

[Before Hon'ble Shri M.Balaganesh, AM & Hon'ble Shri S.S.Viswanethra Ravi, JM]

Assessment Year : 2008-09

I.T.A Nos. 1981&1982/Kol/2013

Assessment Years : 2008-09 & 2009-10

M/s West Bengal Electronics Industry Development Corp. Ltd. -vs- DCIT, Circle-1, Kolkata
[PAN: AAACW 2411 Q]

(Appellant) (Respondent)

Shri S. Dasgupta, Addl. CIT DR

Shri P. Jhunjhunwala, Advocate

Date of Pronouncement : 24.08.2018

Per M.Balaganesh, AM

1. These appeals by the Revenue as well as assessee arise out of the common orders of the Learned Commissioner of Income Tax(Appeals)-XXIV, Kolkata [in short the ld CIT(A)] in Appeal Nos.1211&1212/CIT(A)-XXIV/Cir-1/12-13 dated 28.03.2013

against the separate order passed by the DCIT, Circle-1, Kolkata [in short the Id AO] under section 143(3) read with Section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 30.12.2010 & 26.12.2011 respectively for the Assessment Years 2008-09 & 2009-10. Since identical facts are involved in both the appeals, they are taken up together and disposed off by this common order for the sake of convenience.

2. DISALLOWANCE OF INVESTMENTS WRITTEN OFF

Ground No. 1 for Asst Year 2008-09 in Assessee Appeal

Ground No. 1 for Asst Year 2009-10 in Assessee Appeal

The facts of Asst Year 2008-09 are taken up for adjudication and the decision rendered thereon with regard to this issue would apply with equal force for Asst Year 2009-10 also except with variance in figures.

2.1. The brief facts of this issue are that the assessee is a Government Company. The assessee is the nodal agency of Government of West Bengal for development of Information Technology (IT) and Information Technology Enabled Services (ITES) sectors in the State of West Bengal. The assessee had filed its return of income for the Asst Year 2008-09 on 29.9.2008 declaring total income of Rs Nil and thereafter filed a revised return u/s 139(5) of the Act on 31.3.2010 declaring total income of Rs 2,14,06,844/-. The assessee company was formed with the main object to develop electronic and allied industry through establishment of manufacturing, research and development activities and such other means as will be conducive to the growth of electronics and allied technology.

In the course of fulfilling the above objectives, the assessee company made investments in various subsidiary companies and allied companies from time to time for the purpose of its business.

2.2. The Id AO observed that the assessee, during the Asst Year 2008-09, had written off the following investments made in the following companies :-

Webel Electro Optics Ltd	69,02,500
Webel Consumer Electronics Ltd	28,31,940
Total Investments Written Off	97,34,440

The break up of the same is as under:-

Equity shares of Webel Electro Optics Ltd of Rs 10 each Fully paid up	1,82,73,000
Less: Provision already made in the books written back	1,13,70,500

	69,02,500
Shares of Webel Consumers Electronics Ltd of Rs 10 each Fully paid up and 15% Cumulative Preference Shares of Rs 100 each fully paid up	28,31,940

	97,34,440

2.3. During the course of assessment proceedings, it was submitted that the shares of the aforesaid subsidiaries were taken over with a view to have joint venture projects with renowned industrial houses for promotion of IT & ITES industry in West Bengal. Thereafter, these investments were written off considering the net worth of the companies based on the latest audited financial statements.

2.4. The Id AO sought to disallow the claim of write off of investments made in the aforesaid subsidiaries on the following grounds:-

- a) Assessee is not engaged in money lending / financing business.
- b) Financing the subsidiaries is not the business of the assessee.

c) Advances were given to the subsidiaries for setting up new business as admitted in the explanation.

Accordingly the Id AO disallowed the claim of write off of investments in the sum of Rs 97,34,440/- for the Asst Year 2008-09 in the assessment. This action of the Id AO was upheld by the Id CITA. Aggrieved, the assessee is in appeal before us.

2.5. The Id AR stated that 3% of the shares of the assessee company were held by West Bengal Industrial Development Corporation and 97% were held by the Government of West Bengal. The Id AR stated that the assessee company is engaged in the business of promoting the growth of electronics and allied sectors in the State of West Bengal by making investments in subsidiaries, assisted sectors and joint ventures. During the year under consideration, the assessee acquired the shares of the aforementioned companies from the outsiders at different prices and sought to value the same at Re 1 in its balance sheet under the head 'Investments'. The difference between the purchase price and Re 1 was sought to be written off due to permanent reduction in the value of investments as there is no scope for recovery of these investments from those companies in view of erosion of their net worth. He further stated that these further investments were made during the year in those companies only to make those subsidiaries as wholly owned subsidiaries of the assessee company. This was done in order to have absolute control over those companies to proceed to enter into joint venture projects with renowned industrial houses for promotion of IT and ITES industry in the State of West Bengal. The Id AR pleaded that the very purpose of formation of these subsidiaries itself were for the purpose of the business of the assessee company as its main endeavour is to promote the growth of electronics industry in the State of West Bengal. Hence it was argued that the lending of monies and investment in shares in these subsidiaries were only meant for the purpose of business and if those investments were not realizable and due to valuation difference in the same between the purchase price and realizable value,

the difference in amounts thereon which were written off, would only be a trading loss to the assessee allowable u/s 28 of the Act. He placed reliance on the decision of Hon'ble Madras High Court in the case of CIT vs Tamil Nadu Industrial Investment Corporation Ltd (TIIC) reported in (2017) 88 taxmann.com 528 (Mad HC) dated 15.2.2017.

2.6. On the contrary, the Id DR argued that the assessee had made certain investments in subsidiaries which were merely pure and simple investments and had written off the same in its books. This write off is only a capital loss in the hands of the assessee company and hence cannot be allowed as deduction. He argued that assessee is not an investment company. The reliance placed by the Id AR on the decision of Hon'ble Madras High Court is not applicable in as much as the assessee in that case was an Industrial Investment Company and has got a broader object of promoting industries by way of financing . The assessee before us is not engaged in the business of financing. The assessee before us is a manufacturing company and hence every investment made in subsidiaries cannot be stretched further to have been made for the purpose of business. He further argued that the investments made by the assessee company in the aforesaid subsidiaries were not meant for survival needs of the subsidiary companies.

2.7. We have heard the rival submissions. From the objects contained in the Memorandum of Association of the assessee company, we find that the assessee company was engaged in promoting the growth of electronics, IT and ITES sectors in the State of West Bengal. The relevant clauses of the object clause in the memorandum of association are as under:-

The Clause (1) of the Memorandum of Association of the assessee company stated as follows:-

“To develop electronics and allied industry through establishment of manufacturing, research and development activities and such other means as will be conducive to the growth of electronics and allied technology.”

The Clause (46) of the Memorandum of Association of assessee company stated as follows:-

“To promote and undertake the formation of any institution or company for the purpose of acquiring all or any of the property and liabilities of the company or for any other purpose which may seem directly or indirectly calculated to benefit this company or form subsidiary company or companies. To carry on any business which may seem capable of being carried on conveniently with business or object of the company and to acquire any interest in any industry or undertaking.”

2.7.1. In fulfilling the aforesaid objectives, the assessee company had made certain investments in subsidiaries, wholly owned subsidiaries, assisted sectors and joint venture companies. Hence it could be safely concluded that the investments made thereon in equity shares and preference shares were meant for the purpose of business of the assessee company in consonance with its objects and purpose of formation of the assessee company. It is not in dispute that the subsidiaries in which the assessee had made investments had huge losses and had eroded their net worth. When there is a diminution in the value of these investments made, the assessee had resorted to value those investments in its books at Re 1 for the purpose of retaining those investments in the balance sheet and had sought to write off the valuation difference, being the difference between the purchase price and realizable value, and claim the same as business loss of the assessee. It is not in dispute that the investments made in the aforesaid subsidiaries would not fetch any realizable value to the assessee. Hence the fact of irrecoverability of the same is proved beyond doubt due to erosion of net worth. We hold that the main object of the assessee company itself is to promote the growth of electronics industry in the State of West Bengal and hence the investments made thereon are to be considered as stock in trade and connected to the business of the assessee company. Hence any loss arising on account of valuation of those investments

due to erosion of net worth of investee companies, would only have to be considered as a trading loss. This fact is directly addressed by the *Hon'ble Madras High Court in the case of CIT vs Tamil Nadu Industrial Investment Corporation Ltd (TIIC) reported in (2017) 88 taxmann.com 528 (Mad HC) dated 15.2.2017* wherein the questions raised before the Hon'ble High Court were as under:-

- 1. Whether in the facts and circumstances of the case, the Tribunal had enough material to hold and was right in holding that the loans to companies in liquidation had become bad debts and ought to be written off ?*
- 2. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the shares are the stock in trade of the assessee company ?*
- 3. Whether in the facts and circumstances of the case, the Tribunal was right in allowing the re-valuation of only loss making shares at market value ?*

In that case, TIIC Ltd was a State Government Undertaking and had made certain investment in shares of industrial companies and lent monies to those companies. M/s TIIC Ltd sought to write off the advances given and value of investments in those industrial companies and claimed the same as deduction in its returns. The Hon'ble High Court held as under:-

- 3. We have heard the submissions of Mr. S. Swaminathan for the Revenue and Mr. Vijayaraghavan for the assessee.*
- 4. The assessee is a State Government Corporation engaged in the business of promoting industrial development in the State of Tamilnadu. The Memorandum and Articles of Association reveals the main objects to be financing of long or medium term loans to any concern engaged or proposed to be engaged in businesses/activities such as manufacturing, processing, refrigeration of goods, exploitation of mineral resources, generation or distribution of electricity, shipping, transport or promotion of industrial growth etc. It also provides for the underwriting or subscription in shares, debentures or other securities of industrial concerns and the rendition of financial assistance by various modes including loans, guarantees and under writing subscription. The assessee was thus incorporated solely for the purpose of ensuring and facilitating growth and development of industries in the state of Tamilnadu. Investment by way of subscription to shares is solely on account of the under writing operations. Such being the position, the investments are of the nature of stock-in-trade and cannot be held to be otherwise. In fact, this aspect of the matter was decided by the Income Tax Appellate*

Tribunal in the assessee's own case in respect of assessment year 1970-71 wherein, by a well reasoned order dated 14.3.1975, the stand of the assessee that investment in companies would constitute represent stock in trade, was accepted. Question No.2 is thus answered in favour of the assessee and against the revenue.

5. Question Nos.1 and 3 challenge the conclusions of the tribunal relating to facts and would have to be tested on the touchstone of perversity. The tribunal has noted that valuation of the shares is effected in order to ensure a proper depiction of the value of the asset in the balance sheet. A note prepared for the consideration of the Board in TIIC B.No.13587-88 dated 21.7.1987 has been placed before us. A detailed analysis has been undertaken therein with respect to various items identified and sought to be written off in view of the doubtful character of recovery of loans and investments. Investments in the shares of six industrial companies were undertaken by way of underwriting of issue of shares. Upon finding that the net worth was negative, it was proposed to write off 100% of such investment in five cases. In the matter relating to one defaulter, M/s. Southern Brick Works Limited, the recommendation for write-off was only 50% of the investment, in view of a proposal for take over of the entity by M/s Vinichem Private Limited.

6. The note also proposes the write-off of an amount of Rs.33.82 lakhs being 90% of the advances made to two companies, M/s. Upper India Bearings Limited and M/s. Nedumbalam Samiappa Annapoorani Mills Limited, where creditors had approached the High Court seeking their winding-up and receivers had been appointed.

7. The need for and criteria adopted for the valuation of the shares as well as the efforts taken and measures adopted by the assessee company for recovery of the advances have been duly noted by the tribunal. The erosion of capital leading to a fall in value of shares has been established. We are thus of the view that the conclusion of the tribunal in this regard are well founded and are not vitiated by perversity. Question Nos. 1 and 3 are answered against the Department and in favour of the assessee.

8. The order of the tribunal is confirmed and the departmental appeal dismissed answering all Substantial Questions of Law in favour of the assessee and against the department. No costs.

2.7.2. We find that the Id DR placed reliance on the decision of the Hon'ble Jurisdictional High Court relied upon by the Id CITA in the case of W.B.Financial Corporation vs DCIT reported in 263 ITR 332 (Cal). In that case, the assessee was a State Financial Corporation and had invested in shares of various companies to the tune of Rs 14,05,785/- and the assessee wrote off the above sum as a bad investment in Asst Year 1992-93 on the ground that there was no possibility of getting any amount against the investment in shares of those companies. The Tribunal in that case had held that

those investments by the assessee were not loans and the assessee never treated the shares as stock in trade. The Tribunal further held that if the shares were sold at a lesser value than the acquiring value, as and when that might be done, the assessee might be eligible to claim loss arising out of such sale. This was upheld by the Hon'ble Jurisdictional High Court in favour of the revenue. The SLP filed by the assessee before the Hon'ble Supreme Court was also dismissed. In our considered opinion, this judgement is distinguishable on facts in as much as the assessee before us had not made any investments in shares of subsidiaries as a pure and simple investment. It was done as a measure to promote the growth of electronics industry in the State of West Bengal. Moreover, in that case, the value of investments were completely written off in the books and deduction claimed for write off. Whereas in the instant case, the assessee continues to show the value of investments at Re 1 in its balance sheet, which conduct itself, proves that the investments were not made as a mere pure and simple investment for the purpose of earning dividends. On the contrary, these investments in subsidiaries were made with a view to promote the growth of electronics industry in the State of West Bengal. Moreover, the assessee had not completely written off in the books the value of investments. We find that the issue on diminution in value of investments was not before the Hon'ble Jurisdictional High Court. Whereas, in the case before us, the assessee had claimed partial write off in respect of diminution in value of investments after coming to a conscious conclusion that the value of investments is not realizable. We find that the decision of Hon'ble Madras High Court referred to supra would be squarely applicable to the facts of the instant case as it duly addresses the issue of diminution in value of investments. Moreover, we have already held that the investments though shown in the balance sheet as investments, the same were to be considered only as stock in trade as it was invested in consonance with the main objects stated in the memorandum of association of the assessee company, so as to make those companies wholly owned subsidiaries. It is also not in dispute that the assessee despite knowing the fact that the subsidiaries had incurred huge losses, had bothered to acquire

the shares from outsiders during the year so as to enter into joint venture with renowned industrial houses for promoting the growth of IT and ITES sectors in the State of West Bengal. It is also not in dispute that the assessee company's proposal to enter into joint venture with renowned industrial houses had been abandoned and hence the assessee had no other choice after making investments in shares but to write off the same. This conscious business decision of the assessee cannot be questioned by the revenue and if the shares held by the assessee results in any gain in future on sale of the same, the same would any way get taxed as income in the hands of the assessee company. We find that the objects of the assessee company includes financing also and that the financing could be by way of lending to parties by way of loans or by way of investing in shares of those companies. In effect the assessee had only brought down the value of investments on the ground of non-realisation of the value thereon. Hence we hold that the assessee is entitled for deduction in respect of write off of investments by respectfully following the decision of Hon'ble Madras High Court supra. Accordingly, the Ground No.1 raised for the Asst Years 2008-09 and 2009-10 by the assessee is allowed.

3. DISALLOWANCE OF PROVISION FOR INVESTMENT, LOANS & ADVANCES WHILE COMPUTING BOOK PROFITS U/S 115JB OF THE ACT- RS 4,98,23,842/-

Ground No. 2 of Asst Year 2008-09 in Assessee's Appeal

The brief facts of this issue are that the assessee debited a sum of Rs 4,98,23,842/- towards provision for investments and loans and advances in its profit and loss account and claimed the same as deduction while computing the book profits u/s 115JB of the Act. The break up of the said provision amounts are as under:-

Provision made for Investments

Invt in 300 shares of Zenerex Pvt Ltd	3,000
Invt in 320000 shares of Millenium Information	

Systems (P) Ltd		32,00,000	
		-----	32,03,000
<u>Provision made for Loans</u>	<u>31.3.08</u>	<u>31.3.09</u>	<u>Difference</u>
Webel Consumer Electronics Ltd	16,29,10,517	12,68,32,375	3,60,78,142
Webel Communication Ind Ltd	12,56,33,109	11,50,90,409	1,05,42,700

			4,66,20,842

Total Provision for Investments & Loans and Advances			4,98,23,842

The assessee had reflected in the balance sheet as under:-

<u>Under the head Investments Schedule</u>	<u>31.3.08</u>	<u>31.3.07</u>
Zenerex Pvt Ltd		
300 Nos. Equity shares of Rs 10 each		
fully paid up	3,000	3,000
Less: Provision	3,000	0
	-----	-----
SUB-TOTAL	0	3,000
	-----	-----
Millenium Information Systems P Ltd		
320000 Nos. Equity shares of Rs 10 each		
fully paid up	32,00,000	32,00,000
Less: Provision	32,00,000	0
	-----	-----
SUB-TOTAL	0	32,00,000
	-----	-----

<u>Under the head Loans & Advances</u>	<u>31.3.08</u>	<u>31.3.07</u>	<u>Difference</u>
Webel Consumer Electronics Ltd	16,29,10,517	12,68,32,375	3,60,78,142
Less: Provision for doubtful advance	16,29,10,517	12,68,32,375	3,60,78,142
	-----	-----	-----
Figure in Balance sheet	0	0	0

Webel Communication Ind Ltd	12,56,33,109	11,50,90,409	1,05,42,700
Less: Provision for doubtful advance	12,56,33,109	11,50,90,409	1,05,42,700

Figure in Balance sheet	0	0	0

Total Provision (3000+3203000+36078142+10542700) = 4,98,23,842

3.1. The Id AO sought to add the aforesaid provision of Rs 4,98,23,842/- while computing the book profits u/s 115JB of the Act based on the amendment in Explanation 1 to section 115JB of the Act brought by the Finance (No.2) Act, 2009 with retrospective effect from 1.4.2001 in clause (i) as under:-

- (i) *the amount or amounts set aside as provision for diminution in the value of any asset.*

3.2. This action of the Id AO was upheld by the Id CITA. Aggrieved, the assessee is in appeal before us.

3.3. The Id AR placed reliance on the decision of the Hon'ble Supreme Court in the case of Vijaya Bank vs CIT reported in 190 Taxman 257 (SC) wherein the assessee bank argued as under:-

Once a provision stood created and , ultimately, carried to the balance sheet wherein Loans and Advances or Debtors depicted stood reduced by the amount of such provision, then, there was actual write off because, in the final analysis, at the year end, the so-called provision does not remain and the balance sheet at the year end only carries the amount of loans and advances or debtors, net of such provision made by the assessee for the impugned bad debt. Based on this, the Hon'ble Apex Court considered the following question for consideration :-

The second question which arises for determination in these civil appeals is, whether it is imperative for the assessee bank to close the individual account of each debtor in its books or a mere reduction in the “Loans and Advances Account: or Debtors to the extent of the provision for bad and doubtful debt is sufficient?

The Id AR argued that the Hon’ble Apex Court had held that even if the provision is made and the same is reduced from the value of loans & advances and debtors, and the figures depicted in the balance sheet is net of such provision on the assets side of the balance sheet, the assessee would be entitled for deduction towards the provision made. Accordingly, he argued that the provision for doubtful investments and doubtful loans and advances in the sum of Rs 4,98,23,842/- would have to be allowed as deduction while computing the book profits u/s 115JB of the Act. In response thereto, the Id DR stated that the provisions of section 115JB of the Act has been amended by the Finance (No.2) Act, 2009 and the same would rule the field. Moreover, the decision in Vijaya Bank case was rendered by the Hon’ble Apex Court in the context of allowability of deduction towards provisions for assets under normal computation provisions of the Act and not u/s 115JB of the Act.

3.4. We have heard the rival submissions. We find that the Explanation 1 to section 115JB clause (i) is directly against the assessee which clearly states that any provision made for diminution in the value of any asset is to be added back to the book profits u/s 115JB of the Act. The provisions of section 115JB of the Act are self-contained code in itself and the book profits determined in the manner stipulated thereon shall be deemed to be the total income of the assessee subject to fulfillment of conditions stipulated thereon. Hence the said provisions are to be strictly construed. We are inclined to agree with the arguments of the Id DR that the decision in Vijaya Bank case was rendered in the context of normal provisions of the Act and not u/s 115JB of the Act. However, we find that the Id AR placed reliance on the decision of the Hon’ble Gujarat High Court in the case of CIT vs Vodafone Essar Gujarat Ltd reported in (2017)

85 taxmann.com 32 (Guj) dated 4.8.2017 wherein after considering amendment in Explanation 1 in clause (i) to section 115JB of the Act, the decision has been rendered in favour of the assessee. In this regard, we find that the findings given by the Hon'ble Gujarat High Court while rendering the decision would be relevant to be discussed here. In the said decision, we find that the Hon'ble Gujarat High Court had given a finding that the provision in that case actually tantamount to write off of the debt and the same was reduced from the total value of assets in the balance sheet. Whereas, in the instant case, it is not in dispute that the assessee had made only provision for doubtful investments and doubtful loans and advances in the sum of Rs 4,98,23,842/- which was not written off in the books by the assessee. Infact we find that the assessee had voluntarily added back the said provision of Rs 4,98,23,842/- under the normal computational provisions of the Act and had not disputed the same before the revenue. Hence it could be safely concluded that the amounts provided towards doubtful investments and advances were only in the nature of mere provisions and not write off. Accordingly, the decision of Hon'ble Gujarat High Court would not come to the rescue of the assessee. In the instant case, the provisions of section 115JB of the Act, being a complete code in itself having a deeming fiction, need to be strictly construed and amendment has been brought by way of inserting clause (i) in Explanation 1 to section 115JB of the Act with retrospective effect from 1.4.2001 by the Finance (No. 2) Act, 2009. Accordingly, we hold that the addition of Rs 4,98,23,842/- while computing the book profits u/s 115JB of the Act by the Id AO is in order. The Ground No. 2 raised by the assessee for the Asst Year 2008-09 is dismissed.

4. At the time of hearing, the Id AR stated that the Ground No. 3 raised by the assessee is not pressed for the Asst Year 2008-09. The same is reckoned as statement from the Bar and accordingly, the Ground No. 3 for Asst Year 2008-09 is dismissed as not pressed.

5. The Ground No. 4 for Asst Year 2008-09 is general in nature and does not require any specific adjudication.

6. In the result, the appeal of the assessee for the Asst Year 2008-09 in ITA No. 1981/Kol/2013 is partly allowed.

Let us take up Revenue Appeal for Asst Year 2008-09 in ITA No. 1945/Kol/2013

7. The only issue to be decided in this appeal of the revenue is as to whether the ld CITA was justified in accepting the apportionment of expenses towards rental income , in the facts and circumstances of the case.

7.1. The brief facts of this issue are that the ld AO observed that the assessee has shown rental income of Rs 10,14,92,881/-. The assessee owned certain buildings and roads and part of the land and building, so possessed, were used for company's own business and part was let out for earning rental income. The ld AO observed that separate details of income and expenditure in respect of both categories of building were not produced by the assessee. The ld AO observed further that major expenditures directly related to building i.e municipal tax, repairs & maintenance of building, watch & ward, gardening expenses (included in miscellaneous expenses) etc have not been shown separately. According to ld AO, these information are required for the reason that all expenses directly or indirectly related /attributable to rental portion are not allowable as business expenditure since assessee claimed deduction u/s 24(a) of the Act in the computation. In the computation of total income, the assessee itself disallowed expenditure of Rs 52,24,523/- on account of 'building repairing' debited to profit and loss account and Rs 46,06,824/- being 100% of the depreciation of the block of building. The ld AO observed that since part of the building was also used by the assessee for the purpose of its own business, disallowance of 100% of depreciation would be improper. He

observed that in Asst Year 2007-08 , the assessee itself had shown 75% of the expenditures as attributable to rental income. Taking that as a benchmark, the Id AO proceeded to apportion the following expenditure at 75% as attributable towards rental income :-

<u>Head of Expenditure</u>	<u>Total Amt</u>	<u>Disallowance made by assessee</u>	<u>Disallowance to be made @ 75%</u>
Repairs & Maintenance (Building)	1,02,90,657	52,24,525	77,17,927
Municipal Tax	5,10,205	5,10,205	3,82,653
Depreciation	46,06,824	46,06,824	34,55,118
Watch & Ward	64,68,493	0	48,51,369
Gardening Expenses	16,46,380	0	12,34,785
Total		1,03,41,554	1,76,41,852

The Id AO recomputed the entire income of the assessee by starting from Net Profit as per Profit and Loss Account and then proceeded to make disallowance of Rs 1,76,41,852/- under the head 'income from business' towards aforesaid expenditure attributable to earning rental income. The Id AO also granted standard deduction u/s 24(a) of the Act in respect of expenses towards rental income under the head 'income from house property'.

7.2. The assessee stated before the Id CITA that the watch and ward expenditure incurred by the assessee does not require to be apportioned towards earning of rental income in as much as both the assessee as well as the tenant had appointed separate personnel to provide security of their respective areas. It was submitted that the gardening activity is carried on only in the premises used by the assessee for its business and hence no portion of expenditure towards gardening is required to be attributable

towards earning of rental income. The tenant was not allowed to use the garden at all. The entire upkeep of the garden is the responsibility of the assessee only. With regard to the disallowance made suo moto by the assessee towards repairs and maintenance of building, the assessee had incurred expenditure towards the maintenance cost for let out property in the sum of Rs 52,24,525/- and hence the same was disallowed by the assessee. The Id CITA appreciated all these submissions of the assessee and deleted the addition made by the Id AO and directed him to retain the disallowances made voluntarily by the assessee. Aggrieved, the revenue is in appeal before us.

7.3. We have heard the rival submissions. We find that the Id AR stated that the similar issue in earlier years had come up before this tribunal in assessee's own case in I.T.A. Nos. 1980/Kol/2013 (A.Y.2005-06); 1163/Kol/2014 (A.Y.2006-07) and 606/Kol/2014 (A.Y.2007-08) in assessee's appeals and I.T.A. No. 515/Kol/2014 (A.Y.2007-08) in revenue appeal dated 31.05.2018 and the tribunal had remanded this issue to the file of the Id AO for de novo adjudication. Respectfully following the decision of this tribunal in assessee's own case, we remand this issue to the file of the Id AO for de novo adjudication in accordance with law. Accordingly, the grounds raised by the revenue are allowed for statistical purposes.

8. In the result, the appeal of the revenue in ITA No. 1945/Kol/2013 for Asst Year 2008-09 is allowed for statistical purposes.

Let us take up Assessee Appeal for Asst Year 2009-10 in ITA No. 1982/Kol/2013

9. The Ground No. 1 in Asst Year 2009-10 is similar to Ground No.1 of Asst Year 2008-09 and hence the decision rendered thereon hereinabove would apply with equal force for this Asst Year also except with variance in figures.

10. The Ground No. 2 raised by the assessee was stated to be not pressed by the Id AR. The same is reckoned as a statement from the Bar. Accordingly, the Ground No. 2 raised by the assessee is dismissed as not pressed.

11. Disallowance u/s 14A of the Act read with Rule 8D of the IT Rules

Ground Nos. 3(a) to 3(c) of Assessee Appeal in Asst Year 2009-10

The brief facts of this issue are that the assessee was in receipt of dividend income of Rs 28,09,924/- which was claimed as exempt in the return of income. The assessee claimed that no expenditure was incurred by it for earning dividend income. The Id AO applied the provisions of second and third limb of Rule 8D(2) of the IT Rules and made disallowance of Rs 6,93,046/- in the assessment. This action of the Id AO was upheld by the Id CITA. Aggrieved, the assessee is in appeal before us.

11.1. We have heard the rival submissions. We find that the Id AR argued that the Id AO did not record any satisfaction as mandated in Section 14A(2) and Rule 8D(1) of the Rules having regard to the accounts of the assessee by clearly stating as to why the claim of the assessee that no expenditure was incurred for earning exempt income, was incorrect. It is axiomatic that this is a condition precedent for the Id AO before invoking the computation mechanism provided in Rule 8D(2) of the IT Rules. In this regard, the Hon'ble Supreme Court in its recent decision in the case of Maxopp Investment Ltd vs CIT reported in (2018) 91 taxmann.com 154 (SC) had held as under:-

41. Having regard to the language of section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/ making the investment in shares is to be examined by the AO.

11.2. Further the provisions of section 14A(3) of the Act clearly stipulates as under:-

(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act.

11.3. Hence it could be safely concluded that even when the assessee claims that no expenditure was incurred by it for the purpose of earning exempt income, still it is incumbent on the part of the ld AO to record satisfaction having regard to the accounts of the assessee in terms of section 14A(2) / 14A(3) of the Act as to why the claim so made by the assessee is incorrect. Only after recording such satisfaction, he could resort to computation mechanism provided in Rule 8D(2) of the Rules. In the instant case, we find that the ld AO had recorded in his order as under for resorting to Rule 8D :-

As per provision of Section 14A(3) of the Act if the assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this act, the Ao has to determine the amount of expenditure in accordance to Rule 8D of the I.T. Rules. In view of the above the amount of expenditure is calculated below as per Rule 8D of the I.T. Rules.

11.4. We hold that the above referred para does not reflect the recording of satisfaction by the ld AO as mandated in section 14A(2) / 14A(3) of the Act read with Rule 8D(1) of the Rules in as much as the ld AO had not referred to the accounts of the assessee by identifying individual account heads and link the same with the investments made by the assessee so as to conclude whether at all any expenditure could be attributable towards such exempt income. In the absence of any such recording of satisfaction, we hold that no disallowance u/s 14A of the Act read with Rule 8D of the Rules could be made by the ld AO.

11.5. We also find that that there is no finding given by the ld AO that the borrowed funds were utilized by the assessee for making investments which in turn had yielded

dividend income which was claimed as exempt. We find that the assessee is having sufficient own funds as is evident from the balance sheet. Reliance in this regard is placed on the decision of Hon'ble Bombay High Court in the case of Reliance Utilities and Power Ltd reported in 313 ITR 340 (Bom). The Id AR also argued that the assessee had earned huge interest income which is much more than the interest paid. Hence there is no positive interest expenditure available for making disallowance thereon in second limb of Rule 8D(2) of the IT Rules. In support of this proposition, he placed reliance on the co-ordinate bench decision of this tribunal in the case of DCIT vs Trade Apartment Ltd in ITA No. 1277/Kol/2011 dated 30.3.2012 for Asst Year 2008-09. In any case, he argued that only investments which had yielded dividend income should be considered for working out the disallowance under second and third limb of Rule 8D(2) of the IT Rules. Reliance in this regard was placed on the co-ordinate bench decision of this tribunal in the case of REI Agro Ltd reported in 144 ITD 141 (Kol Trib). We are in complete agreement with the various alternative arguments advanced by the Id AR and since we have already held that no satisfaction was recorded by the Id AO for resorting to computation mechanism provided in Rule 8D(2) of the Rules, which is a condition precedent, as per the provisions of the Act and Rules and also as per the decision of the Hon'ble Apex Court referred to supra, we have no hesitation in directing the Id AO to delete the disallowance made u/s 14A of the Act in the sum of Rs 6,93,046/- in the facts and circumstances of the case. Accordingly, the Ground Nos. 3 (a) to 3(c) raised by the assessee for the Asst Year 2009-10 are allowed.

12. The Ground No. 4 raised by the assessee for the Asst Year 2009-10 is general in nature and does not require any specific adjudication.

13. In the result, the appeal of the assessee in ITA No. 1982/Kol/2013 for Asst Year 2009-10 is partly allowed.

14. To sum up,

<u>ITA No.</u>	<u>Appeal By</u>	<u>Asst. Year</u>	<u>Result</u>
1945/Kol/2013	Revenue	2008-09	Allowed for Statistical Purposes
1981/Kol/2013	Assessee	2008-09	Partly Allowed
1982/Kol/2013	Assessee	2009-10	Partly Allowed

Order pronounced in the Court on 24.08.2018

Sd/-

[S.S. Viswanethra Ravi]
Judicial Member

Sd/-

[M.Balaganesh]
Accountant Member

Dated : 24.08.2018
SB, Sr. PS

Copy of the order forwarded to:

1. DCIT, Circle-1, Kolkata, P-7, Chowringhee Square, Kolkata-700069.
2. M/s West Bengal Electronics Industry Development Corporation Ltd., WEBEL Bhavan, Block EP & GP, Sector-V, Salt Lake, Kolkata-700091.
- 3..C.I.T.(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches