IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकरअपीलसं./ITA No.94/SRT/2020

(निर्धारणवर्ष / Assessment Years: (2014-15)

(Virtual Court Hearing)

Alidhara Textool Engineers Pvt. Ltd., Plot No.168, Udhyog Nagar Road, Udhna, Surat -394210.	**Vs.**	The PCIT-1, Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AAACD8469M**		
(Assessee)		**(Respondent)**

Assessee by : Shri Mehul Shah, CA
Revenue by : Shri Ritesh Mishra, CIT(DR)

सुनवाईकीतारीख/ Date of Hearing : 08/04/2021

घोषणाकीतारीख/Date of Pronouncement: 28/05/2021

आदेश / O R D E R

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

By way of this appeal, the assessee has challenged correctness of the order dated 24.04.2020 passed by the Learned Principal Commissioner of Income Tax - 1, Surat [in short "the ld. PCIT"] under section 263 of the Income Tax Act, 1961 (Hereinafter referred to as "the Act"). Grievances raised by the assessee are as follows.

"1. On the facts and in circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in passing the order u/s 263 by invoking Explanation 2 of Section 263 of the Act, although the assessment order passed u/s 143(3) of the I.T. Act, 1961 was neither erroneous nor prejudicial to the interest of the revenue.

2. On the facts and in circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in setting aside the assessment with the direction to frame the assessment de novo after inquiring into applicability of provision of section 14A and exemption claimed u/s10(38).

3.Even otherwise, order passed by PCIT directing the assessing officer to frame assessment de novo is not justified in law, because the order sought to be revised is subject to appeal and confirmed by CIT(A).

4.It is therefore prayed that above order passed by Pr. CIT u/s 263 may please be quashed or modified as your honours deem it proper.

5.Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal."

2. The relevant material facts, as culled out from the material on record, are as follows. The assessee before us is a Private Limited Company and engaged in the business of manufacturing of textile machinery and other parts. The assessee company filed its return of income for Assessment Year 2014-15, on 29.11.2014 declaring total income at Rs.28,65,15,430/-. Thereafter, the case of the assessee was selected for scrutiny under CASS and assessment was completed under section 143(3) r.w.s. 92CA(3) of the Income Tax Act, on 29.12.2017 wherein the disallowance of Rs.34,52,937/- was made under section 14A of the Act by applying Rule 8D of the Income Tax Rules.

3. Thereafter, Learned Principal Commissioner of Income Tax -1, Surat [in short "the ld. PCIT"] has exercised his jurisdiction under section 263 of the Income Tax Act, 1961. On perusal of Scrutiny records, it was observed by ld PCIT that while computing disallowance u/s 14A by applying formula under Rule 8D item (iii) being percent of average investment, investment in partnership firm M/s. Gokulanand Petro Fibers was not considered. The PCIT noted that assessee has received share of profit of Rs.1,68,92,427/- (being 44 per cent of total profit of the firm), which was claimed and allowed as exempted income u/s 10(2A) of the Act. Further, assessee have not received any interest on its investment in the firm (investment as on 01.04.2013 of Rs.96,58,97,818/- and as on 31.03.2014 of Rs.115,42,90,245/-). As such, only income form the firm earned by assessee was in the form of share of profit, which was exempted. In view of this, even if assessee claims that its investment in the partnership firm was not meant for earning exempt income but the dominant purpose was strategic investment, it still attracts provision of section 14A of the Act and that investment in partnership firm was required to be considered for disallowance under section 14A read with Rule 8D of the Income Tax Rules as per calculation given below:

(A)Average of investment in partnership firm M/s Gokulanand Petro Fibers: (96,58,97,818 + 115,42,90,245)/2 = Rs. 106,00,94,031/-

0.5 per cent of Rs. 106,00,94,031 =Rs. 53,00,470/-.

The ld PCIT noted that, as per section 10(38) of the Act, any income arising from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund is exempted where:- (a) the transaction of sale of such equity share or unit is entered into or after the date on which Chapter VII of the Finance (No.2) Act, 2004 comes into force; and (b) such transaction is chargeable to securities transaction tax under that chapter:
Provided that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under section 115JB.
Explanation for the purposes of this clause-
(a) "equity oriented fund" means a fund: (i) where the investible fund are invested by way of equity share in domestic companies to the extent of more than sixty-five per cent of the total proceeds of such fund; and (ii) which has been set up under a scheme of a Mutual Fund specified under clause (23D): Provided that the percentage of equity share holding of the fund shall be computed with reference to the annual average of the monthly averages of the opening and closing figures.

As such, Long Term Capital Gain (LTCG) arisen on transfer of pure liquid/date mutual funds and hybrid/balanced mutual funds having investment in equity shares of domestic companies in less than 65 percent is not exempted. Such, capital gain is to be taxed at the rate prescribed u/s 112 of the Act.

4. In the light of the above provisions of the Act, ld PCIT did the scrutiny of Balance-sheet, Profit and Loss Account, Computation of income and details in investment in mutual funds and noted that assessee has claimed exempt income of Rs.93,96,281/- being LTCG on sale of mutual funds. The same was allowed by the assessing officer, without having examined, while passing of assessment order u/s 143(3) r.w.s. 92CA(3) of the Act, dated 29.12.2017. Further, on perusal of the investment details of mutual funds, it was noticed that assessee had investment in liquid mutual funds of Reliance Mutual Fund and Franklin Templeton India

Mutual Fund. As these were not equity oriented mutual funds, Long Term Capital Gain(LTCG) from such funds are not exempted u/s 10(38) of the Act. It was to be taxed u/s 112 of the Act. Thus, ld PCIT noticed that there is underassessment of income to the extent of Rs.53,00,470/-, under section 14A of the Act read with Rule 8D of the I.T. Rules and exemption claimed u/s 10(38) of the Act, to the tune of Rs.93,96,281/- which was left to be examined by the AO during the course of assessment proceedings. In view of the above facts and provisions of law, the assessment order passed u/s 143(3) r.w.s. 92CA(3) of the Act for A.Y. 2014-15 is considered erroneous and prejudicial to the interest of the Revenue.

5. On verification of the case record, it was noticed by ld PCIT that exemption claimed u/s 10(38) of the Act and allowed by the AO without making necessary enquiry and verifying the facts whether conditions for availing exemption u/s 10(38) of the Act are fulfilled or not. The AO did not make disallowance u/s 14A r.w. Rule 8D of the IT. Rules, on investment made with firm M/s Gokulanand Petro Fibers. On consideration of these irregularities to the extent of points discussed above make the assessment order passed u/s 143(3) r.w.s. 92CA(3) of the Act dated 29.12.2017 is erroneous and prejudicial to the interest of Revenue, therefore ld PCIT issued show cause notice dated 25.02.2020 to the assessee company.

6. In response to the aforesaid show cause notice, the assessee company had filed written submission, before the ld PCIT, vide letter dated 03.03.2020, which is reproduced below:

> *"In your above notice, your honour has raised following two issues which cause underassessment of income and were left to be examined by assessing officer and hence requires revision u/s 263:*
>
> *(i) Disallowance of Rs.53,00,470/- u/s. 14A r.w. rule 8D of the Act.*
> *(ii) Exemption claimed u/s 10(38) amounting to Rs.93,96,261/-.*
>
> *Proposed disallowance of Rs.53,00,470/- u/s 14A r.w rule 8D*
> *4. At para 2 of the notice dated 25.02.2020 your honour has observed that while computing the disallowance u/s 14A by applying formula under rule 8D item (iii) being percentage of average investment, investment in partnership firm M/s*

Gokulanand Petro Fibres was not considered by the assessing officer, which results into under assessment of income amounting to Rs.53,00,470/-. In this regard following submissions are made.

4.1 During the course of assessment proceedings, assessing officer observed that assessee earned exempt income in form of dividend income and income from mutual fund, therefore assessing officer has made disallowance of Rs. 34,52,937/- u/s 14A r.w rule 8D. Thereafter the ld. CIT(A) vide order dated 24.04.2019 deleted the entire disallowance following the decision of Apex Court in case of PCIT vs. Sintex Industries Ltd. [93 taxmann.com 24] wherein it was held that when the assessee is having interest free own funds which is more than the average investment from whom exempt income is to be received, no disallowance is to be made u/s 14A r.w.r 8D. In the said case, the Assessing Officer had made a disallowance of Rs.90.97 lakhs which included amount under Rule 8D(iii) also, however the total addition was deleted by Tribunal and confirmed by Gujarat High Court in [82 taxmann.com 428] (Guj). The revenue had filed further appeal before Supreme Court and the SLP was dismissed vide order dated 23.03.2018 [93 taxmann.com 24].

4.2 The Ld. CIT(A) while giving relief to the assessee held that there is no interest bearing borrowed funds and total of own funds is more than 200 Crores as against average investment of 75 Crore and hence according to the decision of Supreme Court (cited supra), Section 14A was not applicable and hence there was no question of making disallowance u/r 8D. The copy of the order of CIT(A) is filed herewith.

4.3 It is submitted that in the present case, the assessee is having an opening and closing interest free owned funds (Share Capital and Reserves) of Rs.200,82,99,645/- and Rs.223,76,10,828/-respectively and the average of it comes to Rs.212,29,55,236/- which is more than the average investment taken by Assessing Officer of Rs.75,12,44,464/- and hence no disallowance under Section 14A r.w.r 8D is called for. Even if the investment by assessee company in partnership firm M/s Gokulanand Petro Fibers is considered average investment would come to Rs.181,13,38,495/- [Rs.106,00,94,031 being investment in Gokulanand Petro Fibers + Rs.75,12,44,464/- being taken by assessing officer] which is less than the average net owned funds of the assessee amounting to Rs.212,29,55,236/- . In this regard, reliance is placed on the decision of Honorable Gujarat High court in case of PCIT vs. Sintex Industries Ltd. During assessment proceedings as well as Paper Book filed before Id CIT(A), the assessee filed complete details of Investments and the computation of income contained the details of investment on which the assessee claimed exemption u/s 10(38). In fact, the Ld CIT(A) also appraised the orders of predecessor CIT(A) who restricted the addition to 2% or 5% of exempted dividend income. In fact the addition u/s 14A can never be made by the Assessing Officer without considering the exempt income and hence once Assessing officer has made addition u/s 14A r.w.r 8D after going through the computation of income, it is very obvious that he has considered the exemption claimed u/s 10(38) which cannot be considered as erroneous. The bare reading of provisions of S. 263 makes it clear that the prerequisite to exercise of jurisdiction by the PCIT suo moto under it is that the order of the AO is erroneous insofar as it is prejudicial to the interests of the

Revenue. It is submitted that the PCIT has to be satisfied of twin conditions, namely, (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent i.e. if the order of the AO is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue, recourse cannot be had to s.263(1). In the present case, considering the facts of the case it can be seen that the assessment order is neither prejudicial to the interest of Revenue nor erroneous. Both the conditions are required to be satisfied cumulatively. Reliance is placed on the decision of Honourable Supreme Court in case of Malabar Industrial Co. Ltd. v/s. CIT - 243 ITR 83 (SC) wherein it was held that "The CIT has to be satisfied of twin conditions, namely (i) the order of the AO sought to be revised is erroneous and (ii) it is prejudicial to the interest of the Revenue. If one of them is absent - if the order of the ITO is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue - recourse cannot be had to S. 263(1).

4.4 Further it is submitted that the present case of the assessee stands covered by the doctrine of merger because in the original assessment proceedings assessing officer, as discussed above has made the disallowance of Rs.34,52,937/- u/s 14A r.w rule 8D. Thereafter the Ld CIT(A), vide order dated 24.04.2019, after considering each and every contention of the assessee, came to the conclusion that there is no rational behind making disallowance u/s 14A r.w rule 8D and in view of decision of Honourable Gujarat High Court in case of PCIT vs Sintex Industries Ltd. (cited supra) and decision of ITAT Ahmedabad in assessee's own case for AY 2008-09 deleted the entire disallowance u/s 14A . Reference is made to Clause (c) of Explanation to Sec 263(1) which is reproduced below:

"(c) where any order referred to in this sub-section and passed by the AO had been the subject-matter of any appeal filed on or before or after the 1st June, 1988, the powers of the CIT under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal."

4.5 Hence it is submitted that Clause (c) of Explanation under Sec 263(1) is clearly attracted in this case and particularly when the subject matter in question "having been considered and decided" in appeal, the revisional jurisdiction under Sec 263(1) could not be invoked in this case as per the doctrine of merger. Here in this case the assessing officer has made disallowance of Rs.34,52,937/- u/s 14A r.w rule 8D . Further your honour propose to disallow the sum of Rs. 53,00,470/- by stating that assessing officer has not considered the investment in Gokulanand Petro Fibres while computing disallowance u/s 14A r.w rule 8D. So the total disallowance now stands at Rs. 87,53,407/- as against original disallowance of Rs.34,52,937/-. The disallowance was considered by CIT(A) at the time of original assessment proceedings and your honour wants to disturb the same again in the revisional proceedings. So this is the case of partial merger of original assessment order with the order of CIT(A). Even in the case of the partial merger, the order u/s 263 cannot be passed as held by the decision of Gujarat High Court in case of CIT v/s. Shashi Theatre Pvt. Ltd. - 248 ITR 126 (Guj.)(HC). In the said case, the assessee claimed investment allowance under S.32A of Rs.5,35,424/- on certain fixed assets. However, the assessing officer allowed the claim only in respect of certain fixed assets. On appeal before the CIT(A), the

issue was decided in favour of the assessee. Thereafter, the Commissioner invoked the provision of section 263 on the ground that the action of the assessing officer in granting deduction u/s 32A on certain fixed assets was erroneous. The Honourable Gujarat HC held that "once the Commissioner (Appeals) allowed the assessee's claim on certain fixed assets, the order of the Assessing Officer stood merged with that of the Commissioner (Appeals) and hence, no part of the order of the Assessing Officer could have been revised by the Commissioner under S. 263."

4.6 Further, the reliance is placed upon following decisions for the doctrine of merger:

- *RankaJewellers v. Addl. CIT [2010] 328 ITR 148 (Bom.) (HC).*
- *CIT v. Ram Kishore Raj Kishore [2004] 135 Taxman 511 (All.) (HC) :*
- *Aerens Infrastructure & Technology Ltd. v. CIT [2004] 271 ITR 15 (Delhi)(HC).*
- *CIT v. RatilalBacharilal& Sons [2006] 282 ITR 457 (Bom.)(HC)*
- *PCIT vs. Oil India Ltd. [103 taxmann.com] (Gun. HC)*
- *Renuka Philip vs ITO, [101 taxmann.com 119), (Madras HC)*
- *CIT vs. Slum Rehabilitation Authority [107 taxmann.com 18] (Bombay)*
- *CIT vs. Vam Resorts & Hotels [111 taxmann.com 62] (Allahabad).*

5. In view of the above, your honour is requested not to draw any adverse inference."

7. However, the ld. PCIT has rejected the contention of the assessee and held that assessee has received share of profit of Rs. 1,68,92,427/- (being assessee share of 44 percent of total profit of the firm) which was claimed and allowed as exempted income u/s 10(2A) of the Act. Further, the assessee company has not received any interest on its investment in the firm (investment as on 01.04.2013 of Rs.96,58,97,818/- and as on 31.03.2014 of Rs.115,42,90,245/-). As such, only income from the firm by assessee was in the form of share of profit which was exempted. The Ld. PCIT noted that even if Assessee Company claims that its investment in the partnership firm was not meant for earning exempt income but the dominant purpose was strategic investment, it still attracts provision of section 14A of the Act. As such investment in partnership firm was required to be considered for disallowance under section 14A read with rule 8D of the Rules. The Ld. PCIT also noticed that assessee has not raised any objection against the wrong claim of exemption u/s. 10(38) of the Act amounting to Rs.93,36,281/-. Ongoing through the investment details, it was noticed that the assessee has had investment in liquid mutual funds and such funds are not exempted under section 10(38) of the Act. Therefore, it was to be taxed under section 112 of the Income Tax Act,

1961. The said issue was remained untouched during the assessment proceeding. In the light of the above discussions, the assessment order in the case of M/s. Alidhara Textool Engineers Pvt. Ltd. passed u/s. 143(3) r.w.s. 92CA(3)of the Act for A.Y. 2014-15 on 29.12.2017 was found by ld PCIT to be erroneous and prejudicial to the interest of revenue, therefore Ld. PCIT directed the AO to re-compute and determine the correct total income of the assessee as per law.

8. Aggrieved by the order of ld. PCIT, the assessee is in appeal before us.

9. Shri, Mehul Shah, Learned Counsel for the assessee begins by pointing out that Assessing Officer has thoroughly examined the exempt income of the assessee. The ld Counsel took us through assessment order framed by the assessing officer under section 143(3) r.w.s. 92CA(3) of the Act, dated 29.12.2017, wherein, (vide para No. 3 to 3.6 of the assessment order), the assessing officer discussed and investigated the issue relating to disallowance under section 14A read with rule 8D of the Income Tax Rules. The assessee has submitted the required details before the Assessing Officer, pertaining to exempt income and assessing officer having examined the same, took possible view, therefore ld. PCIT should not have invoked his jurisdiction under section 263 of the Act. The Ld. Counsel pointed out that assessee received Rs.1,13,54,471/-, exempt income by way of dividend. The assessee also received exempt income under section 10(38) at Rs.93,96,281/-, which was alleged by the ld PCIT stating in his order under section 263 that the said income of Rs.93,96,281/- was left to be examined by the assessing officer during the course of assessment proceedings and that is why the ld PCIT held that order passed by the assessing officer under section 143(3) r.w.s.92CA(3) of the Act is erroneous and prejudicial to the interest of revenue. In this regard, Ld. Counsel pointed out that Assessing Officer, after making adequate enquiry, has framed the assessment order, therefore, order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of the Revenue.

10. The ld Counsel also stated that when the assessee, being aggrieved by the assessment order framed by the assessing officer under section 143(3) r.w.s.

92CA(3) of the Act, dated 29.12.2017, for assessment year 2014-15, carried the matter in appeal before the ld CIT(A), then ld CIT(A) deleted the disallowance under section 14A r.w.r.8D of the Rules, therefore principle of doctrine of merger has applied in the assessee's case, and ld. PCIT need not to exercise the jurisdiction under section 263 of the Act in respect of the same matter(disallowance under section 14A r.w.r.8D of the Rules), which was adjudicated and deleted by the ld. Commissioner of Income Tax (Appeals) .

11. On the other hand, Shri Ritesh Mishra, the Learned Departmental Representative (in short "the ld. DR") for the Revenue has relied on the order of the ld. PCIT, particularly para nos. 4 to 6 of the order of ld. PCIT, which we have already narrated above, therefore the same is not being repeated for the sake of brevity.

12. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the ld. PCIT and other material brought on record. First, we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Pr. CIT to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedents laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii)Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v)

if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*'' has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **"unless the view taken by the Assessing Officer is unsustainable in law".**

13. Taking note of the aforesaid dictum of law laid down by the Hon'ble Apex Court, let us examine in assessee`s case under consideration the assessment order framed by the assessing officer under section 143(3) r.w.s. 92CA(3) of the Act, dated 29.12.2017, is erroneous and prejudicial to the interest of the Revenue. We note that ld PCIT has exercised his jurisdiction under section 263 of the Act on account disallowance under section 14A r.w.r.8D of the Rules, being following two issues:

(i) Disallowance of Rs.53,00,470/- u/s 14A r.w. rule 8D of the Act.

(ii) Exemption claimed u/s 10(38) amounting to Rs.93,96,261/-.

We observe that above noted both issues relate to disallowance under section 14A r.w.r.8D of the Rules, therefore, we will adjudicate them together. Now, first of all, we shall examine whether these issues were examined by the assessing officer while framing original assessment order under section 143(3) r.w.s. 92CA(3) of the Act, dated 29.12.2017. We have gone through the said original assessment

order under section 143(3) r.w.s. 92CA(3) of the Act, and noted that assessee has submitted the relevant documents and details before the assessing officer, in respect of disallowance under section 14A r.w.r.8D and assessing officer having applied his mind, has adjudicated the issue, vide para nos. 3 to 3.6 of the assessment order under section 143(3) r.w.s. 92CA(3) of the Act, which are reproduced below:

"3.1 On perusal of case records, it is seen that the assesses has earned dividend from shares amounting to Rs.80.06.230/- and dividend on mutual funds of Rs.33,48,241/-total amounting to Rs.1,13,54,471/- during the year under consideration. However, expenditure in relation to such income has been shown only Rs.3,03,285/-, which is very low.

3.2 Practically it is not possible to earn any income (exempt or non-exempt) without incurring certain expenditure. Further. Sub-Section (I) of Section 14A of the I.T. Act dearly envisaged that for the purpose of computing the total income, no deduction shall be allowed rn respect of expenditure incurred by the assesses in relating to income which does not form part of total Income. As in the instant case, the assessee has shown only expenditure amounting to Rs.3,03,285/- related to such exempt income and also not proved nexus of investment made out of own fund, expenditure attributable to exempted income is required to be ascertained on proportionate basis. Sub-Section (3) of Section 14A read with Rule 8D of the 1,T, Rule, 1962 inserted by the finance Act, 2006 gives- a very scientific method for determining the expenditure related to exempt income, Sub-Section (3) of Section 14A provides that in a case where an assessee claims that no expenditure ha been incurred by him in relation to income which does not form part of total Income, the Assessing Officer snail determine the amount of expenditure incurred in relation to such income which does not form part of total income in accordance with the method prescribed under Rule 80 of the IT, Rules, 1962. Since the exempt income shown by the assesses does' not form part of total income and the assesses has claimed that expenditure* ***of*** *Rs.3,03,235/- has been incurred in relation to such income just to inflate its expenditure and reduce tax liability to that extent, the undersigned has no option but to determine the expenditure In relation to the exempt income shown by the assessee In accordance with the method prescribed under Rule 8D of the IT Rules, Accordingly, the same is determined as under,*

3.3 The aggregate of the following shall be deemed to be the expenditure in relation to the exempted income shown by the assessee during the year under consideration.

[i]	*Amount of expenditure directly related to exempted dividend income and long-term capital gain shown.*	*Nil*
[ii]	*A x B / C*	*0 x 75,12,44,464 / 2,47,62,80,788 = Nil.*
	(A) Amount of expenditure by way interest other than the amount of interest included in clause (i) incurred during the year.	*Nil*
	(B) Average value of investment, income	*(77,19,84,224 + 73,05,04,703)*

	from which does not form part of total income, as appearing in the balance sheet of the assesses, on the first day and last day of the previous year	*=Rs.75,12,44,464/-*
	(C) Average of total assets as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year.	*(2,4345,25,405 + 2,51,80,36,170) =Rs.2,47,62,80,788*
		=1/2% of Rs.75,12,44,464/- Rs.37,56,222/-

3.3 The aggregate of the above amounts comes to Rs.37,56,222/-. As stated above, the assesses has shown only expenditure of in relation to the exempt income of Rs.3,03,285/- shown during the year under consideration, it is pertinent to mention here that the same fact was brought to the notice of Authorised Representative Shri Jaydeap Doshi as to why the disallowance made as per computation Is lessor than the scientific method as prescribed ***by*** *Section 14A read with Rule SD.*

3.4 The AR vide his submission dated nil submitted in the undersigned's office on 18.12.2017 mentioned that a suo moto disallowance on a self arrived formula of taking 5% of exempt income has been made, which ***unfortunately*** *had no documentary proof to substantiate its claim. Although, this reply was In its self sufficient to complete the proceedings, however, in the interest of natural justice and providing adequate opportunity before taking any adverse view against the assessee, the assesses was requested to order to show cause as to why difference of expenditure of comes to Rs.34.52.937/-* ***[Rs.37,56,222*** *- Rs.3,03,285] determined* ***as*** *above in accordance with the provisions Sub-Section (3) of Section 14A of the I.T. Act, be not disallowed and added to the total for the year under consideration as the assessee has totally failed to justify the low expenses claimed in related to exempt income. The assessee was requested to furnish its reply in response to said show cause notice on or before 26.12.2017. However, the assesses company has not submitted any reply in response to the said shown cause notice. Therefore, it is presumed that the assessee has nothing to say in this regard.*

3.5 On the basis of facts and findings, the undersigned has no option but to make disallowance u/s.14A r.w Rule 8D in the case of assessee company. Therefore, I make disallowance u/s.14A r.w. Rule 8D amounting to Rs.34,52,937/- and add it to the total income of the assessee company.

3.6 Penalty proceedings u/s. 271(1)(c) for furnishing inaccurate particulars, are also being initiated in assessee's case separately."

14. It is abundantly clear from the above assessment order passed by the assessing officer under 143(3) r.w.s. 92CA(3) of the Act, that in response to question asked by the assessing officer during the assessment stage, the assessee submitted details and documents before the assessing officer, in respect of long term capital gain on sale of mutual fund Rs. 93,96,281/- and in respect of long term capital gain from

liquid mutual fund Rs. 53,00,470/-. The assessing officer had examined both these issues during the assessment proceedings and took a possible view. Not only that the assessing officer made the disallowance under section 14A r.w.r.8D, at Rs.34,52,937/-, which clearly shows that assessing officer has examined both these issues in depth and applied his mind. Therefore, those issues which have been examined in depth with due application of mind by assessing officer, should not be subject matter of revision proceedings under section 263 of the Act.

15. It is also to be noted that when assessee became aggrieved by the disallowance, made by the assessing officer, under section 14A r.w.r.8D of the Rules, at Rs.34,52,937/-, the assessee carried the matter in appeal before the ld CIT(A), the ld CIT(A) has deleted the said addition of Rs.34,52,937/-, observing as follows:

"7.0 DISCUSSION AND DECISION OF THE APPELLATE AUTHORITY

7.1 I have perused the assessment order & submission of appellant/AR. Only issue for adjudication is disallowances u/s. 14A calculated as per clause (iii) of Rule 8D. The Ld. AO has made disallowances of Rs.34,52,937/- u/s 14A being 0.5% of average investment. The AR stated that there is not borrowed funds by the assessee and interest expense is also nil. The assessee on its own volition as made disallowance of Rs.3,03,285/- u/s 14A @ 3% of exempt income being dividend from shares and mutual funds.

***7.2** The AR submitted the issue has been decided by my Ld. Predecessor in A.Y. 2012-13, wherein disallowances is restricted to 5 % of dividend income vide order dated 29.04.2016. It is seen that there is no rationale given for adopting this 5% for disallowances. However, the Hon'ble ITAT in assessee's own case for A.Y. 2008-09 has deleted the entire disallowances with following finding:*

"In our view, Rule 8D comes into operation where the Assessing officer is not satisfied in relation to income which does not form part of the total income under this Act and thereafter if the Assessing Officer is unable to determine the amount of such expenditure incurred in relation to the income which does not form part of the total income then he may resort to the method with prescribed in Rule 8D of the IT Rules, 1962. In the case of assessee no such satisfaction has been recorded by the Assessing Officer about the incorrectness of the claim of assessee towards expenditure incurred for earning exempt income. In the case of assessee the exempt income are of three types out of which two relate to dividend income from mutual funds and equity shares and another in relation thereof profit in relation to partnership firm and Assessing Officer has calculated a sum of Rs.8,84,542/- as the amount of disallowance u/s 14A of the Act by following the method prescribed under Rule 8D of the IT Rules.

We find that Id. Assessing Officer completely ignored the facts appearing in the computation of total income wherein assessee has added back security transactions tax of

Rs.69,482/- and management fees of Rs. 11,09,173/- to the net profit and loss account. As per submissions made by Ld. AR it has been mentioned that dividend income of Rs.4.29/- Crore is derived from mutual funds and assessee has paid a management fees of Rs.11,01,973/- as a portfolio management fees to the portfolio manager who has taken care of the dealing of the assessee in regard to investment for various mutual funds including switching but not switching out from one fund to another in order to optimum benefit to the assessee. In the given situation where the assessee has himself added a sum of Rs.11,71,455/- to its total income in relation to expenditure incurred to earning exempt income then there remains no reason to sustain the addition of Rs.8,84,542/- as made by Ld. Assessing Officer under the provisions of section 14A of the Act. We therefore, delete the same and allow the appeal of the assessee".

Since the facts continue to be same, the order of ITAT for earlier year applicable to instant assessment year.

7.3 The AR further, brought on record decisions of Hon'ble High Court of Gujarat in case of PCIT Vs. Sintex Industries Ltd 82 Taxmann.com 428, wherein it was held that, where assesse is having interest free own surplus funds which is more than average investment there was no question of making disallowances of expenditure in respect of interest and administrative expenses under section 14A, therefore, there was no question of estimation of expenditure in respect of interest & administrative expenses under rule 8D of the Rules. The SLP filed by I.T. Department was dismissed vide order dtd 23.03.2018, 93 Taxmann.com24. In assessee's case there is no interest bearing borrowed funds and the total of own funds is more than Rs.200 Crores as against the average investment of Rs. 75Cores. The above decision of Jurisdictional High court & Hon'ble Supreme Court is squarely applicable and binding. Hence, respectfully following the decisions of Hon'ble Gujarat HC & Hon'ble SC in Sintex Industries (Supra) & also the decision of Hon'ble ITAT Ahmedabad in assessee's own case for A.Y.2008-09, the disallowances made u/s 14A is hereby deleted."

16. Thus, it is clear that on appeal by the assessee against the order of assessing officer, the ld CIT(A) deleted the addition of Rs. 34,52,937/-.We note that assessee, on its own, *suo moto,* made a disallowance of Rs.3,03,285/- under section 14A @ 3% of exempt income being dividend from shares and mutual funds. The Assessing Officer, in his order under section 143(3) r.w.s.92CA(3) of the Act, recomputed the disallowance under section 14A by invoking provisions of Rule 8D to Rs. 34,52,937/-. On appeal, the Ld. CIT (A) deleted this disallowance of Rs. 34,52,937/-. Hence, the said disallowance under section 14A r.w.r.8D, cannot be subject matter of revision proceedings under section 263 of the Act. Therefore, we are of the view, that based on the assessee`s facts, as narrated above, the doctrine of merger will apply. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative order governing the same subject-matter at a given point of time.

The Ld. PCIT,(on the said disallowance under section 14A r.w.r.8D) while exercising power under section 263 of the Act passed order on 24.04.2020, which is after the appellate order made by the ld Commissioner of Income Tax (Appeals) on 24.04.2019. The ld PCIT could not have invoked power under section 263 of the Act as the assessment order passed by the assessing officer under section 143(3) r.w.s.92CA(3) of the Act, had merged with the order of the ld Commissioner of Income Tax (Appeals). If the department was aggrieved by the order of the ld CIT(Appeals) deleting the disallowance under section 14A r.w.r 8D, the proper recourse would have been to approach the higher forum (Tribunal).

In this respect reliance can be placed on the decision of the Coordinate Bench of ITAT, Delhi in the case of Oscar Investments Ltd. (in ITA No.2823/DEL/2016 for AY.2011-12) order dated 04.11.2019, wherein it was held as follows:

"5.0 We have heard the rival submissions and have also perused the material available on record. The undisputed facts are that for the year under consideration, dividend income of Rs.1,10,58,833/- was earned by the assessee which was claimed as exempt and not liable to tax. In the return of income, the assessee had, suo moto made a disallowance u/s 14A of the Act to the tune of Rs.2.13 crores. The AO, in his order u/s 143(3), recomputed the disallowance u/s 14A by invoking provisions of Rule 8D to Rs.4,05,51,458/-. The Ld. CIT (A) deleted this disallowance and the appeal of the department against the order of the Ld. CIT (A) before this Tribunal was also dismissed vide order dated 9th February, 2017 in ITA No. 4088/Del/2014. It is our considered view that on the factual matrix of the case, the doctrine of merger will apply. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative order governing the same subject-matter at a given point of time. In the case of CIT vs. Narpat Singh Malkhan Singh (1981) 128 ITR 77 (MP), the Hon'ble Madhya Pradesh High Court has very illustratively considered the doctrine of merger. In this case, the Income Tax Officer (ITO) had completed the assessment u/s 143(3) of the Act against which the assessee preferred an appeal before the AAC confining his objections to certain disallowances of expenses by the ITO. The AAC partly allowed the assessee's appeal resulting in partial reduction in the total income of the assessee. The Ld. CIT, thereafter, served a notice u/s 263 of the Act on the assessee to show cause why the assessment order be not set aside as it was erroneous and prejudicial to the interest of the Revenue in as much as the AO had not charged interest u/s 217 (1A) of the Act and had also not initiated penalty proceedings u/s 273(c) of the Act. The assessee's objection to initiation of revisionary proceedings on the ground of doctrine of merger was rejected by the Ld. CIT. The Ld. CIT did not find any defect in any particular item decided by the ITO which was not the subject matter of appeal before the AAC but only in the omission to charge interest u/s 217(1A) and initiate penalty proceedings u/s 273(c). The assessee appealed successfully before the Tribunal. On department's appeal, the question before the Hon'ble Madhya Pradesh High Court was whether the Ld. CIT, while exercising power u/s 263, could set aside the assessment order after the appellate order was made by the AAC. The Division Bench took the view that the Ld. CIT could not have invoked

power u/s 263 as the ITO's order had merged with the order of the AAC. In the present appeal before us, going by the doctrine of merger, since the Ld. CIT (A) had already decided the issue in favour of the assessee, the Ld. Pr. CIT could not have exercised his revisionary powers u/s 263 of the Act. If the department was aggrieved by the order of the Tribunal deleting the disallowance, proper recourse would have been to approach the higher forum. Therefore, we are of the considered opinion that the jurisdiction u/s 263 of the Act could not have been invoked by the Pr. CIT in this case. Accordingly we quash the assumption of jurisdiction u/s 263 of the Act by the Ld. Pr. CIT. We have not examined other merits of the matter."

17. From the above facts of the assessee`s case we note that ld PCIT, under 263 revision proceedings directed the assessing officer to recompute the disallowance under section 14A r.w.r.8D, although in the meantime the order of assessment passed by the assessing officer under section 143(3) r.w.s. 92CA(3) of the Act, had been the subject-matter of appeal before the Commissioner of Income Tax (Appeals). Therefore, order passed by the assessing officer has merged with the Commissioner of Income Tax (Appeals), hence ld Principal Commissioner of Income Tax (Ld. PCIT) does not have power under section 263 to exercise his jurisdiction on the issue of "disallowance under section 14A r.w.r.8D", since the said issue has been already adjudicated by the Commissioner of Income Tax (Appeals). At this juncture, the provision contained in clause (c) of Explanation 1 to section 263(1) of the Act deserves to be noted:

> *"(c) Where any order referred to in this sub-section and passed by the Assessing Officer had been the subject-matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal."*

The above provision has been inserted by amendment by the Finance Act, 1989 with effect from 1-6-1988. We note that the subject-matter in question "Disallowance under section 14A r.w.r.8D" ' has been considered and decided by the Commissioner of Income Tax (Appeals), therefore, now ld PCIT could not invoke the revisional jurisdiction under section 263(1) of Act. The power of revision conferred on the Commissioner by section 263 to call for and examine then record of any proceeding under the Act and to interfere if he considers that any order passed therein by the assessing officer is erroneous insofar as it is prejudicial to the interest of the revenue, does not empower the Commissioner to

interfere with any order passed by the Commissioner of Income Tax (Appeals). Therefore, if any order of the assessing officer had merged in the order passed in appeal by the Commissioner of Income Tax (Appeals), the same cannot be set aside under section 263, in revision, by the Principal Commissioner of Income Tax. For the reasons given above, we are of the view that order of the Principal Commissioner of Income Tax passed under section 263 is without jurisdiction and hence, invalid in law, therefore, we quash the order dated 24.04.2020 passed by the Principal Commissioner of Income Tax.

18. In the result, the appeal of the assessee is allowed.

Order is pronounced on 28/05/2021 by placing result on Notice Board.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

सूरत /Surat
दिनांक/ Date: 28/05/2021
SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS
ITAT, Surat