आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

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

श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ लेखा सदस्य के समक्ष।

BEFORE SRI MAHAVIR SINGH, VP AND SRI G MANJUNATHA, AM

आयकर अपील सं./ ITA No. 3214/Mum/2014

(निर्धारण बर्ष / Assessment Year 2009-10)

आयकर अपील सं./ ITA No. 3215/Mum/2014

(निर्धारण बर्ष / Assessment Year 2010-11)

Tata Sky Limited Unit 301, to 305, 3rd Floor, Windsor, Off C.S.T. Road, Kalina, Santacruz (East), Mumbai-400 098	Vs.	The Asst. Commissioner of Income Tax, Circle 7(3), [now Assistant Commissioner of Income – tax, Range 16(1)] Mumbai
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**
स्थायी लेखा सं./**PAN No. AAGCS9294M**		

आयकर अपील सं./ ITA No. 3971/Mum/2014

(निर्धारण बर्ष / Assessment Year 2009-10)

आयकर अपील सं./ ITA No. 3972/Mum/2014

(निर्धारण बर्ष / Assessment Year 2010-11)

The Dy. Commissioner of Income Tax 7(3) Room No. 615, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020	Vs.	M/s Tata Sky Ltd. 34d Floor, C-1, Wadia International Centre, (Bombay Dyeing), Pandurang Budhkar Marg, Worli, Mumbi-400 025
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**

अपीलार्थी की ओर से / **Appellant by**	:	Shri J D Mistry, Senior Advocate
प्रत्यर्थी की ओर से **/ Respondent by**	:	Shri R Manjunatha Swamy, CIT-DR

सुनवाई की तारीख **/ Date of hearing:**	29-07-2020
घोषणा की तारीख **/ Date of pronouncement :**	10-09-2020

आदेश / O R D E R

महावीर सिंह, उपाध्यक्ष /
PER MAHAVIR SINGH, VP:

These cross appeals, by the assessee and by revenue, are arising out of the orders of Commissioner of Income Tax (Appeals)-13, Mumbai [in short CIT(A)], in appeal Nos. CIT(A)-13/Rg.7(3)/AP-269/11-12 and 127/12-13 dated 03.03.2014. The Assessments were framed by the Asst. Commissioner of Income Tax & Dy. Commissioner of Income Tax, Circle-7(3), Mumbai (in short 'ACIT/DCIT/ AO) for the AY 2009-10 and 2010-11 vide different orders dated 31.12.2011 and 06.02.2013 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The first common issue in these two appeals of assessee for AYs 2009-10 and 2010-11 in ITA Nos. 3214 & 3215/Mum/2014 is as regards to the order of CIT(A) confirming the action of the AO in making disallowance of discount and various other expenses like discount on sale of set-top box and hardware, discount on sale of recharge coupon vouchers, disallowance of bonus or credit provided by the assessee to subscribers, disallowance of sale promotion expenses and disallowance of channel support expenses for non-deduction of TDS by invoking the provision of section 40(a)(ia) of the Act.

3. The facts and circumstances of both the years are identical as admitted by Ld. Senior Counsel for the assessee as well by

Ld. CIT-DR. Hence, we will take the facts from AY 2009-10 and decide the issues raised by the assessee in this year. For this, assessee has raised the following grounds in AY 2009-10: -

> *"1. On the facts and in the circumstances of the case and in law, the Hon'ble Commissioner of Income-tax (Appeals) - 13. Mumbai [C1T(A)] erred in upholding the disallowance of discount on sale of Set-top box & hardware aggregating to Rs. 23.50,51.772 (Rs. 1338,81.648 and Rs. 10,11,70,124 respectively) under Section 40(a)(ia) of the Act.*
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> *2. On the facts and in the circumstances of the case and in law, the Hon'ble 01(A) erred in upholding the disallowance of discount on sale of recharge coupon vouchers of Rs. 38,80,6 I .901 under Section 40(a)(ia) of the Act.*
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> *3. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance of bonus or credit provided by the Appellant to subscribers of Rs. 1,54,24,104 under Section 40(a)(ia) of the Act.*
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> *4. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A)*

erred in upholding the disallowance of sales promotion expenses of Rs. 1,30,37,124 under Section 40(a)(ia) of the Act.

5. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance of distribution channel support expenses of Rs. 10,81,11,728 under Section 40(a)(ia) of the Act."

4. Briefly stated facts are that the assessee has given discount on the sale of Set-top Boxes and Recharge Coupon Vouchers, which is referred to as a primary discount. As a part of its sale promotion the assessee also provides additional discounts like a festival discount, quantity discount, etc. to the distributors to encourage them to purchase and in turn sell higher quantities of products. This additional discount is referred to as a secondary discount. The secondary discounts are recognized by the Assessee as Sale promotion expense or distribution channel support expenses. The AO during assessment of TDS had passed the order under sections 201 and 201(1A) of the Act for AY 2009-10 & AY 2010- 11, wherein the primary discount and secondary discount were held to be subject to provisions of section 194H of the Act. However, the Mumbai Tribunal has held that the primary discount and secondary discount provided by the assessee is not in the nature of commission and not subject to TDS under section 194H of the

Act. In this regard, the Ld. Counsel for the assessee SH JD Mistry stated that the Tribunal has relied on the decisions of the Hon'ble Bombay High Court in the case of Piramal Healthcare Ltd (230 Taxman 505), Qatar Airways Ltd (332 ITR 253) and Intervet India (P.) Ltd (49 taxmann.com 14/3M ITR 238). Ld. Counsel filed a chart before us in regard to the issues decided by the Tribunal, which reads as under: -

Summary chart for AY 2009-10

Ground No.	Grounds of appeal	Reference in the order of the Mumbai Tribunal in the Appellant's own case under section 201 of the Act.
1	Disallowance of discount on sale of Set-top box & hardware aggregating to Rs. 23,50,5 1,772 (Rs. 13,38,81,648 and Rs. 10111,70,124 respectively) under section 40(a)(ia) of the Act	The Mumbai Tribunal at para 34 (page 23) has specifically mentioned about the Appellant giving discount on the sale of Set-top box and recharge coupon vouchers. The Tribunal at para 39 (page 30) has held that such discount is not in the nature of commission
2	Disallowance of discount on the sale of recharge coupon vouchers of Rs 38,80,61,901 under Section 40(a)(ia) of the Act.	
3	Disallowance of bonus or credit provided by the Appellant to subscribers of Rs. 1,54,24,104 under Section 40(a)(ia) of the Act	Please refer to clarification mentioned in point B below
4	Disallowance of sales promotion expenses of Rs. 1,30,37,124 under Section 40(a)(ia) of the Act.	The Mumbai Tribunal at para 34 (page 23) also mentioned about the additional discount, i.e., festival/seasonal discounts to the distributors. The Tribunal at para 39 (page 30) has held that such discount is not in the nature of the commission
5.	Disallowance of distribution channel support expenses of Rs. 10,81,11,728 under Section 40(a)(ia) of the Act	

In view of the above, Ld Counsel argued that the order under Section 201 of the Act for AY 2009-10 was for the period 01.01.2009 to 31.03.2010, whereas, the appeal under consideration for AY 2009-10, the discount amount for the

entire year was subject to disallowance under Section 40(a)(ia) of the Act. Therefore, even the same set of discounts are the subject matter of litigation under both the appeals, the amount of discount will not match on account of the difference in the period under litigation for AY 2009-10.

5. Similarly, in regards to discount/bonus directly provided by the assessee to its subscribers (i.e. end customers), the issue is covered. The facts are explained by giving example, if a subscriber directly goes to the website of the assessee (i.e. distributors/retailers are not involved) and takes the subscription of say 6 months on payment of subscription fees of 5 months. The subscription fee of one month is given as discount/bonus by the assessee to the subscribers. In the books of accounts of the assessee, the subscription fees of 6 months are treated as the revenue of the assessee to comply with the other laws and regulations and one-month free subscription is treated as Discount/Bonus provided to the subscribers. During AY 2009-10, the Assessee has provided discount/bonus amounting to Rs. 1,54,24,104/- directly to the subscribers, which is the subject matter of disallowance by the Assessing Officer. By any stretch of the imagination, the said discount cannot be regarded as 'commission' subject to provisions of section 194H of the Act. To that extent, this ground of the assessee is on much stronger footing than the discount given to the distributors, stated by the learned Counsel for the assessee. Accordingly, it was argued that disallowance of discount given to the customers under section 40(a)(ia) of the Act is unwarranted. However, the AO as

well as CIT(A) has inadvertently considered that the discount/bonus given directly to its subscribers as the discount given to the distributors. However, even in such case, having regard to the decision of the Mumbai Tribunal in the Assessee's own case, the discount given to the customers cannot be subject to deduction of tax at source under section 194H of the Act and accordingly, disallowance of discount given to the customers under section 40(a)(ia) of the Act is unwarranted.

6. The learned Counsel for the assessee stated that the issue is squarely covered by Tribunal's decision in ITA No. 6923 to 6926/Mum/2012 in assessee's own case for AYs 2009-10 to 2012-13 order dated 12.10.2018, wherein, while adjudicating the appeal under section 201(1) and 201(1A) of the Act, whether the assessee is liable for TDS, he stated that the Tribunal vide Para 39 has categorically held that the assessee should not be visited with the liability to deduct TDS under section 201(1) and 201(1A) of the Act. For this he referred to Para 39 and 40 of Tribunal's order as under: -

> *"39. A cohesive reading of the above case laws particularly that of the Hon'ble Bombay High Court in the case of Piramal Healthcare Ltd. (supra), Qatar Airways (supra) and Intervet India (P.) Ltd. (supra) would show that the ld. Counsel of the assessee's plea that the assessee should not be visited with the liability to deduct TDS for non-deduction of tax at source*

u/s. 194H on the difference between the discounted price at which it is sold to the distributors and the MRP upto which they are permitted to sell, is cogent and is sustainable view. As noted hereinabove the Hon'ble Jurisdictional High Court in the case of Piramal Healthcare Ltd. (supra) and Qatar Airways (supra) has found that the difference between MRP and the price at which item is sold to the distributor cannot be held to be commission or brokerage. Similarly in the case of Intervet India (P.) Ltd. (supra), the Hon'ble Bombay High Court has held that when the assessee had introduced sales promotion scheme for distributors to boost sale of its product when it passed on incentives to distributors/dealers/stockists through sale credit notes and claimed it, then since the relationship between assessee and distributors/stockists was that of principal to principal and infact distributors were customers of assessee to whom sales were effected either directly or through consignment agent, it cannot be treated as commission payment under section 194H. Thus it follows on similar facts it has been held that the distributors are customers of

the assessee to whom sales are affected. The discounts and credit notes credited cannot be considered to be commission payment u/s. 194H. Similarly we note that on similar facts, the Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd. (supra) which has been duly followed by the ITAT Mumbai in Business Channels Ltd. (supra) has decided the same issue in favour of the assessee. Though we are aware that the ld. CIT(A) has referred to the decisions in favour of the Revenue on similar issue of Hon'ble Delhi High Court, but however as held by the Hon'ble Apex Court in the case of CIT v. Vegetable Products Ltd. [1973] 88 ITR 192 (SC) if two views are possible, one in favour of the assessee should be adopted. Moreover, as we have already found that the ratios of decision of Hon'ble jurisdictional High Court as mentioned hereinabove are also in favour of the assessee. Hence, there is no question of taking a contrary view following the other high courts. The remarks of the ld. CIT(A) on the jurisdictional High Court decision are totally uncalled for, neither permissible nor sustainable.

> *40. Hence, in the background of the aforesaid discussion and precedent, we hold that the assessee was not liable to deduct the tax at source on the impugned amounts in this case."*

7. When the same was confronted to the learned CIT DR, he could not controvert the above except filing of following case laws: -

> *"1. CIT vs. Idea Cellular Ltd. (2020) 189 Taxman 118 (Delhi)*
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> *2. Idea Cellular Ltd. vs. ACIT (2014) 51 taxmann.com 50 (Hyderabad-Trib.)*
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> *3. Tata Teleservices Ltd. vs. DCIT (2013) 29 taxmann.com 261 (Bangalore – Trib.)*
>
> *4. Bharti Cellular Ltd. vs. ACIT (2011) 12 taxmann.com 30 (Calcutta)."*

He also filed written note dated 14.03.2018. He submitted that the issue is covered in favour of Revenue and against assessee by the case laws of ITAT, Hon'ble High Courts and Supreme Court to support and strengthen the Department's case which are directly on the point. He referred to the following two issues first: -

> *The first issue regarding-*

(1) Disallowance on discount of sale of STBs U/s. 40(a)(ia) - Rs.38,86,45,630/-

(2) Disallowance on discount of sale of RCVs U/s. 40(a)(ia) - Rs.46,27,2 1,974/-

He stated that the assessee is engaged in the business of providing Direct to Home Services (DTH). A Set Top Box (STB) at the premises of the subscribers receives television signals through broadcasters which are uplinked to the satellite. The assessee classified DTH in two parts; the Hardware (which are ultimately sold to the subscribers, assessee does not retain any ownership rights therein) and the Tata Sky Hardware (which are sold without any consideration and assessee retain ownership rights at all times). The main source of income of assessee arises from subscription charges collected from subscribers on Recharge Coupon Vouchers (RCV) and sale of STB. The assessee claims Discount on sale of STB at Rs.38,86,45,630/- & Discount on sale of RCV of Rs.46,27,21,974/-. The AO contended that the very nature of discount given by assessee to its distributors is commission instead of discount and disallowed the amounts under section 40(a)(ia) of the Act as no TDS was deducted by the assessee. The CIT(A) upheld the decision of the AO. Similar arguments were made in respect of other disallowances by Ld CIT-DR.

8. We have heard both parties and perused materials on record. After considering the facts in entirety and hearing both the sides, we are of the view that this issue is squarely covered

by Tribunal's decision in assessee's own case, wherein Tribunal has categorically observed that the assessee was not required to deduct TDS on the amounts of discount on sale of Set-top box and hardware, discount on sale of recharge coupon and vouchers, bonus or credit provided by assessee to subscribers, sales promotion expenses and distribution channel support expenses. Further, the transaction between the company and distributor is on principal to principal basis and all the risk, loss, damages are transferred to distributor on delivery. Further, distributors are free to sale at any price below maximum retail price. In this regard, the assesse has filed the sample copy of invoices for sale of Set Top Box (STB) and other recharge coupons to prove that it is a sale but not services to come within the ambit of the definition of commission as defined under section 194H of the Act. Therefore, we are of the considered view that the assessee is not required to deduct TDS on discount allowed on sale of Set Top Box and hardware, recharge coupons vouchers and disallowance of bonus or credit provided to subscribers including sales promotion expenses. Hence, by following the decision of ITAT in assessee's own case in the proceeding under section 201(1) and 201(1A) in ITA No. 6923 to 6926/Mum/2012 direct the Assessing Officer to delete the addition towards disallowances under section 40(a)(ia) of the Act on discount of sale of STB & hardware, recharge coupon vouchers & disallowance of bonus or credit provided to subscribers, sales promotion expenses and distribution channel support expenses for failure to deduct TDS u/s 194H of the IT Act, 1961. This issue of assessee's appeal is allowed.

9. Similar is the facts in respect of this ground for AY 2010-11 in ITA No. 3215/Mum/2014 hence, in that year also the disallowance is deleted on this account.

10. The next issue in ITA No. 3214/Mum/2014 for AY 2009-10 of assessee's appeal is against the order of CIT(A) confirming the action of the AO in making disallowance of year end provisions was made by assessee in respect of expenses. For this assessee has raised the following ground No. 6: -

> *"6. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance of the year end provisions of ₹ 56,97,54,762/- made by the Appellant in its financial statements under section 40(a)(ia) of the Act."*

11. During the relevant AY 2009-10, the assessee made ad-hoc year-end provision of expenses of Rs.56,97,54,762/- in the absence of receipt of the invoices. Since, the assessee had not deducted tax in AY 2009-10 on such year-end provision, the AO has disallowed the same under section 40(a)(ia) of the Act. Now, before us, the learned Counsel argument having regard to the Gujarat High Court's decision in the case of PCIT vs. Sanghi Infrastructure Ltd. (2018) 257 Taxman 371(Guj.)(HC) in ITA No. 404 of 2018, Ahmedabad Tribunal's decision in the case of Sanghi Infrastructure Ltd. vs. DCIT in ITA No. 2576/Ahd/2012 for Assessment Year 2009-10 vide order dated 30.09.2016 and

Mumbai Tribunal's decision in the case of Mahindra & Mahindra Limited vs. DCIT in ITA No.8597/Mum/2010 for Assessment Year 2006-07 vide order dated 06.06.2012 and Aditya Birla Nuvo Ltd. Vs. DCIT in ITA No. 8427/Mum/2010 for Assessment Year 2006-07 vide order dated 17.09.2014. He argued that there is no obligation on the assessee to deduct tax on the year-end provisions and accordingly, the same should not be disallowed under section 40(a)(ia) of Act for AY 2009-10.

12. The Learned Counsel further stated that in response to above ground, the Bench expressed that AO may be requested to verify whether TDS is deducted in the subsequent years pursuant to bills received and payments made. In this connection, he pointed out that this exercise has been carried out by the AO, who has verified the same and allowed full amount in AY 2010-11. See paras 5.4.2 & 5.4.3 on page 16 of the assessment order for AY 2010-11 reproduced herein below:

> *"5.4.2. The assessee submitted that in the Assessment Order for A Y2009-10, the provision for expenses and subscriber management charges (which are in nature of year-end provision) aggregating to Ks. 56,9 7 54, 762 were disallowed under Section 40(a) (i)/(ia) of the Act for non-deduction of tax at source on the same. During the A Y 20 10-11, the said provision has been reversed and/ or appropriate tax has been deducted and deposited on such*

expenses. Thus, the assessee claimed that such expenses are to be allowed in FY 2010-11. In this connection, the assessee was asked to provide the details of tax deducted and paid on such amount. 5.4.3) The assessee submitted the details of TDS vide letter dated 04.02.2013. The submission of the assessee is considered and verified The assessee is allowed the deduction of the expense ofRs.56.97,54, 762/-."

It is therefore argued that the verification in the present case has already been carried out. However, considering the judicial precedents of the Gujarat High Court and the Mumbai Tribunal, the deduction for year-end provision ought to be allowed in AY 2009-10, and consequently, deduction of the same cannot be granted in the subsequent assessment year (i.e. AY 2010-11).

13. The learned DR on the other hand strongly supported the order of the CIT(A) and submitted that as per the provision of chapter XVII-B of the Act, TDS is required to be deducted either at the time of payment or at the time of credit including even a credit in the suspense account is subject to TDS. Therefore, there is no merit in the argument of the assessee is that TDS is not applicable on year end provisions.

14. We have heard both the parties, perused the materials available on record and gone through the orders of the lower

authorities below including case laws relied upon by the learned counsel for the assessee. The facts borne out from record indicate that the assessee made year-end provisions in respect of sale promotion, legal and professional fees, interest and programming costs as under: -

S NO	*Particulars*	*Section of applicability of TDS*	
1.	*Provision for sales promotion*	*194H*	*1,97,48,132*
2.	*Provision for legal & Professional*	*194J*	*2,74,55,451*
3.	*Provisions for Interest*	*194A*	*61,77,862*
4.	*Provisions for programming cost*	*194J*	*51,58,47,558*
Total			*56,92,29,003*

15. Further, these provisions were debited to the profit and loss account and not added back to the computation of total income by the assessee. Once, the assessee has claimed these expenses by debiting into profit and loss account, it needs to deduct TDS on such expenditure, even if not credited to respective parties account. Since, the assessee has not deducted TDS, the expenses claimed are liable to be disallowed under section 40(a)(ia) of the Act, because as per the provisions of chapter XVII-B of the Act, TDS needs to be deducted either at the time of payment or at the time of credit to the party account. Further, even in a case where credit into the suspense account is subject to TDS under the provisions of the Act. Therefore, we are of the considered view that there is no merit in the argument of the assessee that TDS provisions are not

applicable when year-end provisions are made without crediting to respective parties account. To this extent, we are fully subscribed to the findings recorded by the learned AO as well as learned CIT(A). As regards to the claim of the assessee that in subsequent Financial Year year-end provisions have been either reversed or paid subject to deduction of TDS, does not alter the legal position in so far as disallowance of expenses under section 40(a)(ia) of the Act for non-deduction of Tax at source. The law is very clear as per which TDS is required to be deducted when credit or payment whichever is earlier. As regards various case laws referred by the assessee, we find that all those cases are contrary to the provisions of chapter XVII-B r.w.s.40(a)(ia) of the Act, and hence are not followed. Therefore, considering facts and circumstances of the case, we are of the considered view that there is no error in findings recorded by the lower authorities in disallowing year-end provisions for non-deduction of TDS under respective provisions of the Act. Accordingly, we reject the ground taken by the assessee.

16. Similar is the facts in respect of this ground for AY 2010-11 in ITA No. 3215/Mum/2014 hence, the ground taken by assessee challenging disallowance of year end provisions u/s 40(a)(ia) of the Act for non-deduction of TDS is rejected.

17. The next common issue in these two appeals of assessee for AYs 2009-10 & 2010-11, is as regards disallowance of interest expenses. The issue is exactly identical in both the years. Hence, we take following ground for Assessment Year 2009-10 and decide the issue for both the years: -

"Disallowance of interest expense under section 36(1)(iii)

7. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance of interest expense of ₹1,99,51,000/- under section 36(1)(iii) of the Act."

18. Briefly stated, facts are that during the AY 2009-10 and AY 2010-11, the Assessee had Capital Work-in-progress ('WIP') of Rs.51.87 crores and Rs. 55.09 crores respectively, which consisted of:

Nature of Expenses	AY 2009-10 (Rs. in crores)	AY 2010-11 (Rs.in crores)
Viewing cards	50.13	40.44
Other stand by equipments	1.74	14.65
otal	51.87	55.09

The AO observed that the assessee had not allocated any interest expenditure against the capital WIP. Hence, AO held that part of interest was allocable to such capital WIP and accordingly, he has disallowed proportionate interest expenditure under Section 36(1)(iii) of the Act.

19. The learned AR submitted that the learned CIT(A) has erred in confirming disallowance of interest expenses u/s

36(1)(iii) of the Act without appreciating the fact that for interest expenses to be disallowed it is necessary that capital borrowed should be for acquisition of asset. The AR further submitted that in this case the assessee has not borrowed any specific loans against capital work in progress and it has utilized its own funds being share capital of Rs. 517.92 crores and Rs.276.87 crores respectively raised during assessment years 2009-10 and 2010-11. In this connection, the assessee stated that the share capital received by it was more than the amount of investment into Capital WIP. Hence, it was argued that no interest bearing funds have been utilized for the purpose of making an investment in Capital WIP. The decision of the Bombay High Court in the case of Reliance Utilities & Power Limited (313 ITR 340) also proceeds on the footing that the cash flow of the relevant year should be considered vis-ã-vis investment made in that year. In response to the said ground, the Bench had requested for a reason for receipt of share capital. In this connection, Ld Counsel for the assessee argued that there is no requirement set out in law to specify the reason for the issue of share capital. Nevertheless, the assessee wishes to point out that it had obtained the license to provide the DTH services from the Central Government of India in 2006. It was explained that the DTH industry is capital intensive and the assessee being in its initial years of operations required significant amount of long term equity funds for its business operations. Accordingly, the assessee has raised share capital of Rs. 517.92 crores in AY 2009-10 & Rs. 276.87 crores in AY

2010-11, which were utilized for the purpose of its DTH business.

20. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below along with case laws cited by the learned counsel for the assessee. The facts borne out from record indicate that during the AY 2009-10 and AY 2010-11, the Assessee had Capital Work-in-progress ('WIP') of Rs.51.87 crores and Rs. 55.09 crores respectively. Further, assessee has paid huge interest expenditure on various loans. The AO has disallowed proportionate interest expenses debited to the profit and loss account by invoking proviso to section 36(1)(iii) of the Act and held that interest paid on loan availed for purchase of capital asset needs to be capitalized till such period the assessee put the asset to use. There is no doubt with regard to legal position, because interest paid on borrowed capital shall be capitalized to work in progress till such time the capital asset is put to use. But, what is to be seen is whether the assessee has borrowed any fund for acquisition of capital asset or not. In case, no borrowed fund is used for acquisition of asset then question of capitalization of interest does not arise. In this case, on perusal of facts available on record it is very clear that the assessee has not borrowed specific loan for acquiring capital asset. In fact, the assessment order is silent on this aspect. However, the AO has disallowed proportionate interest paid on other loans including loans borrowed for working capital purpose on the ground that the assessee has used interest bearing funds for acquisition of

capital asset, without bringing on record any evidence to prove that loan funds have been used for acquisition of capital work in progress. But, fact remains that the assessee has categorically demonstrated with evidences that capital work in progress has been acquired out of its own funds being share capital raised for two assessment years. It is settled position of law that if own funds are used for acquisition of capital assets, then the question of disallowance of interest does not arise. Further, if there are funds available, both interest free and interest bearing, then a presumption can be made that the investments were made out of interest free funds available with the company, if the interest free funds are sufficient to meet the investment as held by the Hon'ble Bombay High Court in the case of Reliance Utilities and Power (313 ITR 340). In this case, on perusal of facts we find that the assessee has filed necessary evidences to prove availability of own funds which is sufficient to cover investment in capital work in progress. Therefore, we are of considered view that the AO was erred in disallowing proportionate interest expenses u/s 36(1)(iii) of the Act. Hence, we direct the AO to delete disallowances of interest for both assessment years.

21. The only common issue in these two appeals of Revenue in ITA Nos. 3971 & 3972/Mum/2014 for AYs 2009-10 and 2010-11 respectively, is as regards to the order of CIT(A) deleting the disallowance under section 14A of the Act amounting to ₹90,67,986/-. For this, Revenue has raised exactly identical grounds in both Assessment Years the i.e. AYs 2009-10 and

2010-11, hence, we will take the grounds from Assessment Year 2009-10 and will decide the issue. For this, assessee has raised the following grounds: -

> *"(i) the learned CIT(A) has erred on facts and in law in deleting the disallowance under section 14A of the Act of ₹90,67,986/- made by the Assessing Officer without properly appreciating the factual and legal matrix of the case as clearly brought out by the Assessing Officer.*
>
> *(ii) The learned CIT(A) has erred on the facts and in law in not appreciating the fact that even through during the year no tax free income was earned, investment has been made by the assessee in assets which can yield tax free income and hence the disallowance was correctly made by the Assessing Officer."*

22. Briefly stated, the facts are that during the year under consideration the assessee has invested in various investments which, yield exempt income. Further, the assessee has not made suo moto disallowance of expenditure incurred in relation to exempt income u/s 14A of the IT Act, 1961. The AO has disallowed interest expenses and other expenses by invoking Rule 8D(2)(ii)and (iii) on the ground that although the assessee

has debited huge interest expenses and other administrative expenses, but failed to disallow expenses relatable to exempt income, by following the decision of ITAT Delhi Special Bench in the case of Champ Investment Ltd. (378 ITR 33). It is the case of the assessee that during the year under consideration it has not earned any exempt income and hence, the question of disallowance of expenses u/s 14A of the Act does not arise.

23. We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. We find that this issue is squarely covered in favour of the assessee by the decision of Hon'ble Bombay High Court in the case of Ballarpur Industries Ltd. in ITA No. 51 of 2016, wherein it was held that when there is no exempt income then no disallowance of expenses u/s 14A of the IT Act, 1961 can be made. The Hon'ble Delhi High Court in the case of Cheminvest Ltd. (378 ITR 33supra) has held that if there is no exempt income then no disallowance of expenditure u/s 14A of the Act can be made. The ITAT Delhi Special Bench in the case of ACIT vs. Vireet Investments (P.) Ltd. [2017] 58 ITR(T) 313 (Delhi - Trib.) (SB) has reiterated similar principles of law. Therefore, we are of the considered view that once, there is no exempt income earned for the year, then disallowance contemplated u/s 14A of the Act cannot be pressed into. In this case, the Revenue has not disputed the fact that the assessee has not earned exempt income for the year under consideration. Since, there is no exempt income for the year, the disallowance of expenditure contemplated u/s 14A of the Act cannot be made.

The CIT(A) after considering relevant facts has rightly deleted the addition made by the AO towards disallowance of expenses u/s 14A of the Act. There is no error in the findings of the learned CIT(A). Hence, we are inclined to uphold the findings of the learned CIT(A) and dismissed appeal filed by the Revenue for both the AYs.

24. In the result, the appeals of the assessee for the Asst. year 2009-10 and 2010-11 are partly allowed and the appeals filed by the Revenue is dismissed.

Order pronounced in the open court on 10.09.2020.

Sd/-	Sd/-
(जी. मंजुनाथ /G MANJUNATHA)	(महावीर सिंह /MAHAVIR SINGH)
(लेखा सदस्य / ACCOUNTANT MEMBER)	(उपाध्यक्ष/ VICE PRESIDENT)

मुंबई, दिनांक/ Mumbai, Dated:10.09.2020

सुदीप सरकार, व.निजी सचिव */ Sudip Sarkar, Sr.PS*

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**