

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

**BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA No.4103/M/10
Assessment Year:2006-07**

M/s. Godrej Consumer Products Limited, Pirojshanagar, Eastern Express Highway, Vikhroli, Mumbai- 400 079 PAN: AABCG3365J	Vs.	The Additional Commissioner of Income Tax, Range 10(2), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

**CO No.112/M/11
(in ITA No.4103/M/10)
Assessment Year:2006-07**

M/s. Godrej Consumer Products Limited, Pirojshanagar, Eastern Express Highway, Vikhroli, Mumbai- 400 079 PAN: AABCG3365J	Vs.	The Additional Commissioner of Income Tax, Range 10(2), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

**CO No.173/M/11
(in ITA No.4103/M/10)
Assessment Year:2006-07**

Asstt. Commissioner of Income Tax - 10(2), Room No.432, Aayakar Bhavan, Mumbai – 20	Vs.	M/s. Godrej Consumer Products Limited, Pirojshanagar, Eastern Express Highway, Vikhroli, Mumbai- 400 079 PAN: AABCG3365J
(Appellant)		(Respondent)

**ITA No.5261/M/11
Assessment Year:2007-08**

Dy. Commissioner of Income Tax – 10(2),	Vs.	M/s. Godrej Consumer Products Limited,
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Room No.432, Aayakar Bhavan, M.K. Road, Mumbai - 20		Pirojshanagar, Eastern Express Highway, Vikhroli, Mumbai- 400 079 PAN: AABCG3365J
(Appellant)		(Respondent)

ITA No.4963/M/11
Assessment Year: 2007-08

M/s. Godrej Consumer Products Limited, Pirojshanagar, Eastern Express Highway, Vikhroli, Mumbai- 400 079 PAN: AABCG3365J	Vs.	The Assistant Commissioner of Income Tax, Range 10(2), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

ITA No.6448/M/11
Assessment Year:2008-09

M/s. Godrej Consumer Products Limited, Pirojshanagar, Eastern Express Highway, Vikhroli, Mumbai- 400 079 PAN: AABCG3365J	Vs.	The Additional Commissioner of Income Tax, Range 10(2), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

ITA No.6249/M/11
Assessment Year:2008-09

Dy. Additional Commissioner of Income Tax - 10(2), Room No.432, Aayakar Bhavan, Mumbai – 20	Vs.	M/s. Godrej Consumer Products Limited, Pirojshanagar, Eastern Express Highway, Vikhroli, Mumbai- 400 079 PAN: AABCG3365J
(Appellant)		(Respondent)

Assessee by : Shri F.V. Irani
Revenue by : Shri R.K. Sahu, D.R.

Date of Hearing : 03.10.13
Date of Pronouncement : 20.11.13

ORDER

Per Bench:

With this common order we will dispose off above noted appeals as well as cross appeals and cross objections filed by both the parties relevant to assessment year 2006-07 as the issues raised therein are identical in nature.

ITA No.4103/M/2010 and C.O. No.112/M/11 & C.O. No.173/M/11 – Assessment Year 2006-07

2. This appeal by the assessee and cross objections by the Revenue have been preferred against the order of the CIT(A) dated 26.03.10 relevant to assessment year 2006-07. Common issues have been raised by the assessee as well by the revenue which are discussed as hereunder:

Ground No.1 & Cross Objections of Revenue : Remission of Loan Liability

3. The assessee has opposed the action of the lower authorities in treating the capital receipt in respect of the remission of a loan liability as the income of the assessee under section 41(1) of the Income Tax Act vide Ground No.1 of its appeal, whereas Revenue in its cross objections has stressed that the same is required to be taxed under section 28(i) and 28(iv) of the Income Tax Act or alternatively as capital gain in the light of provisions of section 2(14) of the Act.

4. The brief facts are that in earlier years the appellant was liable to pay the sales tax to the Madhya Pradesh Government. Under the scheme of the State Govt. namely “Madhya Pradesh Government Conversion of Amount of Deferred Tax Into Loan Liability Scheme 1989” the sales tax payable was

converted into loan. The aggregate loans were payable after the period of ten years from the date of deferment. The appellant availed the benefit of such scheme and the sales tax payable by appellant was converted into loan. Simultaneously, the appellant also claimed deduction under section 43B in respect of the sales tax payable (converted into loan) which was allowed to the appellant. Under the scheme, the preponement of payment of Loan was also allowed. During the year under consideration, the appellant prepaid the sales tax loan and had also availed of remission in the aggregate loan liability amounting to Rs.3,25,100/-. The appellant claimed such remission in liability as capital receipt, not liable to tax. The AO did not agree with the appellant's argument and treated such remission in liability as income assessable under section 41(1) of the Act.

On appeal, the Id. CIT(A) observed that in assessment year 2005-06 also, this issue was there in which the appellant claimed Rs.3.16 crores remission in sales tax loan liability as capital receipt not liable to tax. The AO however assessed such remission in liability as income under section 41(1) of the Act which was further confirmed by the CIT(A). Being in agreement with the observations of his predecessor for the earlier year the Id. CIT(A) confirmed the additions made by the AO for the year under consideration also.

5. Before us, at the outset, the Id. A.R. has brought our attention to the fact that this issue raised by the assessee in ground No.1 of its appeal and the Revenue in its cross objections is squarely covered in favour of the assessee vide judgment of the co-ordinate bench of the Tribunal passed in Godrej & Boyce Mfg. Co. Ltd. in ITA No.6867/M/11 decided on 26.06.13. He has further contended that similar issues which have been raised by both the parties in the case in hand, relating tax liability of remission of loan amount, were also

considered in the above noted case by the co-ordinate bench of the Tribunal. The co-ordinate bench of the Tribunal, when faced with almost similar set of facts and circumstances, while relying upon the decision of the Special Bench of the Tribunal in the case of 'Sulzer India Ltd.' (47 DTR 329 dated 10.11.10, has observed as under:

“4. We have considered the rival submissions and carefully perused the order of the lower authorities and the material evidences brought on record. It is not in dispute that the assessee has taken benefit of the scheme offered by the Government of Maharashtra. As provided in Circular No.496 dated 25.09.1987 and Circular No.674 dated 29.12.1993 issued by the CBDT, although the sales tax collected from the customers is a trading receipt, on account of deferral scheme, the same is deemed to have been paid. As a result, it amounts to discharge of the liability to pay sales tax. Once the liability is discharged the unpaid deferrals assumes a character of loan. In the light of the above circulars of the CBDT, sales tax collected by the assessee, which is not paid into the Government Treasury yet deemed to have been paid is nothing but the loan granted by the Government to the assessee. Therefore, such a loan cannot be treated as a trading liability. Facts on record show that during the year under consideration the Government of Maharashtra introduced the Net Present Value (NPV) under Maharashtra Act No.XX of 2002 & Rule 31D of BST Rules 1959 notified vide Govt. Notification No.STR-12.02/CR-002/Taxation-1, dated 16.11.2002, where under the eligible undertaking was permitted to prepay the loan amount. Under the said scheme, the prepayment was allowed at the NPV of the loan repayable at the end of the loan period. The assessee availed the benefits of this scheme and got a remission in the aggregate loan liability amounting to Rs.9,92,92,718/-. It is further seen that on 12.12.2002 the Government of Maharashtra announced a scheme of “Premature Repayment of the amount of deferred tax by the eligible units at NPV”. The industries who had availed the incentives of the sales tax scheme were permitted to prematurely repay the deferred sales tax liability by arriving at NPV by applying a specific discount. The assessee availed the benefit of the scheme announced on 12.12.2002 as under:

Sales tax liability

Rs.18,79,58,925/-

Less: Premature repayment Rs.8,86,66,207/-
Surplus accrued on the above Rs.9,92,92,718/-

This surplus has been treated as capital receipt, which has been taxed by the Assessing Officer u/s 41(1) of the Act. Considering these facts, we find force in the contention of the counsel that the issues are squarely covered by the decision of the Special Bench of the Tribunal in the case of Sulzer India Ltd. (supra). The Tribunal has held as under:

“The assessee was liable to pay sales tax amounts collected from 1-11-1989 to 31.10.1996, payments of which were deferred under the scheme, and the amounts were payable after twelve years in six equal annual installments commencing from 1-5-2003, which meant that the liability was payable in future. Later on, the State Government came out with a scheme by which it was provided that if some dealers opted, then they could pay the future liability at a discounted value or what one may call net present value immediately. Thus, in this situation, it could not be construed as remission of liability, because the State Government had not waived of any of the liability as given in the illustrations. Had the State Government accepted lessor amount after twelve years or reduced such installments, then it could have been a case of remission cessation. However, in the instant case the State Government had chosen to receive the money immediately which was receivable from 1-5-2003 to 1-5-2008. The amount of Rs.337.13 lakhs was actually paid to SICOM on 30-10-2002. Thus, it did not satisfy the condition of actual remission in present. It was a simple case of collecting the amount at net present value which was due later on and even the formula for collecting the net present value was also given by the SICOM and the amounts had been paid as per that formula. Therefore, such payment of net present value of a future liability could not be classified as remission or cessation of the liability so as to attract the provisions of section 41(1)(a) [Para 108]”.

Considering facts in totality, in the light of the aforesaid decision of the Tribunal Special Bench, which has been rightly followed by the CIT(A), we do not find any reason to interfere with the findings of the CIT(A). For the reasons stated above, it was to be held that the deferred sales tax liability being the difference between the payment of net present value against the future liability credited by the assessee under the capital reserve account in its books of account was a capital receipt and could not be termed as remission/cessation of liability and, consequently, no benefit would arise to the assessee in terms of section 41(1)(a) [Para 109]

The appeal filed by the Revenue is accordingly dismissed.”

6. The Id. A.R. has further brought our attention to the fact that even in the own case of the assessee for the earlier assessment year i.e. A.Y. 2005-06, this issue was again under consideration before the co-ordinate bench of the Tribunal and the Tribunal again relying upon the Special Bench decision in the case of ‘Sulzer India Ltd.’ (supra) has decided the issue in favour of the assessee observing as under:

“14. In our opinion, the issue before us squarely stands covered in favour of the assessee by the decision of the Sulzer India Ltd. (supra). The only objection of the Id. D.R. is that in the case of Sulzer India Ltd. (supra), the said assessee has treated the difference as a capital receipt but in the present case the assessee has treated the difference as its profit. In our opinion, the treatment given by the assessee does not make any difference so far as application of the legal principles. Admittedly, the assessee excluded the said amount while computing the total income. We, therefore, reject the object of the Id. D.R. and respectfully following the principles laid down in the case of Sulzer India Ltd. (supra) allow ground no.2 taken by the assessee and direct the AO to delete the addition.”

A perusal of the above reproduced findings of the co-ordinate benches of the Tribunal reveals that the different benches of the Tribunal have been unanimous in holding that the concession received by the assessee from the state government for repaying the loan amount on an early date, which was liable to be paid on a future date as per the scheme of the government, cannot said to be a case of remission or cessation of liability so as to attract the relevant provisions of the Income Tax Act for taxing the said amount and the same has been held to be a capital receipt. In view of the consistent findings of the Tribunal on this issue as discussed above, this issue is decided accordingly in favour of the assessee and against the Revenue.

Ground No.2**Disallowance u/s 14A – Applicability of rule 8D:**

7. Ground No.2 of the appeal of the assessee has not been pressed by the ld. A.R. of the assessee because of the smallness of the amount involved. Hence the findings of the ld. CIT(A) relating to the issue involved in ground no.2 of the assessee's appeal are hereby upheld. However, since this issue has not been decided by us on merits, hence, our decision on this issue will not have any binding effect with respect to subsequent assessment years in the case of the assessee.

Ground No.3**Vehicle Lease Rental – Whether Finance Lease or Operating Lease :**

8. The assessee in its return of income for the relevant year had claimed expenditure of Rs.11,90,627/- on account of lease rental of the cars. The AO noticed that the assessee had capitalized leased assets acquired during the relevant assessment year in the books of accounts and was writing off the cost of such assets in the books of accounts by way of depreciation over the period of lease. However in computation of total income, the depreciation on such leased assets had been disallowed and added back to the total income. The entire lease rentals paid during the year had been claimed as deduction under section 37(1) of the Income Tax Act being revenue expenditure. The AO was not satisfied with the explanation given by the assessee and considered the transaction in question as a finance lease and treated the lease returns paid by the assessee as capital expenditure and disallowed the claim of the assessee for treating the said expenditure as revenue in nature.

9. In appeal the ld. CIT(A) observed that the assessee itself in its books of accounts had treated the lease of vehicles as financial lease and he therefore

confirmed the action of the AO in treating the lease transaction as a financial lease. The assessee is thus in appeal before us on this issue.

10. The Id. A.R. has reiterated his submissions before us as were made before the CIT(A), which may be summed up as under:

- “-The ownership of the vehicle remained with the lessor at all times.*
- the appellant was only granted the possession by way of lease for use of the vehicles for the purpose of its business.*
 - Repair and maintenance expenses were borne by the lessor .*
 - The lease agreement was for a fixed period-the period was quantified either by efflux of time or the specified number of kilometers which the car runs.*
 - At the end of the lease period, the possession of the vehicle once again reverted back to the lessor .*
 - There was not a single vehicle which the appellant5 company had acquired at the end of the lease period and each and every vehicle was repossessed by the lessor at the end of the lease period.*
 - There was no clause or provision in the lease agreement, whereby it could be even remotely inferred that the ownership of the vehicle would pass to the appellant at the end of the lease period on payment of a token agreement amount.”*

11. The further contention of the Id. A.R. has been that the lease transaction in question was essentially an operating lease and the AO wrongly treated the same as a finance lease. His further submissions have been that the assessee, merely because of the requirement of accounting principles, had capitalized the said leasehold assets, itself, cannot be a ground to disallow the claim of the assessee for treating the expenditure as revenue in nature in its computation of income under the Income Tax Act. He has further submitted that as per the

facts and circumstances of the case, the assessee has rightly treated the same as revenue expenditure in its computation of income. On the other hand the Id. D.R. has strongly relied upon the findings of the authorities below.

12. We have considered the submissions of the Id. representatives of the parties and have also gone through the records. The issue relating to definition and meaning of operating and finance lease came into consideration before the Special Bench of the ITAT in 'M/s. IndusInd Bank Limited' (ITA No. 6566/M/2002) decided on 14.03.2012. The Special Bench of the Tribunal, in the said authority, after carefully considering the guidance note of Accounting Standard (AS) 19, the law laid down by the *Hon'ble Supreme Court* in '*Asea Brown Boveri Limited v. Industrial Finance Corporation of India*' [(2006) 154 *Taxman* 512 (SC)] and further in '*Association of Leasing & Financial Services Companies v. Union of India &Ors.*' [2010-(SC2)-GJX-0838-SC] and also by the *Hon'ble Bombay High Court* in '*Avinash Bhosale v. Union of India &Ors*' [(2010) 322 ITR 381 (Bom)] has drawn the following broad features of a finance lease:-

- “- Such a lease is non-cancellable and there is a fixed obligation on the lessee for payment of lease money. In case lease is terminated prematurely by the lessee, the lessor is entitled to recover his investment with expected interest.*
- Such a lease is always for a fixed period, which period is decided by taking into consideration the economic life of the asset.*
- The initial lease period is settled in such a way so as to fully recover the investment of the lessor together with interest thereon.*
- Lessor is always interested in the recoupment of his investment with interest in the shape of rentals over the period of lease and not the asset or its user.*
- It is the responsibility of the lessee to bear all costs of insurance, repairs and maintenance and other related costs and expenses for the leased equipment.*

- *Though the equipment is chosen by the lessee but the payment to the supplier is made by the lessor. Thus it is the lessee who chooses the assets, takes delivery, enjoys the use of the asset, bears its wear and tear. It is the lessee who becomes the real owner of the asset.*
- *It is the lessee who pays taxes etc. in relation to such asset.*
- *The risks and rewards incidental to the ownership vest with the lessee.*
- *The features of bailment are absent in such a lease.*
- *The lessor simply holds the title of asset as his security till his investment and interest thereon is recouped. The lessor is only symbolic owner during the period of lease and on the expiry of lease period, even such symbolic ownership also comes to an end.”*

13. From the perusal of the above said features drawn by the ‘Special Bench’ of the ITAT, it can be gathered that in fact a ‘finance lease’ can be said to be a ‘sale’ which is given the colour of the ‘lease’ by the parties for their mutual benefit and to avoid the consequences pertaining to tax liability or otherwise.

14. In the case in hand, the assessee has placed on the file a copy of the master agreement entered into between ‘Lease Plan India Limited’ & ‘Lease Plan Fleet Management India Private Limited’ (hereinafter referred to as “lessors”) and the assessee i.e. M/s. Godrej Consumer Products Limited, (hereinafter referred to as “lessee”)

A perusal of the above said lease agreement reveals that as per Article 2.2(ii), the insurance premium in relation to insurance policies of the vehicle have been agreed to be borne by the lessor. As per the clause 2.2(iv) the road tax has been agreed to be paid by the lessor. As per clause 2.2(vi) maintenance and repair management charges have been agreed to be borne by the lessor. The lessor has designated certain authorized work shop for maintenance, from

which the lessee is required to get the repairs of the vehicles done and the charges so incurred have been agreed to be paid and settled by the lessor. Similarly the services relating to break down of the vehicle and replacement of the vehicle etc. have also been agreed to be done by the lessor. Under Article 3, the lease period has to end either on the expiry of the contract period or by the mutual consent of the parties. It has been further provided that on the occurrence of the events as mentioned under Article 3.1, upon which the lease contract will end, the lessee would be liable to return the vehicle to the lessor along with documents, keys etc. as provided under Article 3.2 of the said master agreement. Under Article 4.6 the lessee would be liable to pay the charges for the excess kms covered by the vehicle than agreed to be run under the contract for the lease period agreed. The claim of the insurance under the agreement is receivable by the lessor .

15. A reading of the master agreement, as a whole and one document and its various clauses in harmony with each other, reveals beyond doubt that the lessor in this case has remained through out the owner of the vehicle whereas the assessee falls in the definition of lessee. The goods i.e. the vehicle in question which are the subject matter of the lease are specifically identifiable. The lease has to end on the expiry of the specified period or on the happening of any event as mentioned under the agreement including by mutual consent of the parties. On expiry of the lease, the vehicles have been agreed to be returned to the lessor and further the expenditure relating to repair and maintenance etc. of the vehicle has been agreed to be borne by the lessor i.e. the owner of the vehicle. The lessor, who is the owner of the vehicle, has not lost his control over the ownership of the vehicle. The assessee has not claimed any depreciation over the cost/price of the vehicle and the same has

been claimed by the lessor only. Even if, for the sake of argument, we assume that it was a finance lease, in that event the assessee would have been entitled to the depreciation as admissible under the Income Tax Act on the full cost/written down value of the vehicles and not on the lease rental only as has been computed by the AO. The assessee would have also been entitled to interest expenditure calculated proportionately when the lease rental would have been considered as repayment of the loan amount. However, no such claim has been made by the assessee.

The Hon'ble Supreme Court in 'M/s. ICDS Ltd. Vs. Commissioner of Income Tax,' Civil Appeal No.3282/2008 decided on 14.01.13, while dealing with an identical issue of lease rentals relating to vehicles in the case of an assessee who was the lessor of the vehicle and claimed depreciation on the cost/written down value of the vehicle has in paragraph 26 of the judgment has observed as under:

“Therefore, the MV Act mandates that during the period of lease, the vehicle be registered, in the certificate of registration, in the name of the lessee and, on conclusion of the lease period, the vehicle be registered in the name of lessor as owner. The section leaves no choice to the lessor but to allow the vehicle to be registered in the name of the lessee. Thus, no inference can be drawn from the registration certificate as to ownership of the legal title of the vehicle; and (iii) if the lessee was in fact the owner, he would have claimed depreciation on the vehicles, which, as specifically recorded in the order of the appellate tribunal, was not done. It would be a strange situation to have no claim of depreciation in case of a particular depreciable asset due to a vacuum of ownership. As afore-noted, the entire lease rent received by the assessee is assessed as business income in its hands and the entire lease rent paid by the lessee has been treated as deductible revenue expenditure in the hands of the lessee. This reaffirms the position that the assessee is in fact the owner of the vehicle, in so far as Section 32 of the Act is concerned.”

16. When we apply the observations/ proposition of the law as laid down by the Hon'ble Supreme Court as reproduced above to the facts of the present case of the assessee, who is a lessee in the case in hand, there remains no doubt in our mind to hold that lease in question in the case in hand can be said to be essentially an operating lease and not a finance lease.

17. It may be observed that for the earlier years in the case of the assessee i.e. assessment year 2005-06, the AO had issued notice under section 142(1) of the Income Tax Act requiring the assessee to explain as to why the lease rental be not considered as capital expenditure treating the lease as a financial lease and the AO after admitting the explanation given by the assessee in this respect allowed the claim of the assessee in assessment proceedings under section 143(3) of the Income Tax Act. However, for the year under consideration, the revenue departed from its earlier stand without pointing any distinguishing fact on the issue. However, in view of our detailed discussion as above on the issue, this ground of the assessee's appeal is hereby allowed.

ITA No.4963/M/11 (A.Y. 2007-08)

This appeal has been filed by the assessee against the order of the Id. CIT(A) dated 26.04.11 relevant to assessment year 2007-08. The issues involved in this appeal are discussed herein as under:

Ground Nos.1 to 4
Disallowance under Section 14A

18. During the assessment proceedings the AO made disallowance under section 14A for the investments made by the assessee for earning exempt income by way of invoking provisions of Rule 8D of the Income Tax Rules, 1962 and made a disallowance of Rs.12,90,000/-. During the appellate

proceedings the ld. CIT(A) observed that Rule 8D of the Income Tax Rules was not applicable for the assessment year in question in view of the law laid down by the Hon'ble Bombay High Court in the case of Godrej & Boyce Ltd. Vs. DCIT [(2010) 234 CTR (Bom) 1, wherein it has been held that the provisions of Rule 8D are applicable from assessment year 2008-09 onwards and for the years for which Rule 8D is not applicable, disallowance under Section 14A has to be made on some reasonable basis. The ld. CIT(A) further observed that though, the assessee had not received any exempt income during the year yet, the provisions of section 14A were applicable if the investments were made to earn exempt (dividend) income, irrespective of the fact that whether the exempt/dividend income was received or not during the year. He further observed that the assessee had received new loans of Rs.107.99 crores during the year. The assessee's funds were a mix of own funds as well as borrowed funds. There was no clear nexus between borrowed capital and the investments made during the year. However, he also observed that the assessee had earned sufficient profits during the year in comparison to the investments made, hence the interest cost attributable to the investments made during the year for earning exempt income would have been minimum. So keeping in view of the entire facts and circumstances, he reduced the interest cost from Rs.9.41 crores as was worked out by the A.O. to Rs.2 lakhs only. However, he upheld the disallowance of Rs.2,75,000/- towards administrative and managerial expenses attributable to the investments made during the year being reasonable and justified and not on the higher side. He thus restricted the disallowance under section 14A from Rs.12,90,000/- to Rs.4,75,000/-.

19. Before us the ld. A.R. of the assessee has relied upon an authority of the Hon'ble Bombay High Court styled as 'CIT vs. Reliance Utilities and Power

Ltd.’ [2009] 313 ITR 340 (Bom.) wherein the Hon’ble Bombay High Court has held that if there are funds available, both interest free and overdraft/loans taken, then presumption would arise that investments would be out of the interest free fund generated or available with the company if the interest free funds were sufficient to meet the investments. Similar proposition of law has been laid down by the Hon’ble Gujarat High Court in the case of ‘Suzlon Energy Ltd. vs. DCIT’ [354 ITR 630 (Guj)]. However, on the other hand the contention of the ld. D.R. has been that such a presumption would arise only if on the date of investment, assessee had its own/interest free funds available with it. He has further contended that since the assessee has not provided any fund flow statement to prove that sufficient interest free funds were available with it on the date of investment, hence the presumption of investment made by the assessee out of its own funds would not be applicable in the case in hand. On the other hand the ld. A.R. has submitted that the assessee had its own/interest free funds with it on the date of investment. However, the AO did not call for any such fund flow statement from the assessee rather straightway applied Rule 8D.

20. We have considered the submissions of the ld. representatives of the parties. It may be observed that in the case of ‘Godrej & Boyce Manufacturing Co. Ltd.’ 328 ITR 81, the Hon’ble Bombay High Court has held that Rule 8D r.w.s. 14A(2) is not arbitrary or unreasonable but can be applied only if the assessee's method is not satisfactory. It has been further held that Rule 8D is not retrospective and applies from A.Y. 2008-09. For the years for which Rule 8D is not applicable and in the event that the AO is not satisfied with the explanation/working given by the assessee, disallowance u/s. 14A has to be made on a reasonable basis. Almost similar view has been expressed by

Hon'ble Delhi High Court in the case of 'Maxopp Investment Ltd. & Others v. CIT' 247 ITR 162.

21. It may be observed that in the case in hand, that the assessee had given explanation that there cannot be any disallowance u/s. 14A. However, the AO totally ignored the working given by the assessee and applied Rule 8D in a mechanical manner. As per the law laid down by the Hon'ble Bombay High Court in the case of 'Godrej & Boyce Manufacturing Co. Ltd.' (supra) and also by the Hon'ble Delhi High Court in the case of 'Maxopp Investment Ltd.' (supra), the AO was required to indicate cogent and convincing reasons while rejecting the working/calculations given by the assessee. He was required to examine the accounts of the assessee first and then if he would not have been satisfied with the correctness of the claim, only then, he was required to work out the disallowance on some reasonable basis. In the case in hand, no such examination was made or satisfaction recorded by the AO. The Id. CIT(A) though observed that rule 8D was not applicable in this case, but made the disallowance on adhoc basis. In our view, the proper course for the Ld.CIT(A) was to remand back the case to Assessing Officer directing him to find out as to whether sufficient own funds/ interest free funds were available with the assessee, and if found so, no disallowance should have been directed to be made towards interest cost of the investments made for earning exempt income.

22. In view of our above observation, we set aside the disallowance of Rs.2 lakhs made by the Id. CIT(A) towards interest cost attributable to the investments made for earning exempt income and restore the issue to the file of the AO with a direction to find out as to whether sufficient own funds/interest free funds were available with the assessee on the date of investments made for

earning exempt income and if found so not to make any disallowance for interest cost under this head. However if the AO will find from the fund flow statement that sufficient own funds were not available to the assessee on the dates of investments, then also he will duly consider the working, if any, given by the assessee and if the AO will not be satisfied with the working given by the assessee, he will have to record cogent and convincing reasons for the same and thereafter to calculate the disallowance on some reasonable basis. Needless to say that the A.O. will provide proper opportunity to the assessee to file the necessary documents including fund flow statement if any.

23. So far the disallowance made under this head towards administrative and managerial expenses attributable to investments made during the year are concerned, we find that the disallowance of Rs.2,75,000/- on this account is on higher side. The assessee had made investments in the shares of only three companies out of which investment in one company only would have yielded exempt income. It is also the case of the assessee that there was no separate treasury department and only one employee, that too on part time basis, was looking after investments. Keeping in view of the overall facts and circumstances, the disallowance towards administrative and managerial expenses is restricted to Rs. 1 lakh only. This issue is accordingly partly allowed in favour of the assessee.

Ground No.5 : Computation of Book Profit under section 115JB – disallowance under section 14A

24. Vide ground No.5 of its appeal, the assessee has agitated the action of the Id. CIT(A) in relying upon the provisions of section 14A of the Act while computing the amount of expenditure for earning exempt income which is liable for being added back to the book profits as per the provisions of section 115JB of the Income Tax Act. The submissions of the Id. A.R. has been that

section 115JB of the Act is a separate code by itself and the provisions of section 14A cannot be applied for computing the book profit under section 115JB of the Act. In support of his submissions he has relied upon an authority of the Delhi Bench of the ITAT styled as 'Goetze (India) Ltd. vs. CIT' [2009] 32 SOT 101 (Delhi) which has been subsequently followed by the other benches of the Tribunal in the following cases:

1. Ovira Logistics Ltd. (ITA No.3230/Mum/2012 & 2439/Mum/2012) dated August 30, 2013.
2. Bengal Finance & Investments Private Ltd. (ITA No.5937/Mum/2010) dated July 31, 2012
3. Essar Teleholdings Ltd. (ITA No.3850/Mum/2010) dated July 29, 2011
4. Goetze (India) Ltd. reported in 32 SOT 101.

25. On the other hand the ld. D.R. has relied upon another authority of the Mumbai Bench of the Tribunal in the case of 'ITO vs. RBK Share Broking (P) Ltd.' [2013]37 taxmann.com 128, wherein it has been held that the amount disallowable under section 14A is to be added back while computing book profit under section 115JB.

26. In view of the divergent views of the different benches of the Tribunal on this issue, it has become incumbent upon us to discuss the law laid down by the Delhi bench of the ITAT in the case of Goetze (India) Ltd. and the Mumbai Bench of the ITAT in the case of RBK Share Broking (P) Ltd. in the light of the provisions of section 14A as well as section 115JB of the Act.

27. In Goetze (India) Ltd. the Delhi bench of the ITAT while holding that the provisions of section 14A cannot be imported to clause (f) of the explanation to section 115JA has observed as under:

"4.6 We have considered the facts of the case and rival submissions. We may at the outset consider the provisions contained in clause (f) of the Explanation to section 115JA and sub-section (1) of section 14A of

the Act. Under the aforesaid clause (f) the amount of expenditure relatable to any added to the book profit. Under the provisions contained in section 14A, no deduction is to be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act. Since we are dealing with the issue of expenditure relating to dividend income, a matter falling under Chapter III, it becomes clear on perusal of these two provisions that they are similar in nature. Clause (f) uses the words “expenditure relatable to any income”, while section 14A uses the words “expenditure incurred by the assessee in relation to income”. These words have the same meaning. We may also add here that section 14A contains two more sub-section, sub-section (2) and sub-section (3), which do not find a place in the clause (f). Therefore, insofar as computation of adjusted book profit is concerned, provisions of sub-section (2) and sub-section (3) of section 14A cannot be imported into clause (f).”

28. From the perusal of the above reproduced observations of the Delhi bench of the ITAT, it can be gathered that the Delhi bench of the Tribunal has categorically held that the provisions of sub-section (1) of section 14A and clause (f) of the explanation to section 115JA are similar in nature and have the same meaning. However, it has been observed that the other two sub sections of 14A i.e. sub section (2) and sub section (3) do not find a place in clause (f) of the explanation to section 115JA, hence it was held that so far the computation of adjusted book profit is concerned, provisions of sub section (2) and sub section (3) of section 14A cannot be imported into clause (f). With due respect to the finding given by the Delhi bench of the ITAT, we may observe that the case before the Delhi Bench of the Tribunal in Goetze (India) Ltd. (Supra) was related to assessment year 2000-01 whereas sub section (2) and sub section (3) to section 14A have been inserted by the Finance Act, 2006 w.e.f. 01.04.07. Meaning thereby prior to 01.04.07, the provisions of section 14A were akin to the provisions of clause (f) of the explanation to section 115JA. Since the case before the Delhi bench of the Tribunal was pertaining to

assessment year 2000-01, under such circumstances, the provisions of sub section (2) and sub section (3) of section 14A otherwise were not applicable for that year, so far the computation of the adjustment of book profits was concerned.

We may further observe that the different provisions of the Act are to be read in harmony and in consonance with each other, unless or until specifically provided to be read otherwise. When we read section 14A with clause (f) of the explanation to section 115JA or clause (f) of the explanation (1) to section 115JB, we do not find that they have any type of conflict with each other. What has been provided under sub section (1) of section 14A is that the expenditure incurred for exempt income is not allowable as a deduction whereas under sub section (2) a method of computation of such expenditure has been provided and in sub section 3 to section 14A it has been mentioned that such method would be applicable even in cases where the assessee claims that no expenditure has been incurred by him in relation to exempt income. Under clause (f) of the explanation (1) of section 115JB it has been provided that the amount of expenditure relatable to exempt income is to be added back in the book profits while computing tax under section 115JB. The contention of the Id. A.R. that only the expenditure which finds mention in the profit and loss account is required to be added back and not the expenditure as assessed under section 14A does not have any force as no such provision is there under section 115JB. When we read the provisions of section 14A along with section 115JB, it becomes clear that the expenditure relatable to exempt income as provided under sub section (1) of section 14A is required to be added back while computing book profit under section 115JB. We do not find any confliction in the above said two provisions of the Act. The Mumbai bench of

the Tribunal while dealing with the similar issue in RBK Share Broking (P) Ltd. has observed as under:

“6. Be that as it may, we will proceed to decide this ground on merits as well because it involves a pure legal issue as to whether the amount disallowed u/s 14A can be added while computing the book profit u/s 115JB of the Act. The learned AR relied on certain decisions to bring home the point that the amount disallowed u/s 14A cannot be added to net profit for computing ‘book profit’ u/s 115JB. On the other hand, the learned Departmental Representative took us through the language of clause (f) of Explanation (1) to section 115JB, as per which the amount of expenditure relatable to any exempt income is to be added back to the net profit shown in the profit and loss account. At this juncture, it would be relevant to note that ‘Book profit’ u/s 115JB is computed as per Explanation (1) to sub-section (2) of section 115JB. This Explanation provides that “book profit” means net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2) as increased by certain amounts specified under clauses (a) to (i) if debited to the profit and loss account and clause (j) if not credited to the profit and loss account. The amount so determined is further adjusted by reducing the amounts specified in clauses (i) to (vii). The amount which eventually results is the amount of ‘book profit’ on which tax liability is determined u/s 115JB. Clause(f) to Explanation (1) provides that the net profit shown in the profit and loss account shall be increased by : “(f) the amount or amounts of expenditure relatable to any income to which section 10 (other than the provisions contained in clause 38 thereof) or section 11 or section 12 apply;”. A bare perusal of clause (f) of Explanation (1) makes it abundantly clear that the amount of expenditure “relatable to” any exempt income, other than section 10(38), is liable to be added back to the amount of net profit as shown in the profit and loss account. When we turn to the language of section 14A, it transpires that it talks of disallowing any expenditure incurred ‘in relation to’ income not includible in the total income. Sub-section (1) of this provision provides that : “For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.” The expression “in relation to” used for making disallowance u/s 14A has been employed in Explanation (1) to section 115JB(2) as expenditure “relatable to”, in more or less the same form. It is manifest that the amount of dividend is exempt u/s 10(33) [not section 10(38)] of the Act. Thus any expenditure ‘relatable to’ the exempt dividend income would fall under clause (f). The ld. AR argued that unless an amount is specifically debited

to the Profit and loss account in respect of an exempt income, the same cannot be brought within the purview of clause (f) of the Explanation 1 to section 115JB(2). He stated that since the disallowance u/s 14A is computed as per rule 8D, the origin of the expenses disallowed cannot be traced to the profit and loss account and hence it cannot be covered within the mischief of clause (f) of the Explanation. We fail to find any logic in this submission because of the clear language of the Explanation 1, which provides in unequivocal terms that the amount of expenditure 'relatable to' the exempt income shall be added back. Neither the language of clause (f) expressly refers to the amount specifically debited to the profit and loss account nor there can be an implication in this regard. What has been contemplated by the provision is the amount of the expenditure 'relatable to' the exempt income. Further, the amount disallowable u/s 14A is always part of the expenses specifically debited to the profit and loss account. It is axiomatic that unless any expenditure is incurred and claimed as deduction, there can be no question of any hypothetical disallowance u/s 14A. It, therefore, follows that the amount disallowable u/s 14A is covered under clause(f) of Explanation (1) to section 115JB(2). Our view is fortified by another order dated 29 August, 2012 passed by the Mumbai Bench of the tribunal in the case of Esquire P. Ltd, Mumbai (ITA No.5688/Mum/2011). As the assessment year under consideration is assessment year 2008-2009 in which disallowance u/s 14A is required to be computed as per Rule 8D and further it is this amount which has been disallowed and also added to the amount of net profit for computing 'book profit' u/s 115JB, we see no reason to disturb the impugned order on this issue. This ground fails."

29. The view taken by the Mumbai bench of the Tribunal is the latest view which has been taken after duly considering the previous decisions as has been mentioned in the opening lines of Para 6 of the order as reproduced above. We are in agreement with the latest view of the Mumbai Bench of the Tribunal taken in the case of RBK Share Broking (P) Ltd. and in view of our observations made above, it is held that the amount of expenditure disallowable under section 14A is to be added back while computing book profit under clause (f) of the explanation (1) to section 115 JB.

30. Since in the case in hand, so far interest expenditure is concerned, we have restored the matter back to the file of the A.O. and so far administrative and managerial expenses are concerned, we have restricted the disallowance to Rupees One lakh only, hence it is held that whatsoever expenditure would be found by the AO as disallowable under section 14A, the same can be added back while computing book profit under section 115JB in the case of the assessee.

Ground No.6
Vehicle Lease Rental

25. We have dealt with this while adjudicating upon ground No.3 of the assessee's appeal relating to assessment year 2006-07 as above. In view of our findings given above on the issue, this issue is accordingly decided in favour of the assessee.

Ground No.7
Depreciation on Motor Vehicles

26. This ground has been taken by the assessee as an alternate to ground No.6 of the appeal. Since the ground No.6 has been decided in favour of the assessee, so ground No.7 becomes infructuous and does not need any finding at this stage.

ITA No.5261/Mum/11 (Assessment Year 2007-08)

This appeal has been preferred by the Revenue against the order with the CIT(A) relevant to assessment year 2007-08. The various issues raised in the above appeal are discussed as here under:

Ground Nos.1 to 4
Remission of Loan Liability

27. We have already taken this issue in assessee's appeal for assessment year 2006-07 and in view of our findings given above on the issue, the same is accordingly decided in favour of the assessee.

Ground Nos.5 & 6**Disallowance u/s 14A – Applicability of rule 8D:**

28. We have already discussed this issue while dealing with the ground Nos.1 to 4 of the assessee's appeal for the same assessment year i.e. assessment year 2007-08. In view of our findings given above on the issue, these grounds of appeal are decided accordingly.

Ground No.7 : Computation of Book Profit under section 115JB

29. We have already allowed this ground while dealing with the ground No.5 of the assessee's appeal and in view of our observations given above the same is decided accordingly.

ITA No.6446/11 (Assessment Year 2008-09)**Ground No.1 : Vehicle Lease Rental:**

30. We have already discussed this issue while dealing with ground No.3 of assessee's appeal for assessment year 2006-07. In view of our findings given above on the issue, this issue is decided in favour of the assessee accordingly.

Ground No.2 :Depreciation on Motor Vehicles

31. This ground has been taken by the assessee as an alternate to ground No.1 of the appeal. Since the ground No.1 has been decided in favour of the assessee, so ground No.2 becomes infructuous and does not need any finding at this stage.

Ground No.3 : Provision for doubtful debts and advances under section 115JB:

32. This issue has not been pressed by the ld. A.R. of the assessee. Hence the findings of the ld. CIT(A) on this issue are hereby upheld.

ITA No.6249/M/11 (Assessment Year 2008-09)**Ground No.1 : Disallowance under Section 14A:**

33. This issue is similar to the issues raised by the assessee in ground No.1 to 4 of its appeal relevant to assessment year 2007-08. In view of our above observations and findings in respect of the matter, this issue is accordingly decided in favour of the assessee.

Ground No.2 : Computation of Book Profit under section 115JB – disallowance under section 14A:

34. We have already discussed this issue while dealing with ground No.5 of the assessee's appeal relevant to assessment year 2007-08. In view of our findings given above on the issue, this issue is also decided in favour of the assessee accordingly.

Order pronounced in the open court on 20.11.2013.

Sd/-
(D. Karunakara Rao)
ACCOUNTANT MEMBER

Sd/-
(Sanjay Garg)
JUDICIAL MEMBER

Mumbai, Dated: 20.11.2013.

* Kishore

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR "C" Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.