आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

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

BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 8622/Mum/2010

(**निर्धारण वर्ष /** Assessment Year : 2007-08)

The Deputy Commissioner of Income Tax(OSD),1(1) Room No. 540/564, 5th Floor Aayakar Bhawan, M K Road New Marine Lines Mumbai-400020	**बनाम**/ v.	The Saraswat Co-operative Bank Limited Madhushree, Plot No. 85 District Navi Mumbai-400 703
		स्थायी लेखा सं./PAN : AAACT5543L
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No. 7738/Mum/2010

(**निर्धारण वर्ष /** Assessment Year : 2007-08)

The Saraswat Co-operative Bank Limited Madhushree, Plot No. 85 District Navi Mumbai-400 703	**बनाम**/ v.	The Deputy Commissioner of Income Tax(OSD),1(1) Room No. 540/564, 5th Floor , Aayakar Bhawan, M K Road, New Marine Lines Mumbai-400020
स्थायी लेखा सं./PAN : AAACT5543L		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No. 1140/Mum/2012

(**निर्धारण वर्ष /** Assessment Year : 2008-09)

The Additional Commissioner of Income Tax,1(3) Room No. 540/564, 5th Floor Aayakar Bhawan, M K Road New Marine Lines Mumbai-400020	**बनाम**/ v.	The Saraswat Co-operative Bank Limited Madhushree, Plot No. 85 District Navi Mumbai-400 703
		स्थायी लेखा सं./PAN : AABAT4497Q
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No. 694/Mum/2012

(**निर्धारण वर्ष /** Assessment Year : 2008-09)

The Saraswat Co-operative Bank Limited Accounts Department, 4th floor, Plot No. 983, Appasaheb Marathe Marg Prabhadevi, Mumbai-400025	**बनाम**/ v.	The Additional Commissioner of Income Tax,1(3) Room No. 540/564, 5th Floor Aayakar Bhawan, M K Road New Marine Lines Mumbai-400020
स्थायी लेखा सं./PAN : AABAT4497Q		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No. 5627/Mum/2003

(**निर्धारण वर्ष /** Assessment Year : 2009-10)

The Deputy Commissioner of Income Tax,1(3) Room No. 564, 5th Floor Aayakar Bhawan, M K Road New Marine Lines Mumbai-400020	**बनाम**/ v.	The Saraswat Co-operative Bank Limited Accounts Department, 4th floor, Plot No. 983, Appasaheb Marathe Marg Prabhadevi, Mumbai-400025
		स्थायी लेखा सं./PAN : AABAT4497Q
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No. 1/Mum/2014

(**निर्धारण वर्ष /** Assessment Year : 2010-11)

The Saraswat Co-operative Bank Limited Accounts Department, 4th floor, Plot No. 983, Appasaheb Marathe Marg Prabhadevi, Mumbai-400025	**बनाम**/ v.	The Additional Commissioner of Income Tax,1(3) Room No. 540/564, 5th Floor Aayakar Bhawan, M K Road New Marine Lines Mumbai-400020
स्थायी लेखा सं./PAN : AABAT4497Q		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by	Shri Manjunath Swamy,CIT-DR
Assessee by :	Shri Mihir Naniwadekar

सुनवाई की तारीख /**Date of Hearing : 11-08-2016**
घोषणा की तारीख /**Date of Pronouncement : 31-10-2016**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

These bunch of six appeals by Revenue as well as the assessee relates to the assessment years 2007-08, 2008-09, 2009-10 and 2010-11. Since common issues are involved and hence these appeals were heard together and are disposed of by this common order.

2. First we shall take up cross appeals for assessment year 2007-08 , Revenue appeal being ITA no. 8622/Mum/2010 , while the assessee appeal being ITA no. 7738/Mum/2010, both for the assessment year 2007-08

3. The Revenue is aggrieved in ITA No 8622/Mum/2010 for the assessment year 2007-08 , vide first effective ground by decision of learned CIT(A) in restricting disallowance of expenditure to Rs.3,55,270/- u/s 14A of the Income-tax Act , 1961 (Hereinafter called "the Act") as against disallowance of Rs.1,59,23,145/- of expenditure made by the AO with respect to expenditure incurred in relation to the earning of an income which does not form part of total income. The Revenue is aggrieved by the decision of learned CIT(A) in holding that investments in shares of subsidiary company is not an asset yielding tax free income and has to be totally excluded from computation of disallowance of expenditure u/s 14A of the Act.

The assessee earned tax free dividend income of Rs.2,58,64,934/- which was claimed exempt from tax. The assessee did not allocated any expenses

incurred for earning dividend income . The AO applied Rule 8D of Income-tax Rules, 1962 and made disallowance of Rs.1,39,96,085/- u/r 8D(2)(ii) of Income-tax Rules, 1962 and Rs.19,27,060/- u/r 8D(2)(iii) of Income-tax Rules, 1962 , aggregating to Rs. 1,59,23,145/-. Before learned CIT(A), the assessee relied on the decision of Hon'ble Bombay High Court in the case of Godrej and Boyce Manufacturing Company Limited v. DCIT (2010) 328 ITR 81 (Bom.) and argued that Rule 8D of Income-tax Rules, 1962 is not applicable for the assessment year 2007-08 and is applicable from the assessment year 2008-09 onwards. It was contended by the assessee that the reasonable disallowance can be made of the expenditure incurred in relation to earning of income which does not form part of total income u/s 14A of the Act as held by Hon'ble Bombay High Court in the case of Godrej and Boyce Manufacturing Company Limited(supra). The assessee also pleaded before the AO that no expenditure has been incurred to earn the income which was not chargeable to tax , which is not considered by the AO and he simply proceeded to invoke Rule 8D of Income-tax Rules, 1962 without recording satisfaction which is against the decision of Hon'ble Bombay High Court in the case of Godrej and Boyce Manufacturing Company Limited(supra). The learned CIT(A) held that reasonable disallowance should have been made by the AO keeping in view time , energy, effort and expenses incurred in retaining and maintenance of investment in shares as a prudent business man.It was observed by the learned CIT(A) that Rule 8D of Income-tax Rules, 1962 read with Section 14A of the Act provide reasonable disallowance of the expenses incurred in relation to earning of income which is exempt from tax . The learned CIT(A) , however, directed that all investments which yield taxable income as well strategic investment of Rs.10 crores made by the assessee in its subsidiary Saraswat Infotech Limited be excluded for computing disallowance u/s 14A of the Act read with Rule 8D of Income Tax Rules, 1962.

The Revenue is aggrieved by the decision of learned CIT(A) in excluding strategic investment in subsidiary company of Rs. 10.0 crores in Saraswat Infotech Limited while computing disallowance u/s 14A of the Act read with Rule 8D of Income-tax Rules, 1962 and have filed this appeal before the Tribunal. It was submitted by learned DR that the assessee has not filed details of expenditure incurred in relation to the earning of exempt income before the authorities below. It was submitted that the learned CIT(A) erred in giving relief to the assessee by excluding investment of Rs 10 crores made by the assessee in subsidiary company Saraswat Infotech Limited, which is capable of yielding exempt income. The ld DR relied on decision of Hon'ble Supreme Court in the case of Distributors (Baroda) Private Limited v.UOI reported in (1985) 155 ITR 120(SC). The ld counsel for the assessee on the other hand relied on the decisions of the Tribunal in the case of Garware Wall Ropes Limited v. Addl. CIT in ITA no. 5408/Mum/2012 dated 15-01-2014, EIH Associates Hotels Limited v. DCIT in ITA no. 1503/Mds./2012, Interglobe Enterprises Limited v. DCIT in ITA no. 1580/Del/2013 and J M Financial Limited v. ACIT in ITA no. 4521/Mum/2012.It was also submitted that Rule 8D of Income-Tax Rules, 1962 is not applicable for the impugned assessment year 2007-08.

We have considered rival contentions and perused the material on record including case laws relied upon by rival parties. The assessee has earned dividend income of Rs.2,58,64,934/- which was claimed exempt from tax. The assessee has claimed that no expenditure has been incurred by the assessee in relation to the earning of exempt income. The authorities below applied Rule 8D of Income-tax Rules, 1962. In our considered view , Rule 8D of Income-tax Rules, 1962 is not applicable for the impugned assessment year 2007-08 , while reasonable disallowance is to be made of expenditure incurred in relation to the earning of income which does not form part of the total income , keeping in view the mandate of Section 14A of the Act. Reliance

is placed on the decision of Hon'ble Bombay High Court in the case of Godrej and Boyce Manufacturing Company Limited(supra). In our considered view , end of justice will be met if disallowance u/s 14A of the Act be made @5% of total dividend income claimed to be exempt by the assessee which is a reasonable disallowance keeping in view facts and circumstances of the case. We order accordingly.

4. The next grievance of the Revenue is with respect of the decision of learned CIT(A) in restricting the disallowance made u/s. 40A(2)(b) of the Act in directing the AO to adopt the cost per transaction at Rs. 3.06 against Rs.1.64 worked out by the AO. It was observed by the AO that the assessee has paid Rs.13,44,73,913/- to its related enterprise Saraswat Infotech Limited(hereinafter called "SIL") for provision of services pertaining to software and data entry. The SIL as explained by the assessee would maintain and manage the entire IT infrastructure of the bank. Transactions are done by SIL and the assessee pays on 'per transaction basis' to SIL . The assessee paid up-to September 2006 transaction charges @Rs.1.38 per transaction to SIL , while the same was re-worked based on current cost and the projected operational cost in future of SIL as well projected investment to Rs. 4 per transaction. The working is reproduced by the AO in the assessment order page 5/6 based on actual costs as well projected investments and costs of SIL. Keeping in the view that certain expenditure are to be excluded since SIL was occupying the premises belonging to the assessee and also enjoying the facility such as Lift, Security services , services of telephone operator etc and also electricity expenses for which the assessee worked out a lumpsum amount of these services which were utilized by SIL . The AO observed that these costs paid by the assessee to SIL are un-reasonable and excessive keeping in view the provisions of Section 40A(2)(b) of the Act as the payments are made to related enterprise. The AO observed that on verification of the additions to fixed assets made by SIL during the year, it was observed that total addition is Rs.

2.99 crores and depreciation on SLM is Rs. 31.25 lacs while the total depreciation used in the chart for working out cost worked out Rs.420.50 lacs which is almost 14 times the actual depreciation claimed. The actual expenditure of SIL is Rs. 825.21 lacs(excluding depreciation) , while for purposes of working the cost it has been taken at Rs. 1091.90 lacs which is in excess by Rs. 2.46 crores. The AO worked out cost per transaction at arms' length at Rs.1.64 and excessive expenses claimed by the assessee to the tune of Rs. 7.95 crores were added to the income of the assessee by invoking provisions of Section 40A(2)(a) of the Act. In first appeal before learned CIT(A), the assessee contended that Section 40A(2) of the Act is not applicable to the co-operative society relying on decision of Mumbai-Tribunal in the case of Manjara Shetkari Sahakari Karkhana Limited reported in 91 ITD 361 and also submitted that the actual costs incurred by the subsidiary in provisions of services to the assessee were before the AO as the subsidiary company has not taken any other work except the assessee company's work and consequently all the expenses of the subsidiary company were in relation to the provisions of services to the assessee company. Thus, it was submitted that the AO should have worked out disallowance based on actual costs only. The learned CIT(A) held that Section 40A(2) of the Act is applicable to co-operative society and the case relied upon by the assessee is distinguishable as in that case payments were made by the co-operative society to its members but in the instant case payments are made by the assessee to its subsidiary company. It was further held that the co-operative society is not defined u/s 2(31) of the Act and is to be assessed in the capacity of AOP. However , learned CIT(A) agreed with the assessee that if actual costs are available then in that case, the AO should have picked up the actual expenses figure rather than making estimation. The learned CIT(A) worked out cost per transaction based on actual cost figures at Rs. 3.06 per transaction on contrast to Rs. 4.49 per transaction actually paid by the assessee and directed the AO to base the disallowance on these figures.

Aggrieved, Revenue is in appeal before the Tribunal. The learned DR relied on the decision of the AO. It was submitted that the decision of Hon'ble Bombay High Court in the case of CIT v. Manjara Shetkari Sahakari Sakhar Karkhana Limited (2008) 301 ITR 191(Bom) is not applicable as the facts are distinguishable as in the said case payments were made by co-operative society to its member under State Advance Price fixed by the State Government over and above Statutory Minimum Price fixed by the Central Government, while in the instant appeal the payments are made by co-operative society to its subsidiary company and not to its members. It was submitted that in the definition of 'person' as contained in Section 2(31) of the Act, co-operative society is not included and the assessment is to be done as AOP. It was submitted that the said SIL is providing services to other clients and the learned CIT(A) erred in holding that the SIL is not providing services to the other clients apart from the assessee. It was also submitted that the assessee had not submitted details before the authorities below. The learned counsel for the assessee would on the other hand say that the provisions of Section 40A(2) of the Act is not applicable to co-operative society as held by Hon'ble Bombay High Court in 301 ITR 191(supra). It is the say of the learned counsel that SIL is subsidiary of the assessee and is rendering back end services relating to IT infrastructure. It was submitted that payments were made by the assessee to SIL which are held to be excessive and un-reasonable keeping in view provisions of Section 40A(2) of the Act by the AO and partial relief is granted by the learned CIT(A).The assessee's counsel submitted that disallowance cannot be sustained as the Section 40A(2) of the Act is not applicable to co-operative society. The assessee also relied upon decision of the Pune-Tribunal in the case of Shivamrut Dudh Utpadak Sah. Sangh Maryadit v. DCIT in ITA no. 742/Pune/1991 reported in (1999) 63TTJ 405(Pune-Trib.).

We have considered the rival contentions and perused the material on record including case laws relied upon by rival parties. The assessee is a co-operative society and has made payment for availing back end services for managing its IT infrastructure from its subsidiary company SIL. The assessee's payment were held to be excessive and unreasonable as being payment made to related parties u/s 40A(2) of the Act and to the extent considered excessive and un-reasonable , disallowances of the expenditure considered unreasonable and excessive were made by the AO , which disallowance was partly confirmed by learned CIT(A). We have considered and perused the provisions of Section 40A(2)(a) and 40A(2))b) of the Act and have observed that 'co-operative society' are not covered under the said provisions, while 'association of person' is covered under the said provision. It is also observed that while defining person u/s 2(31) of the Act, the law makers have not included 'co-operative society' while 'association of person' is included while the 'co-operative society' is defined u/s. 2(19) of the Act. Section 40A(2) of the Act applies to the person specifically named therein and since co-operative society does not found mention in Section 40A(2)(b) of the Act , the said section would not apply to co-operative society. The co-operative societies are governed by principles of mutuality and deductions are provided u/s 80P of the Act on fulfilling of the prescribed conditions, while the association of person is not governed by principle of mutuality. The Hon'ble Bombay High Court has in the case of CIT v. Manjara Shetkari Sahakari Sakhar Karkhana Limited(supra) has held that provisions of Section 40A(2) of the Act are not applicable to co-operative society . While deciding the afore-stated question, the Hon'ble Court relied on the decision of Hon'ble Bombay High Court in the case of CIT v. Shivamrut Doodh Utpadak Sahakari Sangh Maryadit in Tax Appeal No. 62 of 1999 filed by Revenue whereby Hon'ble Bombay High Court confirmed the decision of the Tribunal and held that Section 40A(2) of the Act is not applicable to co-operative society. Thus, Respectfully following the decision of Hon'ble Bombay High Court in afore-stated cases, we hold that Section 40A(2) of the Act is not

applicable to co-operative society and thus, the additions made based on the premise that Section 40A(2) of the Act is applicable to co-operative society is not sustainable in law and hence is ordered to be deleted. Further, it is the say of the assessee that tax effect is neutral and there is no loss to the Revenue as the said subsidiary company SIL is also paying tax at the same rate and hence no prejudice is caused to the Revenue as the Revenue has got due taxes albeit paid by SIL who is subsidiary of the assessee on the charges received from assessee. We order accordingly and this ground is decided against Revenue.

5. The next grievance of the Revenue is with respect to the allowing the expenditure of Rs.61,76,025/- as Revenue expenditure against capital expenditure whereby it was stated that the learned CIT(A) erred in not accepting the allocation of interest expenditure towards property construction made by the assessee itself out of the total interest paid on the entire borrowed funds. It was observed by the AO that vide revised return of income filed by the assessee, the assessee has claimed Rs. 61,76,025/- which represents borrowing cost which had earlier been capitalized but now is claimed as revenue expenses. It was submitted by the assessee that the assessee is capitalizing the cost of borrowings in terms of accounting standard AS -16 issued by the ICAI in respect of funds utilized for construction of office building and this was added to the capital work-in-progress. It was submitted that due to change in opinion of the auditors , this amount is claimed on revenue account. The AO rejected the contentions of the assessee as the amount pertained to the acquisition of capital asset and hence is capital in nature. Thus, the amount was disallowed by the AO and added to the income of the assessee by the AO . Aggrieved, the assessee filed first appeal with learned CIT(A) and claimed that the assessee has utilized own funds for construction of building and no borrowed funds were utilized for constructing the building. The assesssee submitted that the AO has not

challenged this contention of the assessee. The assessee has notionally allocated the interest debited by the assessee to Profit and Loss Account to the construction of the building account but in the revised return of income filed with the Revenue , the same were claimed as allowable expenditure which was not accepted by the AO and to the extent interest was capitalized , were not allowed by the AO as revenue expenditure. The assessee reiterated its submissions before learned CIT(A) who allowed the appeal of the asseessee as the AO has not given any finding that the assessee has infact paid any interest towards the funds borrowed for construction of the building. It was observed by the learned CIT(A) that it is a notional interest which was capitalized by the assessee while there was actually no borrowed funds utilized by the assessee for the purposes of construction of building which could be capitalized to construction cost of the Building and hence learned CIT(A) allowed the entire interest claimed by the assessee as an allowable revenue expenditure and the additions made by the AO were consequently deleted. Aggrieved, Revenue is in appeal before the Tribunal. It is the say of learned DR that the AO has rightly disallowed interest expenditure as the same was capitalized by the assessee in its books of accounts towards the cost of construction of building. While learned counsel for the assessee relied on the orders of learned CIT(A). The learned counsel of the assessee would say that building fund as held by the assessee as on 31-03-2007 as per audited financial statements in its reserves and surplus is to the tune of Rs. 113.91 crores, while Land and Building including capital work-in-progress as on 31-03-2007 is to the tune of Rs. 98.73 crores and hence it was submitted that interest free own funds towards building fund are much more than the investment made by the assessee in land and building including capital work-in-progress. It was further submitted that there was in-fact no borrowings made by the assessee for construction of building and no interest was paid and no such finding of fact has been recorded by the authorities below. It was submitted that the assessee debited notional interest out of total interest

incurred towards capitalizing of construction of building and as advised by the auditors, the assessee later filed revised return of income whereby the said interest was also claimed as revenue expenditure as in-fact no interest was incurred towards construction cost incurred by the assessee.

We have considered the rival contentions and perused the material on records. We have observed that the assessee has constructed building and total land and building including capital work-in-progress as appearing in audited financial statement as placed in file by the assessee as at 31-03-2007 was Rs. 98.73 crores while the building fund held by the assessee as at 31-03-2007 in its reserves and surplus is Rs. 113.91 crores , which is much higher than the land and building including capital work-in-progress held by the assessee. There is no finding of fact recorded by the Revenue that borrowed funds were used by the assessee, while it is the say of the assessee that no borrowed funds were utilized by the assessee for construction of Building.The assessee has debited and capitalized notional interest of Rs.61.76 lacs out of total interest incurred during the year , towards cost of construction in its books of accounts keeping in view AS-16 issued by ICAI , while later on the advise of the auditors same was claimed as revenue expenditure in the revised return of income filed with the Revenue. It is established principle that entries in the books of accounts are not decisive of the nature and character of expenses. It is not material and relevant how the assessee treated these expenses in its books of account but what is material and relevant is the allowability of these expenses as revenue expenses as per provisions of the Act . The judgment of Hon'ble Supreme Court in the case of *Kedarnath Jute Mfg. Co. Ltd.* v. *CIT* [1971] 82 ITR 363 and Hon'ble Delhi High Court in the case of CIT v. *Triveni Engg. & Industries Ltd.* (2009) 181 Taxman 5 (Delhi) support the contentions of the assessee in this regards . The taxes are to be collected by the authority of law which is mandate of Article 265 of the Constitution of India. Article 265 of the Constitution of

India reads that "No tax shall be levied or collected except by the authority of law." In terms of the Article 265 of the Constitution, tax can be levied only if it is authorized by law. The taxing authority cannot collect or retain tax that is not authorized. Any retention of tax collected, which is not otherwise payable, would be illegal and unconstitutional. The Hon'ble Bombay High Court in *Balmukund Acharya's* v.DCIT (2009) 310 ITR 310(Bom) held that Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconception or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. The Hon'ble Bombay High Court in *Nirmala L. Mehta* v. CIT (2004) 269 ITR 1(Bom.) held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. **Circular No. 14(XL-35) of 1955, dated 11.4.1955**, issued by the Central Board of Direct Taxes reads as under:

> "Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a tax payer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the initiative in guiding a tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department, for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessee on whom it is imposed by law, officers should –

(*a*) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(*b*) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs".

A reading of the circular shows that a duty is cast upon the assessing officer to assist and aid the assessee in the matter of taxation. They are obliged to advise the assessee and guide them and not to take advantage of any error or mistake committed by the assessee or of their ignorance. The function of the Assessing Officer is to administer the statute with solicitude for public exchequer with an inbuilt idea of fairness to taxpayers., ACIT v. *Rajesh Jhaveri Stock Brokers (P.) Ltd's.* (2007) 291 ITR 500(SC).

Once the expenditure is found to be allowable as revenue expenditure as per provisions of the Act, the same are to be allowed as revenue expenditure under the Act while computing income chargeable to tax even if the tax-payer has given different treatment in its books of account by capitalizing the same in its books of account instead of debiting it to the Profit and Loss Account. This is the mandate of the Act which has to be followed as the taxes can only be collected by the authority of law. In our considered view based on our above discussions and reasoning as set-out above, the addition made by the A.O. is not sustainable keeping in view factual matrix of the case and we donot find any infirmity in the orders of the learned CIT(A) which we affirm/sustain and Revenue appeal is dismissed on this ground. We order accordingly.

6. This disposes of the appeal of the Revenue in ITA no 8622/Mum/2010 for the assessment year 2007-08 which is partly allowed as indicated above.

7. Now we will take up the assessees' appeal in ITA No. 7738/Mum/2010 for the assessment year 2007-08.

8. The first grievance of the assessee is with respect to the sustenance of disallowance u/s 14 A of the Act to the tune of Rs. 3,55,370/- by the learned CIT(A), the disallowance worked out with reference to Rule 8D of Income-tax Rules, 1962. The assessee's counsel has submitted that the assessee did not wish to press this ground of appeal and prayed that the same may be dismissed as 'not pressed'. The ld DR has not objected to the dismissal of the said ground of appeal. Hence, We order dismissal of ground no.1 raised by the assessee in memo of appeal filed with the Tribunal in ITA No. 7738/Mum/2010 as 'not pressed'. We order accordingly.

9. The next grievance of the assessee is with respect to disallowance u/s 40A(2) confirmed by the learned CIT(A) when both the payer and payee were tax paying entities and no tax avoidance was caused and no prejudice is caused to Revenue. Further, without prejudice the assessee has raised a ground that Section 40A(2) of the Act is not applicable to the co-operative society and the payment made to SIL is neither excessive nor unreasonable having regard to the legitimate needs of the business of the assessee and benefits derived there from. We have adjudicated this ground while adjudicating Revenue's appeal in ITA no. 8622/Mum/2010 for assessment year 2007-08 in this order in preceding para's and our decision in ITA no. 8622/Mum/2010 on this ground shall apply mutatis mutandis to this issue in assessee's appeal in ITA no. 7738/Mum/2010. We order accordingly.

10. The next grievance of the assessee is with respect to learned CIT(A) confirming the disallowance for delayed PF employee's contribution to PF authorities to the tune of Rs.1,89,337/- when it was admittedly paid within the grace period and in any case prior to the due date of filing of return of income as prescribed u/s 139(1) of the Act. It is the admitted and undisputed position between the rival parties that there was delay in deposit of employee's contribution to PF authorities by the

assessee which was not paid within the due date prescribed by PF authorities but were paid within grace period allowed by PF statute and in any case, the same were paid prior to the due date of filing of return of income as prescribed u/s. 139(1) of the Act, with the Revenue. The issue is no more res-integra and is squarely covered by the decision of Hon'ble Bombay High Court in the case of Cit v. Ghatge Patil Transports Limited (2014) 368 ITR 749(Bom.) and decision of Hon'ble Supreme Court in the case of CIT v. Alom Extrusions Limited (2009) 319 ITR 306(SC) and hence the issue is decided in favour of the assessee and no disallowance u/s 43B of the Act r.w.s. 2(24)(x) and 36(1)(va) of the Act is warranted in the instant case in view of the afore-stated decisions, as the assessee in the instant case paid the employees contribution towards PF within grace period as allowed by PF statute and in any case the employee contribution to PF was deposited with PF authorities before the due date prescribed u/s 139(1) of the Act for filing of the return of income with the Revenue. We order accordingly.

11. This disposes of appeal filed by the assessee in ITA no. 7738/Mum/2010 for assessment year 2007-08, which is partly allowed as indicated above.

12. We shall now take up appeal filed by the Revenue in ITA no 1140/Mum/2012 for the assessment year 2008-09.

13. The first grievance of the Revenue is with respect to the decision of the learned CIT(A) in restricting the disallowance made u/s 40A(2)(b) of the Act in directing the AO to adopt the cost per transaction at Rs. 3.60 .We have already adjudicated this issue while deciding the cross appeals for the assessment year 2007-08 in preceding para's of this order and our decision for the assessment year 2007-08 shall apply mutatis mutandis to this issue in Revenue appeal for assessment year 2008-09. We order accordingly.

14. The next grievance of the Revenue is with respect to the decision of learned CIT(A) in not accepting the allocation of interest expenditure towards property construction made by the assessee itself out of total interest paid on the entire

borrowed funds. We have also adjudicated this issue while deciding Revenues' appeal for assessment year 2007-08 in ITA no.8622/Mum/2010 in preceding para's of this order. Our decision on this issue in ITA no 8622/Mum/2010 for assessment year 2007-08 shall apply mutatis mutandis to this issue in Revenue's appeal for assessment year 2008-09. We order accordingly.

15. This disposes of the Revenue's appeal in ITA no. 1140/Mum/2012 for assessment year 2008-09 which is partly allowed as indicated above.

16. Now we shall take up assessee's appeal in ITA No.694/Mum/2012 for assessment year 2008-09.

17. The assessee is aggrieved by the decision of learned CIT(A) in confirming the disallowance u/s 14A of the Act read with Rule 8D of Income-tax Rules, 1962 to the tune of Rs. 3.89 crores and not excluding the investments which do not results in earning tax free income , as against exempt income of Rs. 3.60 crores. The assessee earned tax free dividend income of Rs.3,60,83,071/- which was claimed exempt from tax. The assessee allocated expenses of Rs. 1,64,97,856/- incurred for earning dividend income . The AO applied Rule 8D of Income-tax Rules, 1962 and made disallowance of Rs.3,53,24,395/- u/r 8D(2)(ii) of Income-tax Rules, 1962 and Rs.35,89,403/- u/r 8D(2)(iii) of Income-tax Rules, 1962 , aggregating to Rs. 3,89,13,798/-, against which voluntary disallowance made by the assessee of Rs. 1,64,97,856/- was reduced and balance Rs.2,24,15,942/- was added to the income of the assessee. Rule 8D of Income-tax Rules, 1962 is applicable for the assessment year 2008-09 and onwards as held by Hon'ble Bombay High Court in Godrej and Boyce Manufacturing Company Ltd.(supra). The AO shall compute disallowance u/s 14A of the Act with respect to expenditure incurred in relation to earning of exempt income having regard to the accounts of the assessee as per mandate of Section 14A(2) of the Act. The primary onus is on the assessee to bring on record details of expenses incurred in relation to earning of exempt income as

provided u/s 14A of the Act having regards to the accounts of the assessee. In the failure thereof the assessee to discharge primary onus, the AO shall record satisfaction and apply Rule 8D of Income-tax Rules, 1962 to compute disallowance u/s 14A of the Act of the expenditure incurred in relation to the earning of exempt income . We are also of the considered view, that strategic investment made by the assessee in its subsidiary Saraswat Infotech Limited as well in the other securities which are capable of yielding exempt income i.e. by way of dividend etc. which are exempt from tax shall be included while computing disallowance u/s 14A of the Act as per the scheme of the Act as contained in provisions of Section 14A of the Act as the statute does not grant any exemption to the strategic investments which are capable of yielding exempt income to be excluded while computing disallowance u/s 14A of the Act and hence the investment made by the assessee in subsidiary company M/s Saraswat Infotech Limited and all other securities which are capable of yielding exempt income by way of dividend etc shall be included for the purposes of disallowance of expenditure incurred in relation to the earning of exempt income , as stipulated u/s 14A of the Act. Our decision is fortified by the recent decision of Hon'ble Karnataka High Court in the case of United Breweries Limited v. DCIT in ITA No. 419/2009 vide orders dated 31-05-2016 and also decision of the tribunal in the case of ACIT v. Uma Polymers Limited in ITA no 5366/Mum/2012 and CO No. 234/Mum/2013 vide orders dated 30-09-2015. We are of the considered view that the matter need to be restored back to the file of the AO for de-novo determination of the issue on merits in accordance with our directions in this order. Needless to say proper and adequate opportunity of heard shall be provided by the AO to the assessee in accordance with the principles of natural justice in accordance with law. We would also like to make it clear that the AO shall also be guided by the decision of Hon'ble Bombay High Court in the case of CIT v. Reliance Utilities and Powers Limited (2009) 313 ITR 340 (Bom) and also decision of Hon'ble Bombay High Court in the case of HDFC Bank Limited v. DCIT (2016) 383 ITR 529(Bom.) while computing disallowance of interest expenditure and if the assessee's own interest-free funds are more than the investments in the securities capable of yielding

exempt income, presumption will apply unless rebutted by the Revenue that the assessee has utilized its own interest-free funds for making investment in securities which are capable of yielding exempt income. We order accordingly.

18. This disposes of the assessee's appeal in ITA no 694/Mum/2012 for the assessment year 2008-09 which is partly allowed as indicated above.

19. We shall now take up appeal of the Revenue for assessment year 2009-10 in ITA no 5627/Mum/2013.

20. The Revenue is aggrieved by the decision of the learned CIT(A) whereby the learned CIT(A) has held that investment in shares of subsidiary company is not an asset yielding tax-free income and has to be totally excluded from computation of disallowance u/s. 14A of the Act . Further, Revenue is aggrieved by the decision of learned CIT(A) in not applying Section 14A of the Act r.w.r. 8D of Income-tax Rules, 1962 without appreciating the fact that the Hon'ble Bombay High Court in the case of Godrej and Boyce Manufacturing Company Limited(supra) has categorically held that Section 14A of the Act r.w.r. 8D of Income-tax Rules, 1962 is applicable from assessment year 2008-09. We have already adjudicated this issue assessee's appeal for assessment year 2008-09 in ITA No. 694/Mum/2012 , our decisions in afore-stated appeals shall apply mutatis mutandis to the Revenue's appeal for the assessment year 2009-10 in ITA no. 5627/Mum/2013. We made it clear that only investments which are capable of yielding tax-free income shall be included for disallowance u/s 14A of the Act and also strategic investments in securities which are capable of yielding tax-free income are to be included while computing disallowance u/s 14A of the Act, while the investments which are capable of yielding taxable income shall not be included in computing disallowance u/s 14A of the Act. Rule 8D of Income-tax Rules, 1962 is applicable w.e.f. 2008-09 as held by Hon'ble Bombay High Court in Godrej and Boyce Manufacturing Company Limited(supra) which shall be applied by the AO only after disallowance of expenditure incurred in relation to earning of exempt income could not be worked

out having regards to accounts of the assessee in accordance with Section 14A(2) of the Act and the onus is on the assessee to bring on record all details connected therewith. This disposes the grounds raised in Revenues appeal in ITA No.5627/Mum/2013 for assessment year 2009-10.We order accordingly.

21.This disposes of revenue's appeal in ITA no 5627/Mum/2013 for the assessment year 2009-10 which is partly allowed as indicated above.

22. We shall now take up assessee's appeal in ITA No.1/Mum/2014 for assessment year 2010-11.

23. The first grievance of the assessee is with respect to the disallowance u/s 14A of the Act of Rs. 1.88 crores without recording satisfaction that assessee's calculation of such disallowance to the tune of Rs. 1.01 crores was not correct. Further, the assessee is aggrieved by the decision of the learned CIT(A) in not excluding investment in subsidiary company while computing disallowance u/r 8D of Income-tax Rules, 1962. We have already adjudicated these issues in preceding para's while adjudicating appeals for assessment year 2008-09 and 2009-10. Our decisions in the afore-stated appeals shall apply mutatis mutandis to this appeal. We order accordingly.

24. The next grievance of the assessee is with respect to the decision of learned CIT(A) in confirming the levy of interest u/s. 234B and 234C of the Act by the AO, without appreciating that there was a sudden spurt in advances and recovery in March 2010 , which factors could not at all have been anticipated by the assessee while making its bona-fide estimation of advance tax and as such there was no default or deferment of advance tax liability at all , and consequently interest u/s. 234B and 234C of the Act is not leviable. The contention of the learned counsel for the assessee is that the assessee received advances in the Month of March 2010 and hence the assessee was not in a position to estimate advance tax liability as such advances were received only in March 2010 .Our attention is drawn to 'statement of fact' filed wherein it is stated in SOF that there was a sudden spurt in

advances and recovery in March 2010 and these factors could not have been at all anticipated by the assessee while making bona-fide estimation of advance tax. Thus, it was submitted that no default or deferment with respect to advance tax obligations occurred and the authorities below erred in applying provisions of Section 234B and 234C of the Act in mechanical manner. It was prayed that the authorities below may verify these contentions of the assessee and matter may be remanded to the authorities below for conducting necessary verifications. The learned DR submitted that these contentions of the assessee before the Tribunal need verification. After hearing both sides and on perusal of material on record, we are of the considered view that this plea/contentions of the assessee that there was a sudden spurt in advances in the month of March 2010 while led to increase in advance tax liability which could not be anticipated while estimating advance tax liability as per provisions of the Act need verification by the AO and hence we are inclined to set aside and restore this issue to the file of the AO for de-novo adjudication of the issue on merits in accordance with law. Needless to say that proper and adequate opportunity of being heard shall be provided by the AO to the assessee in accordance with principles of natural justice in accordance with law. We order accordingly.

25. This disposes of the assessee's appeal in ITA no 1/Mum/2014 for the assessment year 2010-11 which is partly allowed as indicated above.

26. In the result all the six appeals i.e. Revenue appeal in ITA no. 8622/Mum/2010 for assessment year, Assessee's appeal in ITA no. 7738/Mum/2010 for assessment year 2007-08 , Revenue appeal in ITA no. 1140/Mum/2012 for assessment year 2008-09, Assessee's appeal in ITA no. 694/Mum/2012 for assessment year 2008-09, Revenue's appeal in ITA No. 5627/Mum/2013 for assessment year 2009-10 and assessee's appeal in ITA no. 1/Mum/2014 for assessment year 2010-11, are partly allowed as indicated above.

Order pronounced in the open court on 31st October, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांकः 31.10-2016 को की गई ।

Sd/-	sd/-
(C.N. PRASAD)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 31-10-2016

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व.नि.स./ R.K., Ex. Sr. PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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