The Ld. CIT(A) after considering the contention of the assessee upheld the addition / disallowance made by the AO as well as the adjustment suggested by TPO in the order 10.10.2014. Thus, further aggrieved the assessee has filed present appeal before this Tribunal.

9. We have heard the submissions of learned Senior Counsel Sh. P.J. Pardiwala (Ld. AR) of the assessee and the Ld. Senior Departmental representative (ld. DR) for the revenue and have gone through the orders of authorities below. Grounds No. 1 to 5 relates to transfer pricing adjustment / addition on account of notional interest on export receivables. The Ld. AR of the assessee submits that outstanding receivables are not international transaction for A.Y 2009-10, which is the

assessment year under consideration. The outstanding receivable is merely incidental transaction of sale of goods and not *per-se* separate international transaction. The amendment in Sec. 92(B) by way of insertion of Explanation was brought in the statue book by Finance Act, 2012, which has no retrospective application. The Ld. AR for the assessee submits that the assessee has not charged / recovered interest in delayed receivable from both the AEs as well as none AEs customers. The assessee does not recover any interest from none AE customers also, the practice of not recovering interest from AEs customers is an ALP applying the internal CUP method and no TP adjustment on this account is warranted. In support of his submission the Ld. AR of the assessee relied upon the following decisions.

- *CIT Vs. Indo Americal Jewellery Ltd., [2014] 44 taxmann.com 310 (Bom),*
- *CIT Vs. Livingstones [ITA No. 887 of 2014] (Bom),*
- *Livingstones Vs. DCIT 16(3) [2014] 41taxmann.com 499 Mumbai - Trib),*
- *ITO Vs. Frost & Sullivan (Ind) Pvt Ltd., and Frost & Sullivan (Ind) Pvt Ltd., Vs. ACIT [ITA 6721/Mum/2010 & IT (TP)A. No. 2290/Mum/2017]*

10. In alternative submission the Ld. AR submits that once the sales transaction has been bench mark on transactional net margin method (TNMM) and found to

be in order and thus no adjustment is warranted on account of delay in receivable. In support of his submission the Ld. AR relied upon the decision of Rushabh Diamonds Vs ACIT, [2016] 68 taxmann.com 141 (Mumbai-Trib).

11. The Ld. AR further submits transfer pricing officer ought to have appreciated that AEs have also made pre payment against their receivables even if the ALP to be computed then same had to be computed by aggregating the impact of delay in same cases pre payment in other cases reliance is made on the following cases:
    - *Barclys Bank PLC Vs. ADIT, [2018] 100taxmann.com476 (Mumbai - Trib),*
    - *DCIT Vs. Indo American Jewellary Ltd., [2012] 50 SOT 528 (Mumbai),*
    - *Jewellmark India P. Ltd Vs. ITO (ITA No. 432/M/2014).*
12. On the other hand, Ld. DR for the revenue submitted the order of TPO/CIT(A). The Ld. DR for the revenue submits that after the amendment in Sec. 92B of the Act any benefit arising out of capital finance is an international transaction.
13. We have considered the submissions of both the parties deliberated on various case laws relied upon by the AR of the assessee. We have noted that TPO while making bench mark accepted the international transaction on

sale of cut and polished diamonds with its AEs. However, the TPO was of the view the delay in realisation of export receivable from these international transaction as a separate international transaction computed the notional interest @ 6.00 per annum on delayed realization of receivable. The contention of the assessee that there are certain pre payments were also not accepted by him. TPO worked out the adjustment of Rs. 1.51 crore on account of such notional interest on delay in export receivable. The Ld. DRP upheld the action of AO /TPO by applying the Explanation to Sec. 92B of the Act.

14. We have noted that explanation to Sec. 92B of the Act has been inserted vide Finance Act, 2012 and held as prospective by Coordinate Bench in ACIT Vs. Gitanjali Exports Corporation Ltd., 81 taxmann.com 452 (Mum). Further, we have noted that there is average delay in receivable from AE of 39 days and in case of none AEs 44 days. There is no dispute that the assessee is not charging interest from none AE on such export receivable. Coordinate Bench of Tribunal in Gitanjali Exports Corporation Ltd.(supra) also held that where no interest is charged from Non-AEs, i.e. independent transactions, as well, there cannot be any occasion to make an

ALP adjustment, for notional interest, on delay in realisation of trade debts from AEs.

15. Considering the aforesaid facts and in view of the law as referred above, when the assessee is adopting the uniform policy for none charging interest on export receivable from AE and none AE and moreover the transaction with regard to sale of cut and polished diamonds has been accepted by the TPO at ALP, no notional interest was warranted. In the result Grounds No. 1 to 5 of the appeals are allowed.

16. A Ground No. 6 and 7 relates to disallowance of mark to market los of Rs. 2.86 crore. The Ld. AR of the assessee while explaining fact submits that assessee being an importer and exporter of diamond is expose to the risk of foreign export fluctuation in the price of foreign currencies. To safeguard the interest against such losses due to fluctuation in currency rates, being a prudent business man the assessee entered into foreign currency forward contract in respect of receivable / payable from its exports / import orders in order to hedge against the risk of foreign currency fluctuation. The assessee is following mercantile system accounting and AS-11, would revalue the outstanding foreign currency monitory items and the closing rate at the rate as on 31st March. Accordingly, the debtors and creditors, borrowing and

uncertain forward contracts were restated at the yearend applying the closing rate of the foreign currency and gain / loss on such conversations were charged to profit and loss account. During the relevant period the assessee suffered foreign exchange fluctuation loss of Rs. 6.69 Crore. The details of which was furnished before the lower authorities. This included foreign exchange fluctuation loss of Rs. 2.86 Crore on yearend conversion of its outstand forward contracts, details of export invoices related to these contracts as on 31st March 2009 were furnished to the lower authorities. Copies of the same are placed at page no. 299 to 302 of the paper book. The AO disallowed Rs. 2.86 crore to yearend conversion of foreign forward exchange contract treating it to be a notional loss and by taking view that contracts were outstanding and settled in subsequent year. The assessee has been consistently following the treatment of revaluation of foreign currency transaction and has been allowed by the AO in all previous and subsequent years except in Assessment Year 2008-09 and 2009-10. The Ld. CIT(A) affirmed the action of AO by following the order of its predecessor in AY 2008-09 which was upheld by the Tribunal.

17. The Ld. AR submits that in AY 2008-09 the assessee incurred loss of Rs. 4.02 crore on yearend conversion of

its outstanding forward contract. The AO disallowed mark to market loss relying on instruction No. 3 of 2010 dated 23.03.2010 by CBDT on the ground that the loss is a notional loss which has not crystallized during the year as contracts are yet to mature as on 31.03.2008. In so for as the loss incurred actual cancellation of foreign exchange forward contract during the year AO specifically recorded that such losses were allowable as business loss. The CIT(A) in appeal for AY 2008-09 though referred the provision of Sec. 43(5) relating to speculation loss, confirmed the assessment order that loss incurred by the assessee was a notional loss. The appeal of assessee was dismissed by the Tribunal holding that loss on valuation on un-matured forward contract as at the yearend as speculation loss u/s 43(5), which was not subject matter of the appeal before the Tribunal.

18. The Ld. AR for the assessee submits that the Tribunal in doing so took a contrary view to the decision of jurisdictional High Court in CIT Vs. Badridas Gauridu P Ltd., (261 ITR 256) (Bom). The Ld. AR further submits that the issue of allowability on loss of revaluation of un-matured foreign exchange forward contract is covered by the decision of Hon'ble Supreme Court in CIT Vs Woodward Governor India (P) Ltd., 312 ITR 254 (SC),

wherein, the Hon'ble Court had held that such losses are not notional and are allowable as expenditure u/s 37(1). The Ld. AR further submits that when the claim of the assessee has been accepted by the revenue in assessment year other than 2008-09 and 2009-10 then it is not open for AO to take a different stand in those assessment years. The Ld. AR submits that a short issue before the Tribunal is whether the loss on revaluation "un-matured" foreign exchange forward contract is a notional loss or not. The AO has not invoked Sec. 43(5) of the Act to disallow the loss, Sec. 43(5) is not invoked is also clear from the fact that loss on foreign exchange forward contract mature during the year has been allowed.

19. The Ld. AR for the assessee further submits that the Hon'ble Bombay High Court in CIT Vs. D Chetan & Co. 390 ITR 36 (Bom), while considering the decision of Badridas Gauridu P Ltd., (supra) and order in assessee's own case for AY 2008-09, held that the order of Badridas Gauridu P Ltd., (supra) was not brought to the notice of Tribunal when Tribunal rendered its decision in S. Vinod Kumar (supra). The Hon'ble High court held that forward contract in foreign exchange when incidental to carrying of business of exporter and then to cover up of losses on account of difference in foreign exchange valuation would

not be speculative activity but a business activity. Accordingly, Ld. AR of the assessee submits that decision in earlier i.e AY 2008-09 should not be followed in the year under consideration.

20. The Ld. AR also relied upon the decision of the Tribunal in ACIT Vs. Shree BalKrishnan Exports, ITA No. 4185/M/2014, wherein it has been held that earlier year decision of Tribunal is no longer applicable in view of the later decision of High Court in case of D. Chetan & Co.(supra).

21. On the other hand, the Ld. DR for the revenue strongly relied upon the order of lower authorities.

22. We have considered the rival contentions of the parties and carefully gone through the orders of lower authorities. We have also deliberately on various case laws relied by the Ld. AR of the assessee. The Hon'ble Supreme Court in case of Woodward Governor India (P) Ltd., (supra) held that losses on revaluation of un-mature foreign exchange forward contract and such are not notional losses and are allowable as expenditure u/s 37 of the Act.

23. The Hon'ble Jurisdictional High Court in D. Chetan and Co (supra) while referring its earlier decision in Badridas Gauridu P Ltd., (supra) and the decision of Tribunal in assessee's own case (AY 2008-09) held that forward

contracts for purpose of hedging in course of normal business activities of import and export done to cover up losses on account of differences in foreign exchange valuations would not be speculative activity, but business activity. The relevant part of the decision is extracted below:

> **"7.** The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently come to the conclusion that the transaction entered into by the Respondent assessee is not in the nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard-11 is concerned, it would not by itself determine whether the activity was a part of the Respondent-assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction

was speculative but only disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in *S. Vinodkumar Diamonds (P.) Ltd.* (*supra*) in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in *S. Vinodkumar* (*supra*) are identical/similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in *S. Vinodkumar Diamonds (P.) Ltd.* (*supra*), the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act. However, it appears that the decision of this court in *CIT* v. *Badridas Gauridu (P.) Ltd.* [2003] 261 ITR 256/[2004] 134 Taxman 376 (Mum.) was not brought to the notice of the Tribunal when it rendered its decision in *S. Vinodkumar Diamonds (P.) Ltd.* (*supra*). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity.

8. In the above view, the question of law, as formulated by the Revenue, does not give rise to any substantial of law. Thus, not entertained."

24. Further, the Coordinate Bench of Tribunal in ACIT Vs. Shree Balkrishna Exports (supra) while considering the subsequent decision of Hon'ble Bombay High Court in D.

Chetan & Co. (supra) held earlier year decision of Tribunal (referring the assessee's case order for AY 2008-09) is no longer applicable. –

25. Now turning to the facts of the year under consideration that assessee entered into foreign exchange forward contract to safeguard against the losses due to fluctuation in foreign currency. Further, the assessee is following mercantile system of accounting and would revalue the outstanding foreign currency monitory item at the closing rate i.e rate as on 31st of March. These facts are not disputed by lower authorities. The AO disallowed Rs. 2.86 Crore pertaining to the yearend conversion of foreign exchange contract treat it to be notional by taking view that the contracts were outstanding and were settled in this subsequent year, while doing so he relied upon CBDT instruction No. 2 of 2010 (supra). The Ld. CIT(A) affirmed the action of AO by fallowing the order of its predecessor. Before us, the Ld.AR of the assessee fairly conceded that in earlier year the disallowance was upheld by Tribunal, though, while doing so the Tribunal held that transactions entered by the assessee were speculative transaction. The assessee filed an application under section 254(2) but the same was dismissed. Against the order on application under

section 254(2) the assessee filed a Writ Petition before the Hon'ble High Court but no success.

26. We have noted that the Hon'ble Bombay High Court in subsequent decision in D. Chetan & Co. (supra) while referring its earlier decision in Badridas Gauridu P Ltd., (supra) held that the order in Badridas Gauridu P Ltd., was not brought to the notice of Tribunal when it rendered the decision in Vinod Kumar Diamonds (assessee's) case. It was reiterated by Hon'ble High Court that forward contracts for purpose of hedging when incidental to carrying on business of exporter and then cover up losses on account of difference in foreign exchange valuation, would not be speculative activity but a business activity.

27. Considering aforesaid factual and legal discussion and keeping in view the decision of Hon'ble Supreme Court in Woodward Governor India P. Ltd., (supra) that losses on revaluation of unmatured foreign exchange forward contract and such losses are not notional losses and are allowable as business expenditure u/s 37(1) of the Act. Further, in case of D Chetan & Co., wherein, the Hon'ble High Court reiterated its earlier decision in Badridas Gauridu P Ltd, that forward contract in foreign exchange when incidental for carrying on business of export and are done to cover up losses on account difference in

foreign exchange valuation would not be speculative activity but a business activity. Therefore, we direct the AO to delete the disallowance. In the result, Ground No. 6 & 7of the appeal is allowed.

28. Ground No. 8 relates to disallowance Rs. 32,62,934/- u/s 14A read with Rule 8D(ii) & 8D(iii). The Ld. AR of the assessee submits that during the year the assessee claimed exempt income of Rs. 1.62 lakhs only and on its investment, there was no expenditure incurred in relation to exempt income earned by the assessee. The assessee earned exempt income from its past investments. The AO without establishing nexus between the exempt income and the expenditure incurred, disallowed interest expenditure under Rule 8D(ii) of Rs. 30,13,853/- and disallowance under Rule 8D(iii) of Rs. 2,49,081/-. The Ld. AR for the assessee submits that the assessee made investment in Diamond India Ltd., on 30.06.2006 and on 21.01.2007 of Rs. 50 lakhs each, thus, total investment of Rs. 1 crore. Further, 50 lakhs were invested on 31.01.2008 in Diamond Ltd., and Rs. 3.47 Crore in Reliance Power Ltd. All investments are old investments. The Ld. AR of the assessee submits that assessee has not invested out of the borrowed fund the assessee has sufficient interest free fund available with it. The assessee has share capital of Rs. 9.82 Crore

and reserve and surplus of Rs. 93.24 Crore as on 31.03.2007. Further, during the financial year 2007-08 the assessee earned a profit of Rs. 18.25 Crore. Thus, the assessee's own funds are in far excess than the investment. The Ld. AR of the assessee submits that when interest free funds are in far excess and no disallowance in view of the decision of Bombay High Court in Reliance Utility and Power Ltd,, 313 ITR 340 (Bom) and CIT Vs. HDFC Bank Ltd., 366 ITR 505(Bom). On the basis of the aforesaid submissions, the Ld. AR submits that no interest disallowance as provided u/s Rule 8(D)(ii) is warranted against the assessee. Even no disallowance under Rule 8D(2)(iii) is warranted.

29. In alternative submission (in written synopsis) the Ld. AR for assessee submitted that the disallowance u/s 14A of the Act cannot exceed to the amount of exempt income. The exempt income earned by the assessee is only Rs.1.62 lakhs and disallowance may be restricted to that extent only, in support of his submission the Ld. AR relied upon the following decisions:

- *PCIT Vs. HSBC Invest Direct (India) Ltd., ITA No. 1672/Mum/2015,*
- *Daga Global Chemical Pvt Ltd, ITA No 5592/Mum2012 and,*
- *Future Corporate Resources Ltd.,85 taxmann.com 190.*

30. On the other hand, Ld. DR supported the orders of the authorities below.

31. We have considered the rival submissions of both the parties and deliberated various case law relied upon by the assessee. We have noted that during the year under consideration the assessee has earned exempt income of Rs. 1.62 lakhs only. The AO disallowed interest expenses under Rule 8D(ii) of Rs. 30,13,853/-. We have perused the profit and loss account of the assessee copy of which is available in the paper book filed by the assessee. We have noted that the assessee's reserves and surpluses as on 31.03.2007 is Rs. 93.24 Crore and share capital of Rs. 9.8 Crore. The total investment as per schedule 6 of profit and loss account is only Rs. 4.98 Crore. Moreover, most of the investments were made in past. Considering the decision of Jurisdictional High Court in HDFC Bank (supra) and Reliance Utility (supra) no disallowance under Rule 8(D)(ji) is warranted in case the reserve and surplus of the assessee are in far excess to the investment made by the assessee. Considering the decision of Jurisdictional High Court and the fact that the assessee has surplus reserve available with it at the end of financial year, when the investments were made foreign exempt income and therefore no disallowance under Rule 8(D)(ii) is warranted.

32. The Delhi High Court in the case of *Joint Investments (P.) Ltd.* v. *CIT* [2015] 372 ITR 694/233 Taxman 117/59 taxmann.com 295 held that the window for disallowance is indicated in section 14A and is only to the extent of disallowing expenditure incurred by the assessee in relation to tax exempt income. This proportion or portion of the tax exempt income surely cannot swallow the entire amount as has happened in this case.

33. Further, considering the fact that disallowance u/s 14A of the Act cannot exceed the exempt income in view of the decision of Bombay High Court in PCIT Vs. HSBC Invest Direct (India) Ltd (supra), we direct the AO to restrict the disallowance u/s 14A of the Act at Rs. 1.62 lakhs only. In the result this ground of appeal is also partly allowed.

34. In the result appeal filed by the assessee is partly allowed.

Order pronounced in open court on 03rd August 2020.

Sd/-	Sd/-
(RAJESH KUMAR)	(PAWAN SINGH)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated 03 /08/2020
KRK, PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asst. Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Mumbai