आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'बी', अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
" B " BENCH, AHMEDABAD

BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER And
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.1668/Ahd/2012

(**निर्धारण वर्ष /** Assessment Year : 2006-07)

And

CO No.178/Ahd/2012 – AY 2006-07
(in ITA No.1668/Ahd/2012 – AY 2006-07)

The ACIT(OSD) Circle-8, Ahmedabad	**बनाम**/ Vs.	M/s.Torrent Power Limited Torrent House Nr.Dinesh Hall Off Ashram Road, Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCT 0294 J		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी/**Respondent & Cross Objector**)

Revenue by	**:**	Shri Samir Tekriwal, CIT-DR
Assessee by	**:**	Shri Vartik Chowkshi

सुनवाई की तारीख **/Date of Hearing**	03/03/2020
घोषणा की तारीख /**Date of Pronouncement**	05 /03/2020

आदेश / O R D E R

PER SHRI SANDEEP GOSAIN, JUDICIAL MEMBER :

The captioned appeal has been filed at the instance of the Revenue against the appellate order of the Commissioner of Income Tax(Appeals)-XIV, Ahmedabad [CIT(A) in short] dated 14/05/2012 arising in the assessment order passed under s.143(3) r.w.s.147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") dated 17/11/2011 concerning

Assessment Year (AY) 2006-07. The assessee has also filed cross-objection in the Revenue's appeal.

2. First, we take up the Revenue's appeal in ITA No.1668/Ahd/20212 for AY 2006-07, wherein following grounds have been raised by the Revenue:

> *1) The Ld.Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the disallowance of Rs.2,56,00,942/- made by the Assessing Officer u/s.14A of the Act.*
>
> *2) The Ld.Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in allowing relief to the Assessee after rejecting the recomputation of the Long Term Capital Loss by the Assessing Officer at Rs.47,74,277/- as against claim of the Assessee at Rs.8,20,72,056/-.*
>
> *3) The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the addition made of the amount disallowed u/s.14A of the Act while computing the Book Profit/Income u/s.115JB of the Act.*

3. Brief facts of the case are that assessee engaged in the business of Generation, Transmission and Distribution of Electricity. The return of income for the year under consideration was filed and subsequently assessment u/s.143(3) of the Act was passed on 30/12/2008. Subsequently, the case was reopened by issuing statutory notice and after seeking reply of the assessee, assessment order u/s.143(3) r.w.s.147 of the Act was passed on 17/02/2011 thereby making additions/disallowances under different heads.

4. Aggrieved by the order of the AO, assessee preferred an appeal before Ld.CIT(A), who after considering the case of both the parties, allowed the appeal filed by the assessee.

5. Aggrieved by the order of the ld.CIT(A), now the Revenue is in appeal before us on the grounds mentioned hereinabove and assessee has also filed their Cross Objection vide CO No.178/Ahd/2012.

Ground No.1 of Revenue's appeal

6. This ground raised by the Revenue relates to challenging the order of Ld.CIT(A) in deleting the disallowance of Rs.2,56,00,942/- made by the Assessing Officer u/s.14A of the Act.

7. Ld.DR appearing on behalf of Revenue relied upon the order passed by the Assessing Officer. Findings recorded by the Assessing Officer are contained in paragraph No.3.1 of the order of the Ld.CIT(A) which is reproduced hereunder:

"3.1 The Assessing Officer has made the following observation while making addition on this ground.

"Section 14A of the I. T. Act, 1961 specifies that 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 the Act. The expenditure is required to be disallowed in accordance with Rule 8D of the I. T. Rules.

The Assessee claimed exempt income of Rs. 140018095. The disallowance was liable to be worked out in accordance with the provisions of section 14A read with Rule 8D of the Act.

The assessee was given a show cause vide notice dated 29/09/11 as to why disallowance u/s 14-A of the act should not be computed as per rule 3D as you have claimed exempt income'? Assessee filed his reply vide letter dated 03/11/11.

The reply of the assessee has been considered and not found acceptable. As regards the reply of the assesse as per his letter dated 03/11/11 at para number 7 to para number 7.4 the same has already been dealt with vide this office letter dated 29/09/2011 while rejecting the objections taken by the assessee for reopening of assessment under section 147 of the act and the same has been reproduced above at para no. 3 of this order and are not being reproduced again for the sake of brevity.

Further on merits, it is stated that Parliament in its wisdom had enacted section 14A with retrospective effect from 1-4-1962 in order to clarify the already existing position that only those expenses could be claimed which were relatable to the taxable income. In the past, it was seen that assessee's were pushing the expenses relating to exempt income which were not taxable towards taxable income and thereby reducing the taxable income wrongly. It was to curb this mischief that the Parliament enacted section 14A and also to overcome the decision of Hon'ble Supreme Court in the case of Rajasthan State Warehousing Corpn. v. CIT [2000] 2421TR 450, wherein it was held that if the exempted income and the taxable income are earned from one and indivisible business then the apportionment of expenditure could not be sustained. The intention of the Legislature is clearly evident from the Memorandum explaining the provisions contained in the Finance Bill wherein it was explained that only those expenses could be claimed as deduction which are incurred in relation to earning the taxable income. The use of the expression -only to the extent' in the memorandum is clear indicator that only that part of expenses can he allowed as deduction which is related to the earning of taxable income. Accordingly, when the income is exempt and does not form part of the total income then, no expenditure whether (direct or indirect in relation to that income could be claimed as deduction.

Whether to invest or not to invest and whether to retain the investments or to liquidate the same are very strategic decisions which the management is called upon to take. These are mind-boggling decisions and top management is involved in taking these decisions. This decisions making process is very complicated and requires very careful analysis. Moreover, the assessee has to keep track of the divided incomes declared by the investee companies and also to keep track of the dividend income having been regularly received by the assessee. This activity itself called for considerable management attention and cannot be left to a junior clerk.

The language of sub-section (1) of section 14A clearly provides that 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'. On going through the simple and plain language, it is abundantly clear that the relation has to be seen between the exempt income and the expenditure incurred in relation to it and not vice versa. What is relevant is to work out the expenditure in relation to the exempt income and not to examine whether the

expenditure incurred by the assessee has resulted into exempt income or taxable income. It is clear from sub-section (1) that the exercise of making disallowance starts with firstly, tracing out the exempt income and then initiating the process of working out the expenditure incurred in relation to such exempt income. It is clearly borne out from rule 8D as has been discussed infra that it has three dames of sub-rule (2), being the expenditure directly relating to the exempt income as per clause (i); expenditure by way of interest which is not directly attributable to particular income as per clause (ii); an amount equal to one half per cent of the average of the value of investment as per clause (iii). The sum total of these three amounts is the amount disallowable under section 14A. The stipulation of section is to compute the amount of expenditure which is not allowable under section 14A, as is re lot able to the exempt income and not for considering all the expenses one by one for ascertaining if either of them have resulted into exempt income and thereafter, considering such an amount as disallowable under section 14A. If that way of interpretation of section 14A was to be accepted, then the method of computing the expenditure as relatable to the exempt income as provided in rule 8D, would become meaningless and the words 'in accordance with such method as may be prescribed' in sub-section (2) for determining the amount disallowable would require obliteration, which is not possible.

The expression 'in relation to ' has been used in various sections apart from section 14A, such as sections 36(1)(ix), 35(2AB). The phrase 'relating to' has been used again in several sections including sections 36(l)(vii), 28(ii)(c). The phrase 'wholly and exclusively for the purposes of has been used in sections 37 and 57(iii). On going through the use of the above and other similar expressions in different parts of the Act, it is clearly borne out that these have not been used interchangeably. The Legislature is fully conscious of an employment of an appropriate expression, depending upon its intent of expanding or contracting the scope of the section. Wherever it intends to give a wider meaning, it uses the phrase like 'in relation to ' or. 'attributable to ', etc. However, where the scope is to be restricted, it uses the suitable phrase, such as 'directly relatable to ' or ('wholly and exclusively for the purposes of, which narrows down its ambit. The meaning of a word or a phrase can be viewed only in reference to the context in which it is used. There is no need to wander here and there in search of the meaning of the expression 'in relation to', as used in sub-section (1) because the same has been explained in sub-section (2) itself. Whereas said sub-section states that 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', sub-section (2) provides the meaning of the same expression, that is, "expenditure incurred 'in relation to ' such income which does not form part of the total income" to mean the amount as determined by the Assessing Officer 'in accordance with such method as may be prescribed'. The method has been prescribed in rule 8D to mean both, direct and indirect expenditure. Since the Legislature has opted to field the expression 'in relation to ' in preference over 'directly relatable to' or 'wholly and exclusively for the purposes of, it clarified its intention of giving a wider meaning and bringing into Us sweep not only the direct but also the indirect expenditure in relation to the exempt income for the purposes of disallowance under section 14A. The position becomes more clear when one looks into the direction of rule 8D, which has been brought in pursuance to sub-section (2) of section 14A.

On going through the contents of rule 8D, it becomes amply clear that not only the expenditure directly relating to exempt income [Sub-rule 2(i) of rule 8D] hut also the indirect expenditure like interest which is not directly attributable to any particular income or receipt [Sub-rule 2(ii)] and then further, one half per cent of the value of investment to cover up incidental indirect expenses [Sub-rule 2(iii)] have been categorized as 'expenditure incurred in relation to exempt income'. The intention behind using expression 'in relation to ' in section I4A is to encompass not only the direct but also the indirect expenditure which has any relation to exempt income. Therefore, all the direct and indirect expenses are disallowable under section 14A, which have any relation with the income not chargeable to tax under the Act.

Be that as it may, the discussion about the apportionment of direct or indirect expenditure towards taxable and exempt income has become academic in view of rule 8D, which prescribes mechanism for working out the disallowance under section 14A. In that scenario, the further question raised by the parties about the onus on the Assessing Officer or the assessee for bringing a particular amount of expenditure in the purview of section 14A and the manner of computation of disallowance had ceased to be of any relevance since the Assessing Officer is bound to adopt rule 8D for making disallowance under section 14A, where he is not satisfied with the correctness of the claim of the assessee in respect of such an expenditure.

In view of the above narrated facts and points of law disallowance u/s. 14A r.w.r. 8D is reworked as under.

Details	*Rs.*
(a) Direct expenses	*Nil*
(b) Indirect expenses (Interest charged to P & L A/c.)	*434725125*
(c) Investment as on 31.3.2005	*0*
(d) Investment as on 31.3. 2006	*1951037000*
(e) Average of(c) + (d)	*975518500*
(/) Assets as on 3 1.3,2005	*859000*
(g) Assets as on 31.3.2006	*33129360699*
(h) Average of (f) + (g)	*16565109850*

(i) : Expense incurred on interest attributable to exempt income = (b) X (e) / (h)	*25600941*
(j) Expenses being 0.5% of (e)	*4877593*
Total expenses disallowable u/s. 14A [(i) +(/)]	*30478534*
Less: Disallowance actually made [as per order dated 7. 4.10 giving effect to CIT(A) 's order dated 27.01.2010	*48,77,592*
Total disallowance :	*2,56,00,942*

Accordingly a disallowance of Rs. 2,56,00,942/- is made and added back to the total income of the assessee. Reliance, in this regard is placed upon the following decisions:

1. *ITO Vs. Daga Capital Management Pvt.Ltd, 117 ITD 169 (Mum)(SB) .*
2. *Southern Petrol Chemical Industries Ws. DCIT, 93 TTJ 161.*
3. *Godrej & Boyce Mfg.Co.Ltd. V/s. DCIT (ITA No. 626 of 2010)(Mumbai High Court)".*

8. On the other hand, Ld.AR appearing on behalf of assessee reiterated the same arguments as were raised by him before the Ld.CIT(A) and the same are contained in paragraph No.3.2 of the order of the Ld.CIT(A) which is reproduced hereunder:

"3.2. During the course of appellate proceedings, the AR of the appellant has made the written submission and it will be appropriate to reproduce below the relevant part of the submission:

"The learned A. O. has invoked provisions of Rule SD and made disallowance of interest by applying the formula of Rule 8D, in total disregard of the fact that at the time of original assessment the appellant had already explained before him that the investments were not referable to any borrowed funds and this aspect was appreciated by him as also by the C1T(A) as per extracts from such orders reproduced in the earlier para. Hence this disallowance on concluded issue is totally unjustified.

Apart from this, it is submitted that Rule 8D is not applicable to the year under consideration, as it is applicable only prospectively from 1-4-2008 as held by the Bombay High Court in the case of Godrej & Boyce Manufacturing Co. Ltd. 194 !TR Taxman 203.

Having regard to this aspect, the appellant further submits that various courts have been taking a consistent view that disallowance u/s.l4A can be made only if there is an actual nexus between tax-free income and expenditure incurred on the same. In this connection reliance may be placed on the following judicial pronouncements:

I. *Wimco Seedlings Ltd. vs. Deputy Commissioner of Income Tax 107 ITD 267*
II. *Indo-German International (P.) Ltd. vs. Deputy Commissioner of Income Tax 185 Taxman 103*
III. *Deputy Commissioner of Income-tax, Range 3(1), Mumbai vs. Beck India Ltd. 26 SOT 141*
IV. *Impulse (India) (P.) Ltd. ;vs_ _ Assistant Commissioner. of Income-tax (OSD), New Delhi 22 SOT 368.*
V. *CIT vs. Hero Cycles Ltd. [2010] 189 Taxman 50 (P& H High Court) .*

Without prejudice to the above, it may be appreciated that the appellant is having enough share capital and reserves and surplus of the aggregate amount of Rs.2,60, 718 lakh as against investment in shares / mutual fund of only Rs. 19,510 lakh. Thus the appellant is having enough interest free funds of its own and in such circumstances there is no justification for disallowance of interest on this ground. In this connection the appellant may refer to the following:

"(i) Decision of the Bombay High Court in CIT v. Reliance Utilities and Power Ltd. (313 1TR 340)

(ii) Decsiion of the ITAT, Ahmedabad, in ACIT v Hipolin Ltd. (ITA No.4259/Ahd/2007)

The above decision of the ITAT in the case of Hipolin Ltd. has been approved by the Gujarat High Court. Thus, in any case, having regard to the facts of the appellant's case and the above decisions, there w3as no justification of disallowance of interest. Accordingly, the addition of Rs.2,56,00,941 was not at all justified."

9. The Ld.AR also relied upon the decision of Hon'ble Gujarat High Court in the case of Gujarat Power Corpn.Ltd. vs. Assistant Commissioner of Income-tax reported at (2012) 26 taxmann.com 51 (Guj.).

10. We have heard the Learned Representatives for both the parties. We have also perused the material placed on record, judgements cited by the parties as well as the orders passed by the revenue authorities. Before we decide the merits of this ground, it is necessary to evaluate the order passed by the Ld.CIT(A). The Ld.CIT(A) has dealt with this ground in paragraph No.3 of his order, however, the operative portion is contained in paragraph No.3.3 of the order passed by the CIT(A) and the same is reproduced hereunder:

"I have carefully perused the findings of the assessing officer I and submissions made by the Id.AR. On perusal of the facts, it is noticed that while passing the assessment order u/s. 143(3) dated 30/12/2008 in para 2.1 and 2.2, the A. O/had considered the investment in shares made by the assessee and its source. He had, thereafter, disallowed 1% of the expenses by invoking section 14A. the Id.CIT(A) had thereafter in the appellate order -dated 19/02/2009 considered the applicability of section 14A and held that out of interest nothing was to be disallowed since the A. O. had not attached attributability..of such interest to any particular income and only administrative expenditure were found to be disallowable. The Id. CIT(A) had thereafter enhanced the disallowance to 0.5% of the investment i.e. to Rs.48,77,592/-. Thus, the disallowance of interest and administrative expenses in terms of Section 14A was already considered and decided by my predecessor in the appeal against the order u/s. 143(3) of the Act referred to above. Hence, the A. O. was not justified in enhancing such disallowance by reworking the disallowance from interest and administrative expenses. Further, it is noticed that the provisions of Rule 8D are applicable from A. Y. 2008-09 as held by Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. [194 Taxman 203], Hence, the said provisions are not applicable for the present year. The appellant has shown that it has aggregate interest free funds by way of share capital and reserves amounting to Rs.195.10 crores which is more than the investment in shares and mutual funds amounting to Rs.129.8 crores. Thus, the appellant is having enough interest free funds and, therefore,, also the disallowance out of interest expenditure could not be made having regard to the ratio of decision of Bombay High Court in the case of CIT Vs. Reliance Utilities and Power Ltd. [313 ITR 340]. Said decision is also followed by

ITAT, Ahmedabad in the case of AC!T Vs. Hipolin Limited. For this reason also, the disallowance of Rs.2,56,00,942/- out of interest expenditure made by the A. O. as per section 14A was not justified. The A. O. is therefore directed to delete the disallowance of Rs.2,56,00,942/- made on this count. The disallowance of Rs.48,77,592/- made on account of administrative expenses u/s. 14A of the Act, has been confirmed by my predecessor vide his appellate order dated 19/02/2009, The same is, therefore, upheld.

The ground of appeal is accordingly ***partly allowed."***

11. After having heard both the parties and after appreciating the facts of the present case, we find that the initial order of assessment u/s.143(3) of the Act was passed on 30/12/2018, wherein the Assessing Officer has considered the investment in shares made by the assessee and its source. Therefore disallowed 1% of the expenses by invoking section 14A of the Act. The CIT(A) after considering the applicability of section 14A of the Act held that out of interest nothing was to be disallowed since the Assessing Officer had not attached attributability of such interest to any particular income and thus only administrative expenses were found to be disallowed. Thus, in this way, the disallowance of interest and administrative expenses in terms of section 14A have already been considered and decided by Ld.CIT(A) in an appeal against original order passed u/s.143(3) of the Act. Thus, in the present circumstances, the Ld.CIT(A) while passing the impugned order had rightly concluded that Assessing Officer was not justified in enhancing such disallowances by re-working the disallowance from interest and administrative expenses.

11.1. Even otherwise, it was rightly concluded by the ld.CIT(A) that the provisions of Rule 8D of the Income Tax Rules, 1962 are applicable from AY 2008-09 as held by Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg.Co.Ltd. (194 Taxman 203). Since the year under consideration is AY 2006-07, therefore we are also of the view that as per the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg.Co.(supra), the provisions of Rule 8D are not applicable for the year under consideration. From the records, we also noticed that the assessee had aggregate interest-free funds by way of share capital and reserves and amounting to Rs.195.10 crores which are more than the investment in shares and mutual funds amounting to Rs.129.80 crores. Thus, in this way, the assessee was having enough interest-free funds and, hence, the disallowance out of interest expenditure could not have been made while relying upon the ratio laid down by the Hon'ble Bombay High Court in the case of CIT vs. Reliance Utilities and Power Ltd. (313 ITR 340). The Ld.CIT(A) while deciding this issue had also taken into consideration the decision of Coordinate Bench of ITAT Ahmedabad in the case of ACIT vs. Hipolin Limited in which the Hon'ble Bench had also decided the identical issue while keeping in view the principles laid down by the Hon'ble Bombay High Court in the case of CIT vs. Reliance Utilities and Power Ltd.(supra). Since Ld.CIT(A) had rightly concluded that disallowance of Rs.2,56,00,942/- out of interest expenditure made by the Assessing Officer as per section 14A of the Act was not justified keeping in view the principles laid down by the Hon'ble Bombay High Court as well as the Coordinate Bench of ITAT Ahmedabad and even no new facts or circumstances have been brought before us in order to controvert or rebut

the findings so recorded by the Ld.CIT(A). Therefore, we find no reason to interfere with or deviate from the findings so recorded by the Ld.CIT(A). Thus, we uphold the order of the ld.CIT(A) and ground raised by the Revenue is dismissed.

Ground No.2 of Revenue's appeal

12. This ground raised by the Revenue relates to challenging the order of Ld.CIT(A) in allowing relief to the Assessee after rejecting the recomputation of the Long Term Capital Loss by the Assessing Officer at Rs.47,74,277/- as against claim of the assessee at Rs.8,20,72,056/-.

13. The Ld.DR appearing on behalf of the Revenue relied upon the order of Assessing Officer. Such observations made by the Assessing Officer are contained in paragraph No.4.1 of the order of the Ld.CIT(A) which is reproduced below:

"4.1 The Assessing Officer has made the following observation while making addition on this ground,

"On perusal of the details filed by the assessee it was observed that the investment sold by the assessee was acquired by him in a scheme of amalgamation which became effective from 1-4-2005. In view of Explanation (iii) to Section 48 of the Act, for the purpose of working "indexed cost of acquisition," the Cost Inflation index of the year 20.05-06 required to be adopted for both the year of transfer of the asset and year of acquisition of the asset as shown below:

Cost of acquisition	*X*	*Cost inflation Index of FY 2005-06 (year of sale)*
	÷	*Cost inflation index ofF.Y.2005-o6 (year of purchase)*

= 16293226.16 X 497

= Rs, 1629322616.

Thus the indexed cost of acquisition would be same as the cost before indexation. Accordingly, the LTCL worked out to Rs. 4774277 only as against Rs.82072060 as was-deter mined by the assessee. Accordingly assessee was given a show cause vide this office letter dated29. 09. 2011 as to " why LTCL should not be reworked after disallowing indexation claimed by you.

In response to the above notice the assessee filed his reply vide letter dated 03/11/2011. The reply of the assessee has been considered and not found acceptable. Explanation (Hi) to section 48 defines indexed cost of acquisition and is reproduced as under:

"Explanation.—For (he purposes of this section,—

(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April 1981, whichever is later"

To identify the cost of acquisition and to give the benefit of indexation are two different things and both the situation have been dealt under different sections of the act. Explanation (iii) to section 48 defines indexed cost of acquisition and section 49 deals with cost with reference to certain modes of acquisition. Both the sections operate in different field. Explanation (iii) to section 48 deals with the indexation and it covers 'what' needs to be indexed and 'from when'. 'What' refers to cost of acquisition and 'from when' refers to year from which indexation needs to be done. Whereas, section 49 deals with only one situation, as to 'what' is the cost with reference to certain modes of acquisition. Therefore 'what' needs to be indexed is supplied by section 49, wherever applicable, but the question 'from when' the cost needs to be indexed is not answered by section 49 it is answered by Explanation (iii) to section 48. Thus when Explanation (iii) to section 48 defines indexed cost of acquisition in a strict and in an unambiguous terms the language cannot be interpreted in a different manner than what is clearly said.

On a plain reading of Explanation (iii) to section 48 it is amply clear that benefit of indexation for cost of acquisition is available to the assessee from the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later". Thus there is no ambiguity in the language of the explanation to section 48.

Further reliance is placed in the case of Deputy CIT v. Kishore Kanungo, 102 ITD 437 (Mum.).In this case, as regards the cost indexation, the Tribunal held that in view of the

express provisions of Explanation (iii) to S. 48, the cost inflation index for the fir si year in which the asset was held by the assesses was to be considered. In the opinion of the Tribunal, this year was 1991-92, the year in which the partition of the HUF took place. The Tribunal therefore held that cost indexation was available only from the first year from which the asset was held by the assessee and not by the previous owner.

In Taxation laws the intention of the legislature is primarily to be gathered from the words used in the statute:

In the case of Smt. Tarulata Shy am v. CIT [1977] 108 ITR 345, Hon'able Supreme Court observed:

"To us, there appears no justification to depart from. the normal rule of construction according to which the intention of the Legislature is primarily to be gathered from the words used in the statute. It will be well to recall the words of RowlattJ. in Cape Brandy Syndicate v. IRC [1921] 1 KB 64 (KB) at page 71, that:

'.....in a taxing Act one has, to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a lax. Nothing is to be read in; nothing is to be implied. One can only look fairly at the language used".

In this regard reliance is also placed upon the decision of the Hon'ble Supreme Court in a bench of Five Judges in the case of Padmasundara Rao Vs State of Tamil Nadu[2002] 255 ITR 147 and also in the case of Prakash Nath Khanna Vs CIT[2004] 266 ITR 1 (SC).

"Once it is shown that the case of the assessee comes within the letter of the law, he must be taxed, however great the hardship may, appear to the judicial mind to be."

Further as far as the legislative intent was concerned the IT AT, Mnmbai 's ruling rejecting appellants plea in the case of Smt. Smita N Shah Vs. JCIT [2005] 94 JTD 492(Mum), that Section 51 of the Act should be interpreted with reference to the dictum: - "UT RES MAGIS VALEA T QUAM PEREAT", i. e. such a meaning should be given to the statute so it could carry out and effectuate to the fullest extent the intention of the Legislature; reproduced below throw light on the rules of interpretation.

"Interpretation postulates the search for the true meaning of the words used in the statute. If the language of the statute is plain, obvious meaning is to be applied. Rules of interpretation are applied only to resolve the ambiguities. The object and purpose of interpretation is to ascertain the MENS LEGIS, i. e. the intention of the law, as evinced in the statute. If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense. Words may be modified or varied where their import is doubtful or obscure..... The word "indexed cost of acquisition" is nowhere mentioned in Section 51 of the Act. As such, it is beyond the competence of the Court to substitute it. The

language of the statute is clear and explicit. The words of the statute speak the mens legis. As such recourse cannot be made to the purposive theory of interpretation. "

Thus, where precise words used were plain and unambiguous, the provisions were to be construed in their ordinary sense. As far as the provisions of Explanation (Hi) to section 48 were concerned, the language of the statute was clear and explicit.

Further, nowhere in section 2(42A), section 47(vi) or section 49(1), the word "indexed cost of acquisition " was mentioned and hence it could not be substituted.

Explanation (iii) to section 48 was unambiguous in defining the "indexed cost of acquisition " and lays down "...,,. Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee... " In clear unambiguous terms it provides that the first year in which the asset was held was to be taken into consideration for the purpose of computing capital gains under section 48 of the Act. Hence, there was no scope of interpreting Explanation (iii) of section 48 w.r.t. section 49(1), section 2(42A) and explanation below it and, section 47 (vi) of the Act.

• The legislative intent was very clear from the fact that in section 49(1) of the Act, the cost of acquisition of the asset to the previous owner was expressly mentioned whereas in Explanation (iiii) of section 48, there was no reference to the period of holding of the previous owner. Instead, the cost had to be indexed w.r.t. the period from which the assessee first held the asset. What was clearly spelt out in the .provisions of the Act cannot be overridden by assuming a different purpose or intent of the legislature.

• The purpose of Explanation I (b) to section 2(42A) was to determine the nature of capital gain i.e. whether it was Long Term Capital Gain or Short Term Capital Gain. There is no dispute to the fact that the asset transferred was a Long Term Asset liable to Long Term Capital Gain. The issue concerns only "indexation of cost of acquisition " which can be considered only from the year in which the asset was held by the assessee by virtue of Explanation (iii) to section 48 of the Act. Explanation l(b) to section 2(42A) of the Act does not override other provisions of the Act including Explanation (iii) of section 48. Neither section 2(42A), nor its explanation contains anon obstante clause. Thus, it cannot be taken into consideration for determining "indexed cost of acquisition."

• Further, there was no basis for the argument that, as Explanation (iv) of section 48 allowed indexation of cost of improvement incurred by the previous owner, the interpretation of Explanation (iii) of section 48 to mean that it did not allow indexation for the period of holding of the previous owner, would lead to anomaly. The fact of the matter was that section 49(1) which specifies the method of determining the cost of acquisition of asset provides that "the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the properly acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be." It meant that in case, of acquisition of asset in the manner mentioned in section 47, "cost of

acquisitions" shall be the aggregate of the cost of acquisition, cost of improvement by previous owner and the cost improvement by the beneficiary owner. Thus, there was no question of allowing "indexed cost of improvement" separately in cases of acquisition of asset in the manner covered by section 47 of the Act.
Indexation of cost of acquisition was allowable with reference to the year in which the asset was first held by assessee, which in the instant case was F. Y. 2005-06. Thus, assessee could not derive any benefit on indexation of cost of the Long Term Capital Asset transferred because the year in which the asset was first held by assessee and it was transferred by sale was the same.

In view of the above it is amply clear that the benefit of indexation cannot be allowed to the assessee and the excess loss to the tune of Rs.7,72,97,779 cannot be allowed and is therefore not allowed to be carried forward." "

14. On the other hand, AR reiterated the same arguments as were raised before the Ld.CIT(A) while filing the written submissions and the same are contained in paragraph No.4.2 of the order of the Ld.CIT(A) which reads as under:

"*4,2 During the course of appellate proceedings, the AR of the appellant has made the written submission and it will be appropriate to reproduce below the relevant part of the* submission:

"In this connection the appellant relies on the following paras from Statement of facts

"Computation of long term capital gains without considering Indexation of actual cost relating to the period the investments in question were held by the previous owners (Amalgamating Companies) resulting into disallowance of carry forward of long term capital loss of 'Rs. 7,72,9 7, 783 (Rs. 8,20,72,060 minus Rs. 47,74,277).

As only a plain reading of the impugned reassessment order shows, the appellant had made elaborate written submissions explaining how the proposed recomputation of the long term capital loss after ignoring the period for which the investments in question were held by their previous owners (the Amalgamating Companies) for the purpose of indexation of actual cost of acquisition was entirely misplaced. Before Your Honour, the appellant begs to further rely on an elaborate Note on this subject |vhich is attached at Annexure-'B' hereof. ,

The appellant begs to further point out:

(a) that the Division Bench decisions of the ITAT on which the learned Assessing Officer has relied in justification of his stand for refusing to grant Indexation of the actual cost of the previous owners in respect of the period for which the investments in question were held by the previous owners, have since come to be disapproved by the decision of the Special Bench of the Hon'ble ITAT, Bombay in DCIT v. Manjulaben J. Shah rendered on 16-10-2009. For the sake of immediate reference, a copy of the order of the Hon'ble Special Bench passed in ITA No. 7315/Mum/2007 is attached at Annexure - 'C' hereof.

(b) Pertinently, the Department's appeal against the above decision of the Special Bench has been comprehensively rejected by the Hon 'ble Bombay High Court in its decision in CIT v. Manjulaben J. Shah rendered on 11.10.211 in ITA No.3378 of 2010. A copy of the judgment of the Bombay High Court is attached at Annexure – 'D'.

For the sake of immediate reference the most relevant portion of the judgement of the Bombay High Court in the above decision is quoted below.

"13) In the present case, the capital asset in question (Flat No. 1202-A) was originally acquired by the previous owner (daughter) on 29/1/1993 and the same was acquired by the assessee under a gift deed dated 2/J/2003 without incurring any cost. The assessee sold the said capital asset on. 30/6/2003 for Rs.1,10,00,000/-. Since the assessee held the capital asset for less than thirty six months (2/1/20-03 to 30/6/2003) in the ordinary course, ay per Section 2(42A) of the Act the assessee would have held the asset as a short term capital asset and accordingly liable for short term capital gains tax. However, in view of Explanation: l(i).(b) to Section 2(42A) of the Act which provides that in determining the period for which any asset is held by an assessee under a gift, the period for which the. said asset was held by the previous owner shall be included,' the assessee is deemed to have held the asset as a long term capital asset and accordingly, liable for long term capital gains tax. Thus, by applying the deeming provision contained in the Explanation l(i)(b) to Section 2(42A) of the Act, the assessee is deemed to have held the asset from 29/1/1993 to 30/6/2003 (by including the period for which the said ass-el was held by the previous owner) and accordingly held liable for long term capital, gains tax.
14) It is-not disputed by the revenue that the assessee must be deemed to have held the capital asset from'29/1/1993 (though actually held from 1/2/2003) by a])plying the Explanation l(i)(b) to Section 2.(42A) of/he Act and hence liable for long term capital gains tax. However, /he. revenue disputes the applicability of the deemed date of holding (he asset from 29/1/1993 while determining the indexed cost of acquisition under clause (Hi) of the Explanation to Section 48 of the Act.

15) For belter appreciation, of the dispute, we quote the relevant part of Section 48 herein :

"Mode of Computation

48. The income chargeable under the head "capital "gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the result of the transfer of the capital asset the following amounts, namely:

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto;
Provided that...

Explanation -For the purposes of this Section,
(i) .....
(ii) .....
(iii) "indexed cost of acquisition " means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later;

16) It is the contention of the revenue that since the indexed cost of acquisition as per clause (in) of the Explanation to Section 48 of the Act lias to he determined with reference to the Cost Inflation Index for the first year in which the asset was held by (he assessee and in the present case, as the assessee held the. asset with effect from 1/2/2003, the first year of' holding the asset would be FY 2002-03 and accordingly, the cost inflation index for 2002-03 would be applicable in determining the indexed cost of acquisition.

17) We see no merit in the above contention. As rightly contended by Mr. Rai, learned counsel for the assessee, the indexed cost of acquisition has to be determined with reference to the cost inflation index for the first year in which the capital asset was 'held by the assessee[1]. Since the expression 'held by ,' the assessee' is not defined under Section 48 of the Act, that / expression has to. be understood as defined under Section 2 of the.. Act. Explanation l(i)(b) to Section 2(42A) of the Act -provides that in determining the period for which an asset is held by an assessee under a gift, the period for which the said asset was held by the previous owner shall be included. As the previous owner held (he capital asset from 29/1/1993, as per s Explanation 1(i) (b) to Section 2(42 A) of the. Act, the assessee is deemed to have held the capital asset from 29/1/1993. By reason of the deemed holding of the asset from 29/1/1993, the assessee is deemed to have held the asset, as a long term capital. asset. If the long term capital gains liability has to be computed under Section 48 of the Act by treating that the assessee held the capital asset from.29/1/1993, then,. naturally in determining the Indexed cost of acquisition under Section 48 of the A ct, the assessee must be treated to have held the asset from 29/1/1993 : • and; accordingly the cost inflation index for 1992-93 would be applicable in determining the indexed cost of acquisition.

18) If the argument of the revenue that the deeming fiction contained in Explanation l(i)(b) to Section 2(42A) of the Act cannot be applied in computing the capital gains under Section 48 of the Act is accepted, then, the assessee would not be liable for long term capital gains tax, because, it is only by applying the deemed fiction contained in Explanation l(i)(b) to Sect ion 2(42 A) and Section 49(l)(ii) of the Act, the assessee is deemed to have held the asset from 29/1/1993 and deemed to have incurred the cost of acquisition and accordingly made liable for the long term capital gains tax. Therefore, when the legislature by introducing the deeming fiction seeks to lax the gains arising on transfer of a capital asset acquired under a gift or will and the capital gains under Section 48 of the Act has to be computed by applying the deemed fiction, it is not possible to accept the contention of revenue that the fiction contained in Explanation l(i)(li) to Section 2(42A) of the Act cannot be applied in determining the indexed cost of acquisition under Section 48 of the Act,

19) It is true that the words of a statute are to be understood in their natural and ordinary sense unless (lie object of the statute suggests to the contrary. Thus, in construing the words 'asset was held by the assessee' in clause (iii) of Explanation to Section 48 of the Act, one has to see the object with which the said words are used in the statute. If one reads Explanation l(i) (b) to Section 2 (42A) together with Section 48 and 49 of the Act, it becomes absolutely clear that the object of the statute is not merely to tax the capital gains arising on transfer of a capital asset acquired by an assessee by incurring the cost of acquisition, but also to tax the gains arising on transfer of a capital asset inter alia acquired by an assessee under a gift or will as provided under Section 49 of the Act where the assessee is deemed to have incurred the cost of acquisition. Therefore, if the object of the legislature is to tax the gains arising on transfer of a capital asset acquired under a gift or will by including the period for which the said asset was held by the previous owner in determining the period for which the said asset was held by the assessee, then that object cannot be defeated by excluding the period for which the said asset was held by the previous owner while determining the indexed cost of acquisition of that asset to the assessee. In other words, in the absence of any indication in clause (Hi) of the Explanation to Section 48 of the Act that the words 'asset was held by the assessee' has to be construed differently, the said words should be construed in accordance with the object of the statute, that is,' in the manner set out in Explanation 1 (i)(b) to section 2(42A) of the Act.

20, To accept the contention of the revenue that the words used in clause (iii) of the Explanation to Section 48 of the Act has to be read by ignoring the provisions contained in Section 2 of the Act runs counter to the entire scheme of the Act. Section 2 of the Act expressly provides that unless the context otherwise requires, the provisions of the Act have to be construed as provided under Section 2 of the Act. In Section 48 of the Act, the expression 'asset held by the assessee is not defined and, therefore, in the absence of any intention to the contrary the expression 'asset held by the assessee' in clause (Hi) of the Explanation to Section 48 of the Act has to be construed in consonance with the meaning given in Section 2(42A) of the Act. If the meaning given in Section 2(42A) is not adopted in construing the words used in Section 48 of the Act, then the gains arising on transfer of a capital asset acquired under a gift or will be outside the purview of the capital gains tax

which is not intended by the legislature. Therefore, the argument of the, revenue which runs counter to the legislative intent cannot be accepted.

21) Apart from the above, Section 55(l)(b)(2)(u) of the Act provides that where the capital asset became the property of the assessee by any of the modes specified under Section 49(1) of the Act, not only
the cost of improvement incurred by the assessee but also the cost of improvement incurred by the previous owner shall be deducted from the total consideration received by the assessee while computing the capital gains under Section 48 of the Act. The question of deducting the cost of improvement incurred by the previous owner in the case of an assessee covered under Section 49(1) of the Act would arise only if the period for which ; the asset was held by the previous owner is included in . determining the period for which the asset was held by the assessee. Therefore, it is reasonable to hold that in the case of an assessee covered under Section 49(1) of the Act, the capital • gains liability has to be computed by considering that the assessee held the said asset from the date it was held by the determining the indexed cost of acquisition.

22) The object of giving relief to an assessee by allowing indexation is with a view to offset the effect of inflation. As per the CBDT Circular No. 636 dated 31/8/1992 [see 198 ITR 1 (St)] a fair method of allowing relief by way of indexation is to link it to the period of holding the asset. The said circular further provides that the cost of acquisition and the cost of improvement have to be inflated to arrive at .the indexed cost of acquisition and the indexed cost of improvement and then deduct the same from the sale consideration to arrive at the long term capital gains. If indexation is linked to the period of holding the asset and in the case of an assessee covered under Section 49(1) of the Act, the period of holding the asset has to be determined by including the period for which the said asset was held by the previous owner, then obviously in arriving at the indexation, (he first year in which the said asset was held by the previous owner would be the first year for which the said asset was held by the assessee.

23) Since the assessee in the present case is held liable for long term capital gains tax by treating the period for which the capital asset in question was held by the previous owner as the period for which the said asset was held by the assessee, the indexed cost of acquisition has also to be determined on the i very same basis.

;

24) In the result, we hold that the ITAT was justified in holding that while computing the capital gains arising on transfer of a : capita! asset acquired by the assessee under a gift, the indexed cost of acquisition has to be computed with reference to the year in which the previous owner first held the asset and not the year in which the assessee became the owner of the asset. "

On this issue, as pointed out earlier, the appellant may state that the investments with reference to which capital loss was claimed at Rs. 8,20,72,056 by claiming index cost with

reference to the conclusion of such investment by the amalgamating company. The fact is that the said investments were transferred by process of law to the appellant on amalgamation of Torrent Power AEC Ltd. and Torrent Power SEC Ltd. with effect from 1-4-2005 with the appellant company. Therefore, the appellant claimed that the cost of the said investments for the purpose of section 48 is to be computed with reference to the cost in the hands of the amalgamating company. This issue is under dispute with the A. O. He has held that (he cost is to be allowed at Rs.47,47,277 as against the index cost of Rs. 8,20,72,060. He has referred to the Explanation (in) below section 48 and held that the benefit of indexation is available to the assessee from the year in which the asset was held by the assessee. It is held by him that the investments were for the first time held by the assessee in the year in which it was sold and hence indexation is not given.

As stated above in the statement of facts, the ITAT, Mumbai in the case of Manjulaben J. Shah has decided the issue in favour of the assessee and the said decision has been approved by the Bombay High Court vide decision dated 11-10-2011, copy of which is already attached. As discussed by the Bombay High Court, the term "held, by the assessee " is not defined in section 48 and it has to be understood with reference to section 2(42A) of the Act.

The appellant may in the. back ground of this position refer to section 47 (vi) wherein it is held that transactions referred to in section 47 are not to be considered as transfer. This, inter alia, .includes in clause (vi) of section 47 to any transfer in scheme of amalgamation of capital asset by amalgamating company to the amalgamated company if the amalgamated company is an Indian Co. In the appellant's case these conditions are fulfilled.

Now reference may be made to section 49 which refers to cost with reference to the asset becoming property of the assessee in certain cases. Sub-section 1(iii)(e) refers to the transaction as stated in section 47 which includes section 47(vi). For the transaction so referred to in section 49(i) it clearly provides that, the cost of asset as per said .transactions shall be deemed to be the cost for which previous owner had acquired it.

As stated above, section 48 or any other section does not define the term "first year in which asset was held by the. assessee". When the above provisions are referred to viz. section 47, 48 and 49, for the purpose of holding period in the absence of any other provisions, one has to refer to section 2 (42A) wherein the definition of short term capital asset is given. Explanation I of the said sect ion states that in determining the period for which the capital asset is held by the assessee the transactions referred to therein provide for including the period of holding by the previous owner. Section 2(42A) reads as under:

> *42A)["short-term capital asset" means a capital asset held by an assessee for not more than [thirty-six] months immediately preceding the date of its transfer:]*

Provided that in the case of a share held in a company [or any other security listed in a recognised stock exchange in India or a unit of the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963) or a unit of a Mutual Fund specified under clause (23D) of section 10] [or a zero coupon bond], the provisions of this clause shall have effect as if for the -words "thirty-six months", the words "twelve months" had been substituted.]

[Explanation 1].—(i) In determining the period for which any ' • capital asset is held by the assessee—

(a) in the case of a share held in a company in liquidation, there shall be excluded the period » subsequent to the date on which the company goes into liquidation;

(b) in the case of a capital asset which becomes the . property of the assessee in the circumstances mentioned in [sub-section (I)] of section 49, there shall be included the period for which the asset was held by the previous owner referred to in the said section ;

(c) in the case of a capital asset being a share or shares in an Indian company, which becomes the property of the assessee in consideration of a transfer referred to in clause (vii) of section 47, there shall be included the period for which the share or shares in the amalgamating company were held by the assessee ;]

(d) in the case of a capital asset, being a share or

any other security (hereafter in this clause referred to as the financial asset) subscribed to by the assesses on the basis of his right to subscribe to such financial asset or subscribed to by the person in whose favour the assessee has renounced his right to subscribe to such. financial asset, the period shall be reckoned front the date of allotment of such financial asset; .

(e) in the case of a capital asset, being the right to subscribe to any financial asset, which is renounced in favour of any other person, the period shall be reckoned from the date of the offer of such right by the company or institution, .-as the case may be, making such offer ;]

(f) in the case of a capital asset, being a financial asset, allotted without any payment and on the basis of holding of any other financial asset, the period shall be reckoned from the date of the allotment of such financial asset;]

(g) in the case of a capital asset, being a share or shares in an Indian company, which becomes the properly of the assessee in consideration of : a demerger, there shall be included the period for which the share or shares held in the demerged company were held by the assessee ;]

(h) in the case of a capital asset, being trading or clearing rights of a recognised stock exchange in India acquired by a person pursuant to demutualisalion or corporatisation of the recognised stock exchange in India as referred to in clause (xiii) of section 47, there shall be included the period for which the person was a member of the recognised stock exchange in India immediately prior to such demutualisation or corporatisation;

(ha) in (he case of a capital asset, being equity share or shares in a company allotted pursuant lo demutualisalion or corporatisaiion of a recognised stock exchange in India as referred to in clause (xiii) of section 47, there shall be included the period for which the person was a member of the recognised stock exchange in India immediately prior to such dennitualisation or corporatisation;]

(hb) in the case of a capital asset, being any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer free of cost or at concessional rate to his employees (including former employee or employees), the period shall be reckoned from the date of allotment or transfer of such specified security or sweat equity shares;]

(ii) in respect of capital assets other than those mentioned in clause (i), the period for which any capital asset is held by the assessee shall be determined subject to any rules which the Board may make in this behal.f]

It may be seen from the above that in the case of asset which becomes property of the assessee in the circumstances mentioned in section 49(1) the period holding by the previous owner is to be included in the period of holding by the assessee. It is very much clear that asset is to be considered as held by the appellant from date on which it is held by previous owner i.e. amalgamating company. Accordingly, in view of this section it is to be held that the appellant held capital asset from the date on which the amalgamating company had acquired such capital asset and not from the date on which the scheme of amalgamation had taken place. This is what is appreciated and by the Bombay High Court in the above referred case. Accordingly, the A. O. was not justified in rejecting the claim of indexation and disallowing the long term capital loss to the extent of R.s.7.72 crores. The addition deserves to be deleted."

15. We have heard the Learned Representatives for both the parties. We have also perused the material placed on record, judgements cited by the parties as well as the orders passed by the revenue authorities. Before we decide the merits of this ground, it is necessary to evaluate the order passed by the Ld.CIT(A) while deciding this ground. The Ld.CIT(A) has dealt with

this ground in paragraph No.4.1 of his order which is reproduced hereinabove. The operative portion contained in paragraph No.4.3 of the order of the ld.CIT(A) is reproduced hereunder:

"4.3. "Decision

I have carefully perused the findings of the assessing officer and submissions made by the Ld.AR. It is noticed that the appellant had claimed the cost of previous owner and indexation of such cost from the date when the relevant investments were acquired by the previous owner. The A.O. noticed that the investments which were sold by the appellant were acquired by the appellant in a scheme of amalgamation which became effective from 01/04/2005. Therefore, according to the A.O. in view of Explanation (iii) of section 48 of the Act for the purpose of working out index cost, the cost inflation index for the year 2005-06 was required to be adopted for both the year of transfer and year of acquisition. He has thus held that for the purpose of index cost, the year in which the asset was first held by the assessee is to be considered. On the other hand, the appellant has claimed that the index cost is to be considered with reference to the year in which the asset was acquired by the previous owner.

It is noted that the investment were acquired by the appellant on scheme of amalgamation of other companies with it. The provisions of section 47(vi) defines that any transfer in a scheme of amalgamation shall not be regarded as transfer and nothing contained in Section 45 shall apply. Now, as per the provisions of section 49(1)(e), the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the asset incurred or borne by the previous owner or the assessee as the case may be. Therefore, in view of section 49(1), the cost of asset of such investment is to be taken as that of the previous owner. As pointed out by the A.R., section 48 or any other section does nto define the term "first year in which asset was held by the assessee". However, when provisions of section 47, 48 & 49 are to be applied and considered together, the picture becomes clear. For the purpose of holding period, it would be relevant to refer to section 2(42A) wherein the short term capital asset is defined. As per explanation of the said section, the period for which the asset is held by the assessee is to be determined by including the period for which asset was held by the previous owner as referred to in section 49(1) [Refer to Explanation 1 Clause (b)]. Thus, after considering these provisions, the period of holding by the amalgamating companies is to be included in the period of holding by the appellant. Accordingly, it is held that the appellant held capital

asset from the date on which the amalgamating companies acquired such assets and the A.O. was, therefore, not justified in considering the date of amalgamation for the purpose of indexation. This finding is further supported by the ratio of the Bombay High Court decision in the case of CIT vs. Manjulla J. Shah {ITA No.3378 of 2010] dated 11/10/2011] wherein similar analysis has been made by the Hon'ble Court. Accordingly, the A.O. is directed to consider the period of holding of the investment from the date when the investments were acquired by the amalgamating companies. The appellant's claim in this regard, is therefore, accepted and the ground of appeal is accordingly allowed."

16. After having heard the Counsels of both the parties at length and after having gone through the facts of the present case, we find that assessee had claimed the cost of previous owner and indexation of such cost from the date when the relevant investments were acquired by the previous owner. We notice that the investment sold by the assessee was acquired by the assessee in a scheme of amalgamation which became effective from 01/04/2005. However, as per Revenue, for the purpose of indexation cost, the year in which the asset was first 'held' by the assessee is to be considered, but as per assessee, the indexation cost is to be considered with reference to the year in which the asset was 'acquired by the previous owner'. We also notice that the investments were acquired by the assessee in a scheme of amalgamation of other companies and the provisions of section 47 of the sub-clause (vi) defines that any transfer in a scheme of amalgamation shall not be regarded as "transfer" and nothing contained in section 45 shall apply. Now, therefore, as per the provisions of section 49(1)(e) of the Act, the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it. Therefore, keeping in view the provisions of section 49(1), the cost of asset of such investment is to be

taken as that of the previous owner. Since as per section 48 of the Act or any other section do not define the term "first year in which asset was held by the assessee". Thus, in such circumstances, from the conjoint reading of sections 47, 48 & 49 the picture becomes clear. For the purpose of holding period, it would be relevant to refer to the provisions of section 2(42A) of the Act, wherein the short term capital asset is defined and as per the Explanation of the said section, the period for which the asset is held by the assessee is to be determined by "including" the period for which asset was held by the previous owner as referred to in section 49(1) of the Act.

16.1. After considering these provisions as mentioned above, the period of holding by the amalgamating companies is to be 'included' in the period of holding by the assessee. Accordingly, ld.CIT(A) has rightly held that assessee held capital asset from the date on which the amalgamating companies acquired such assets and the Assessing Officer was, therefore, not justified in considering the date of amalgamation for the purpose of indexation. The ld.CIT(A) while reaching to said conclusion had relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs. Manjulla J. Shah (ITA No.3378 of 2010) dated 11/10/2011, wherein under the similar circumstances, the Hon'ble Court decided the controversy. No new facts or circumstances have been brought before us in order to controvert or rebut the findings so recorded by the Ld.CIT(A). Therefore, we find no reason to interfere into or to deviate from such findings of the Ld.CIT(A) and we uphold the findings of the Ld.CIT(A) and reject the ground raised by the Revenue.

Ground No.3 of Revenue's appeal

17. This ground raised by the Revenue relates to challenging the order of the Ld.CIT(A) in deleting the addition made of the amount disallowed u/s.14A of the Act while computing the Book Profit/Income u/s.115JB of the Act.

18. The Ld.DR relied upon the order of the Assessing Officer.

19. On the contrary, Ld.AR relied upon the decision of the Ld.CIT(A) as well as the written submissions filed before the Ld.CIT(A) which is contained in Paragraph No.5.1 of the order of the Ld.CIT(A) which is reproduced hereunder:

"5.1 During the course of appellate proceedings, the AR of the appellant has made the written submission and it will be appropriate to reproduce below the relevant part of the submission:

"As stated above, the learned A.O. has made .adjustment to the book profit on account of disallowance of expenditure of aggregate amount of Rs.3,04,78,534 made in the reassessment order. It is submitted that as per explanation 1 (f) of section 115JB only such expenditure, which are specifically relatable to the income to which section 10 applies are to be added back in the computation of section 115JB and no adjustme.nl of notional disallowance as per section 14A is permissible. It is submitted that the disallowance it/s. 14Ais made by invoking Rule 8D of Income-tax Rules which is only notional amount worked out by the A.O. by applying formula, otherwise no specific expenditure is pointed which is actually found to have been incurred for exempt income. In this connection it is submitted that for the purpose of section 115JB the A.O. has to consider the Profit & Loss Account as prescribed under the provisions of the Companies Act, adjustment which could be made are only those which are prescribed in section 115JB. The adjustment so prescribed are following:

" Explanation [1].—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by -

(a) the amount of income-lax paid or payable, and the provision therefor; or
(b) the amounts carried to any reserves, by whatever name called [, other than a reserve specified under section 33AC]: or
(c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities or
(d) the amount" by way of provision for losses of subsidiary companies; or
(e) the amount or amounts of dividends paid or proposed ; or
(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; or]
(g) the amount of depreciation,]
(h) the amount of deferred tax and the provision therefor,
(i) the amount or amounts set aside as provision for diminution in the value of any asset,

if any amount referred to in clauses (a) to (i) is debited to the profit and loss account, and as reduced by,—]]

(i) the amount withdrawn from any reserve or provision (excluding a reserve created before the 1st day of April, 1997 otherwise than by way of a debit to the profit and loss account), if any such amount is credited to the profit and loss account:

Provided *that where this section is applicable to an assessee in any previous year, the amount withdrawn from reserves .; created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves ., or provisions (out of which the said amount was withdrawn) under this Explanation or Explanation below the second proviso to section 115JA, as the case may be; or]*

(ii) the amount of income to which any of the provisions of : 30[section 10 (other than the provisions contained in clause (38) thereof)] or section 11 or section 12 apply, if any such amount is credited to, the profit and loss account; or
[(iia) the amount of depreciation debited to the profit and loss account (excluding the depreciation on account of , revaluation of assets); or
iib) the amount withdrawn from revaluation reserve and credited to the profit and loss account, to the extent it does not exceed the amount of depreciation, on account of revaluation of assets referred to in clause.(iia); or]

(iii) the .amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.

It is submitted that as per explanation 1 (f) referred to above, only those expenditure which are specifically relatable to .income to which section 10(other than clause 38 of that section

10) or section 11 or section 12 are applicable are to be disallowed. No notional disallowance could have been made for the purpose of this section. Only those direct expenditure which are relatable to earning of income u/s. 10 (other than section 10 (38) could have been adjusted. The A.O. was, therefore, not justified in making this adjustment. This may be appreciated in view of the ITAT Delhi in the case of Goetze (India) Ltd. reported at 32 SOT 101. A copy of the said decision is attached.

In the case before the ITAT, Ahmedabad (the appellant being Gujarat State Energy Generation Ltd.) vide order dated 15-4-2011 the ITAT has approved the following decision of the CIT (Appeals) in that case:

> *"7.2 The matter has been considered. The decision of Hon'ble Supreme Court in the case of Apollo Tyres (supra) is quite unambiguous. Only such items which are specifically mentioned in the Explanation to section 115JB need to be excluded or included, as the case be, and nothing more can be brought in. All the three items listed above do not feature in the Explanation. Otherwise, the disallowance u/s. 14A would be material In computation of the normal process of income while the second item interest on investment in bonds stands already included in (he book profit. As far as to prior period expenses are concerned, there is no such mention in the explanation. The assessment order on the other hand is silent as to under which category it is being included for the matter to be further analyzed. Therefore, as the matter stands, none of the three items can be added for computation of book profit. "*

In the above 'decision the CIT(Appeals) had not approved adjustment of book profit on account of disallowance u/s. 14A in the above manner. Thus the appellant's case is squarely covered by the decision of IT AT, Mumbai and ITAT, Ahmedabad referred to above."

20. We have heard the Learned Representatives for both the parties. We have also perused the material placed on record as well as the orders passed by the revenue authorities. From the facts of the present case, we notice that in computation of section 115JB of the Act, no adjustment of notional allowance as per section 14A was permissible. Similar sort of situation have already been dealt with by the Coordinate Bench of ITAT Delhi in the case of Goetz India (32 SOT 101) in which it has been categorically held that under clause F of Explanation to section 115JA, the provisions of section 2 and sub-

section 3 of section 14A cannot be imported. Further, the Coordinate Bench of ITAT Ahmedabad in the case of Gujarat State Energy Generation Limited in ITA Nos.1777 and 2028/Ahd/2009 vide order dated 15/04/2011 has held that after considering the decision of Hon'ble Apex Court in the case of Apollo Tyres only such items which are "specifically mentioned" in Explanation to section 115JB need to be 'excluded' or 'included' and nothing more can be brought in.

20.1. Thus, after considering the decisions of the Coordinate Benches, we are also of the view that the book profit has to be computed as per the audited books of accounts maintained by the assessee and the audited results which have been approved in the AGM by the shareholders. Only those adjustments can be made to the approved book profit, which are specifically mentioned in the Income Tax Act. Thus, in our view, any "notional adjustment" in the book profit is not permissible. No new facts or circumstances have been brought before us in order to controvert or rebut the findings so recorded by the Ld.CIT(A). Therefore, we find no reason to interfere with or deviate from the findings so recorded by the Ld.CIT(A). Thus, we uphold the order of the ld.CIT(A) and ground raised by the Revenue is dismissed.

Assessee's Cross Objection No.178/Ahd/2012 (in ITA No. 1668 /Ahd/2012) for AY 2006-07

21. The Assessee has raised the following effective ground in its cross objection:

> 1. *On the facts and in the circumstances of the case, the learned CIT(A) erred in rejecting the relevant ground of appeal raised by the assessee-company before him challenging the validity of the proceedings initiated u/s.147 of the IT Act.*

22. As the appeal filed by the Revenue itself was dismissed as indicated above and the cross objection arises only as a result of that appeal, the cross objection filed by the assessee has become infructuous. Hence, the cross-objection filed by the assessee is dismissed being infructuous.

23. In the result, the appeal of the Revenue and the Cross-objection of the assessee, both are dismissed.

Order pronounced in the Court on	**05-03-2020**	**at Ahmedabad**

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Ahmedabad; Dated 05/ 03 /2020

टी.सी.नायर, व.नि.स./*T.C. NAIR, Sr. PS*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-XIV, 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