IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD
(CONDUCTING THROUGH VIRTUAL COURT)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER

ITA Nos.2277&2278/Ahd/2018
(Assessment Years: 2014-15 & 2015-16)

Gujarat Mineral Development Corporation Ltd. Khanji Bhavan, 132ft. Ring Road, University Ground, Ahmedabad-380052	Vs.	Asst. CIT Circle-2(1)(1), Ahmedabad
[PAN No. AAA CG7 987 P]		
(**Appellant**)	..	(**Respondent**)

Appellant by :	Shri S. N. Soparkar, Sr. Advocate & Shri Parin Shah, A.R.
Respondent by:	Shri Vinod Tanwani, Sr.D.R.

Date of Hearing:	21/07/2020
Date of Pronouncement:	28/07/2020

O R D E R

PER Ms. MADHUMITA ROY -JM:

Both the appeals filed by the assessee are directed against the separate orders dated 04.09.2018 & 06.09.2018 passed by the Commissioner of Income Tax (Appeals)-2, Ahmedabad arising out of the orders dated 28.12.2017 passed by the ACIT Circle-2(1)(1), Ahmedabad u/s. 143(3) r.w.s. 144C & 143(3) of the Income Tax Act, 1961(hereinafter referred to as 'the Act') for Assessment Years 2014-15 & 2015-16 respectively.

ITA No. 2277/Ahd/2018 A.Y. 2014-15:-

2. The appeal has been preferred by the assessee with the following grounds:-

> *"1. In facts and circumstances of the case, your appellant, most respectfully submits that the Ld. Commissioner of Income Tax (Appeals) has erred on law and on facts in confirming the addition of Rs. 51,72,597/- u/s 14A r.w.r. 8D, in respect of investments*

from which the appellant has not earned any exempt income, disregarding the orders passed by Commissioner of Income Tax (Appeals) in earlier years and also disregarding the decision of Hon'ble Gujarat High Court in the case of Corrtech Energy Private Limited reported at 45 taxman.com 116 (Gujarat).

2. On facts and circumstances of the case, your appellant submits that the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts by confirming the addition in respect of river diversion expense and HT line shifting expenses of Rs. 23,03,770/- by treating the same as of capital expenses & not following the ration as specified in the decision of Hon'ble Supreme Court in the case of Bikaner Gypsums Ltd. vs. Commissioner of Income Tax (1991 AIR 227, 1990 SCR Supl. (2) 313).

3. Your petitioner craves leave to add, to alter on to amend the grounds of appeal, if the occasion arises."

Ground No. 1:-

3. The short point involved in this particular ground is this as to whether the confirmation of addition of Rs. 51,72,597/- under Section 14A r.w.r 8D in respect of investment from which the appellant has not earned any exempt income is sustainable in the eye of law or not.

The brief facts leading to the case is this that during the assessment proceeding upon perusal of the balance sheet of the assessee company it was found that huge investment in Shares and Mutual Funds were made. The company has earned exempt income i.e. dividend income to the tune of Rs. 5,51,68,066/-. The assessee suo motu has disallowed an amount of Rs. 59,05,592/- under Section 14A r.w.r. 8D and added the same in the statement of total income. Calculation whereof was also submitted as per point No. 5 of the explanation asked for by the Ld. AO. According to the Ld. AO such calculation is not justifiable in the absence of any proof or specific explanation other than working on disallowance at .5% of the average value of investment. Further that the assessee has only considered certain specific investment for the purpose of disallowance under Section 14A r.w.r. 8D and has not considered the value of entire investment in terms of Sec. 14A r.w.r. 8D as also was the finding of the Ld. AO. He, therefore, determined the

disallowance under Section 14A r.w.r. 8D .5% on the average value of total investment of Rs. 2,21,56,37,775/-. The disallowance was worked out at Rs. 1,10,78,189/-. Since the assessee has already made disallowance under Section 14A amounting to Rs. 59,05,592/- the balance of Rs. 51,72,597/- has been added to the total income of the assessee which was, in turn, confirmed by the First Appellate Authority. Hence, the instant appeal before us.

4. At the time of hearing of the instant appeal the Ld. Senior Counsel Mr. Soparkar appear for the assessee submitted before us that only those investments are to be considered for computing average value of investment which yielded exempt income during the year and not the value of entire investment as has been done by the Revenue. The Ld. CIT(A) has disregarded the order passed by his predecessor and also the judgment passed by the Hon'ble Gujarat High Court in the case of Corrtech Energy Private Limited, reported in 45 taxman.com 116 (Gujarat) as also argued by him. On this aspect, the Ld. Senior Counsel further relied upon the judgment passed by the Special Bench of the Hon'ble Tribunal at Delhi passed in the matter of ACIT vs. Vireet Investment Pvt. Ltd. reported in (2017) 82 taxmann.com 415 (Delhi Trib.) (SB). A copy whereof is part of the Paper Book filed before us. He, therefore, prays for the relief in regard to the disallowance for computing average value of investment by restricting it to the investments which has only yielded exempt income during the year under.

5. On the other hand, the Ld. DR relied upon the order passed by the authorities below. However, he has failed to controvert such submissions made by the Ld. Senior Counsel appearing for the assessee.

6. We have heard the respective parties, we have also perused the relevant materials available on record and also the judgments relied upon by the Ld. AR,

including the judgment passed by the Special Bench of Ld. Tribunal Delhi Bench in the matter of ACIT vs. Vireet Investment Pvt. Ltd. (2017) 82 taxmann.com 415 (Delhi - Trib.) (SB). While deciding the identical issue the Hon'ble Special Bench has been pleased to observe as follows:-

> *"11.16 Therefore, in our considered opinion, no contrary view can be taken under these circumstances. We, accordingly, hold that only those investments are to be considered for computing average value of investment which yielded exempt income during the year.*
>
> *11.17. As far as argument relating to be ascribed to the phrase 'shall not' used in Rule 8D(2)(iii) is concerned, the Revenue's contention is that it refers to those investments which did not yield any exempt income during the year but if income would have been yielded it would have remain exempt. There is no dispute that if an investment has yielded exempt income in a particular year then it will enter the computation of average value of investments for the purposes of Rule 8D(2)(iii). The assessee's contention that if there is no certainty that an income, which is exempt in current year, will continue to be so in future years and, therefore, that investment should also be excluded, is hypothetical and cannot be accepted.*
>
> *11.18 In view of above discussion, the matter is restored back to the file of AO for recomputing the disallowance u/s 14A in terms of above observations. Thus, revenue's appeal is dismissed and assessee's cross-objection, on the issue in question, stand allowed for statistical purposes, in terms indicated above."*

In view of the ratio laid down by the above judgment we find substance in the argument made by the Ld. Senior Counsel appearing for the assessee to this effect that only those investments are to be considered for computing average value of investment which yielded exempt income during the year. In that view of the matter we find it fit and proper to restore the matter to the file of the Ld. AO for re-computing the disallowance under Section 14A in terms of the observation made hereinabove. Hence, this ground is allowed for statistical purposes.

Ground No. 2:-

7. The crux of the issue is this that as to whether the addition in respect of river diversion expense and HT line shifting expense of Rs. 23,03,770/- treating the same as of capital expenses is permissible in the eye of law.

8. The brief facts leading to the case is this that the assessee has debited a sum of Rs. 28,79,712/- under the head 'Mining and Project Development' expenses written off in P&L Account. Since this expenditure under the same head as claimed by the assessee in the earlier year was disallowed, the assessee was directed to submit and explain as to why such addition should not be followed in the year under consideration. The Ld. AO did not accept the explanation rendered by the assessee and disallowed 4/5th of the expenses following the order passed by the Revenue in earlier year. The same was confirmed by the Ld. CIT(A) treating it as capital expenditure. Hence, the instant appeal before us.

9. At the time of hearing of the matter, the Ld. Senior Counsel appearing for the assessee submitted before us that under no stretch of imagination, the expenditure can be treated as capital expenditure particularly in view of the judgment passed by the Hon'ble Apex Court in the matter of Bikaner Gypsums Ltd. vs. CIT (1990) 53 taxman 279 (SC). Furthermore, the revenue expenditure cannot be stretched over a period for a specified number of years. The expenditure should be allowed for the year it has been specifically incurred. On this respect he has relied upon the judgment passed by the Supreme Court in the matter of Taparia Tools Ltd. vs. JCIT, Nasik (2015) 55 taxmann.com 361 (SC). A copy whereof has also been submitted before us. In view of the said judgment the Ld. Senior Counsel prays for allowing entire expenditure.

10. On the other hand, the Ld. DR relied upon the orders passed by the Revenue.

We have heard the respective parties, we have also perused the relevant materials available on record.

11. It appears from the records that before the Ld. AO, the assessee submitted that such expenses of Rs. 28,79,712/- includes river diversion expenses to the tune of Rs. 25,00,000/- and HT Line Shifting of Rs. 3,79,712/-. The HT Line, which does not belong to GMDC i.e. the appellant before us. It became necessary for the appellant to shift the same for mining operation; similarly river diversion was also necessary to undertake the mining activities. Such nature of expenditure is of revenue and thus the total amount of expenditure has been claimed as revenue expenditure under Section 37 of the Act. The assessee's case is this that Sec. 37 prohibits allowance of expenditure having an enduring benefit but by diverting and obstructing river or HT line, the corporation has not gained or availed any benefit but only could get rid of an obstacle. Though the benefit is always on positive side and results in positive gain, getting rid of an obstacle or hurdle is removal of negativity and both are different.

However, the Ld. AO relying on the assessment made in the preceding year on the similar issue, rejected the right off of the claim of Mining and Project Development expenses amounting to Rs. 28,79,712/- and added back to the total income of the assessee. However, since in the earlier years the Ld. CIT(A) allowed 1/5th of such expenses of deduction for 5 years, the Ld. AO as amortized the expenditure in 5 years treating the benefit of expenditure as long-term and allowed only Rs. 5,75,942/- i.e. 1/5th of the total expenditure. In appeal the Ld. CIT(A) upheld such disallowance holding the expenditure as capital in nature.

The assessee before the Ld. AO further relied upon the judgment passed by the Hon'ble Apex Court in the matter Bikaner Gypsum Ltd. vs. CIT, reported in 187 ITR 39. We have considered the same wherein we find that the Railway authorities shifted the Railway establishment to facilitate the assessee to carry on

his business in a profitable manner and for this purpose the assessee paid a sum of Rs. 3 lakhs towards the cost of shifting the Railway construction. Such payment made for removal of visibility and obstacle did not bring into existence any advantage of an enduring nature and, therefore, the Tribunal allowed such expenditure of Revenue account. In appeal the Hon'ble Apex Court was pleased to uphold the observation and the decision of the Hon'ble Tribunal in categorizing such expenses as of revenue account.

We have considered the judgment relied upon by the Ld. AR passed by the Hon'ble Apex Court in the matter of Taparia Tools Ltd. vs. JCIT (2015) 55 taxmann.com 361 (SC) wherein the deduction of upfront interest charges paid during the relevant year was shown as deferred expenditure in the books of account to be written off over a period of 5 years whereupon the AO allowed only 1/5th of the payment as deduction, the Hon'ble Apex Court allowed the claim of expenditure of the assessee as deduction on the basis of this particular fact that the assessee made actual payment and the course of action adopted by the assessee inconsonance with the provision of the Act; though a different treatment was given in the books of account the same could not be a factor which would deprive the assessee from claiming entire expenditure as a deduction. The relevant discussion on the issue made by the Hon'ble Apex Court is as follows:-

> *"18. What follows from the above is that normally the ordinary rule is to be applied, namely, revenue expenditure incurred in a particular year is to be allowed in that year. Thus, if the assessee claims that expenditure in that year, the IT Department cannot deny the same. However, in those cases where the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of 'Matching Concept' is satisfied, which upto now has been restricted to the case of debentures.*
>
> *19. In the instant case, as noticed above, the assessee did not want spread over of this expenditure over a period of five years as in the return filed by it, it had claimed the entire interest paid upfront as deductible expenditure in the same year. In such a situation, when this course of action was permissible in law to the assessee as it was in consonance with the provisions of the Act which permit the assessee to claim the expenditure in the year in which it*

was incurred, merely because a different treatment was given in the books of account cannot be a factor which would deprive the assessee from claiming the entire expenditure as a deduction. It has been held repeatedly by this Court that entries in the books of account are not determinative or conclusive and the matter is to be examined on the touchstone of provisions contained in the Act [See – Kedarnath Jute Mfg. Co. Ltd. v. CIT [1971] 82 ITR 363 (SC); Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT [1997] 227 ITR 172/93 Taxman 502 (SC); Sutlej Cotton Mills Ltd. v. CIT [1979] 116 ITR 1 (SC) and United Commercial Bank v. CIT [1992] 240 ITR 355/106 Taxman 601 (SC).

20. At the most, an inference can be drawn that by showing this expenditure in a spread over manner in the books of account, the assessee had initially intended to make such an option. However, it abandoned the same before reaching the crucial stage, inasmuch as, in the income tax return filed by the assessee, it chose to claim the entire expenditure in the year in which it was spent/paid by invoking the provisions of Section 36(10(iii) of the Act. Once a return in that manner was filed, the AO was bound to carry out the assessment by applying the provisions of that Act and not to go beyond the said return. There is no estoppel against the Stature and the Act enables and entitles the assessee to claim the entire expenditure in the manner it is claimed.

21. In view of the aforesaid discussion, we are of the opinion that the judgment and the orders of the High Court and the authorities below do not lay down correct position in law. The assessee would be entitled to deduction of the entire expenditure of Rs. 2,72,25,000/- and Rs. 55,00,000/- respectively in the year in which the amount was actually paid. The appeals are allowed in the aforesaid terms with no orders as to costs."

12. In the case in hand we find that the assessee has also not spreaded particular expenditure over a period of years as it reflects from the return filed by it and it has claimed the entire expenditure as deductable in the same year. The assessee has claimed the expenditure in this particular year in which it has been incurred and, therefore, when it has chosen to claim the entire expenditure spent it is justifiable to allow such claims for the year under consideration invoking the provision of Sec. 36(1)(iii) of the Act and also the ratio laid down by the judgment cited above. Respectfully, relying upon the judgments passed by the Hon'ble Apex Court we allow the entire claim of the assessee. The addition is, therefore, deleted.

13. In the result, the ground of appeal is allowed.

ITA No. 2278/Ahd/2018 A.Y. 2015-16:-

14. The appeal has been filed by the assessee with the following grounds:-

"1. In facts & circumstances of the case, your appellant, most respectfully submits that the Ld. Commissioner of Income Tax (Appeals) has erred on law and on facts in confirming the addition of Rs. 1,05,96,298/- u/s 14A r.w.r. 8D, in respect of investments from which the appellant has not earned any exempt income, disregarding the orders passed by Commissioner of Income Tax (Appeals) in earlier years and also disregarding the decision of Hon'ble Gujarat High Court in the case of Corrtech Energy Private Limited reported at 45 taxman. Com 116 (Gujarat).

2. On facts and circumstances of the case, your appellant submits that the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts by confirming the addition in respect of river diversion expense and HT lines shifting expense of Rs. 43,02,943/- by treating the same as of capital expense & not following the ratio as specified in the decision of Hon'ble Supreme Court in the case of Bikaner Gypsums Ltd. vs. Commissioner of Income Tax (1991 AIR 227, 1990 SCR Supl. (2) 313)."

Ground No. 1:-

15. This ground of appeal is identical to that of the ground already been dealt with by us in ITA No. 2277/Ahd/2018 for A.Y. 2014-15 and in the absence of any changed circumstances the same shall apply mutatis mutandis. Hence, the ground preferred by the assessee is also allowed for statistical purposes.

Ground No. 2:-

15. This ground of appeal is identical to that of the ground already been dealt with by us in ITA No. 2277/Ahd/2018 for A.Y. 2014-15 and in the absence of any changed circumstances the same shall apply mutatis mutandis. Hence, the ground preferred by the assessee is also allowed.

16. In the result, both appeals filed by the assessee are allowed for statistical purposes.

This Order pronounced in Open Court on 28/07/2019

Sd/-	Sd/-
(WASEEM AHMED)	(Ms. MADHUMITA ROY)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 28/07/2019
Tanmay

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

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

आदेशानुसार/BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad