आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,'जी',मुंबई।

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES, 'G' MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री मनोज कुमार अग्रवाल, लेखा सदस्य**,** के समक्ष

Before Shri Joginder Singh, Judicial Member, and Shri Manoj Kumar Aggarwal, Accountant Member

ITA No.3053/Mum/2015
Assessment Year: 2011-12

M/s Shapoorji Pallonji & Co. Ltd. Shapporji Pallonji Centre, 41/44 Minoo Desai Marg, Colaba Mumbai-400005	**बनाम**/ Vs.	DCIT, Circle-3(3), Room No.609, 6th floor, Aayakar Bhavan, M.K.Road, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN. No. AAACS6994C		

निर्धारिती **की ओर से /** Assessee by	Shri Chetan Karia
राजस्व **की ओर से** / Revenue by	Mrs. Vidisha Kalra-CIT-DR

सुनवाई की तारीख **/ Date of Hearing :**	**19/01/2017**
आदेश की तारीख /**Date of Order:**	**03/03/2017**

आदेश / O R D E R

Per Joginder Singh(Judicial Member)

The assessee is aggrieved by the impugned order dated 31/03/2015 of the Ld. First Appellate Authority, Mumbai.

2. Ground no.1, raised by the assessee, pertains to not providing sufficient opportunity of being heard to the assessee and consequent enhancement of disallowance u/s 14A of the Income Tax Act, 1961 (hereinafter the Act) r.w.r-8D of the Income Tax Rules, 1962 (hereinafter the Rules). The crux of the argument on behalf of the assessee, Ld. counsel, Shri Chetan Kariya, is identical to the ground raised. On the other hand, Ms. Vidisha Kalra, ld. CIT-DR, explained that sufficient opportunity was provided to the assessee, therefore, there is no substance in the ground raised by the assessee.

2.1. We have considered the rival submissions and perused the material available on record. We find that the assessment order was framed u/s 143(3) of the Act, whereas, as is evident from page-1 itself, the ld. counsel for the assessee, Shri Vijay C. Kothari along with Shri Vijay Agarwal, appeared and were heard. The arguments advanced by the ld. counsel was duly considered, therefore, we are not satisfied with the argument of the ld. counsel for the assessee that proper opportunity was not provided to

the assessee, consequently, this ground of the assessee is dismissed.

3. So far as, ground no. 2 & 3 with respect to computing the disallowance u/s 14A of the Act read with Rule 8D(2)(ii) at Rs.60,04,84,033/- as against the disallowance computed by the assessee at Rs.1,09,16417/- accepted by the ld. Assessing Officer and consequent disallowance u/s 14A of the Act r.w.r 8D(2)(iii) at Rs.4,63,71,213/- as against the disallowance computed by the assessee at Rs.1 lakh is concerned, the crux of argument, on behalf of the assessee, before us, is that own funds substantially covers the investment made by the assessee as per settled position of law and further the method of calculation followed by the assessee has to be accepted for making disallowance u/s 14A of the Act as has been accepted by the Revenue in the past several years, thus, rule of consistency requires that similar view should be taken in the present year also. It was also explained that the assessee has already made *suo-moto* disallowance of Rs.1.10 crores and Rs.1 lakh.

3.1. On the other hand, the ld. CIT-DR defended the disallowance made by the Assessing Officer and further enhanced by the Ld. Commissioner of Income Tax (Appeal). It was also contended that each year is independent, therefore, addition/disallowance was rightly made by the

Assessing Officer. It was also contended that rule of consistency is not applicable in the present case.

3.2. We have considered the rival submissions and perused the material available on record. We find that the Tribunal vide order dated 09/12/2015 ITA No. 4418 /Mum/ 2012, for Assessment Year 2008-09 on identical issue, considered the factual matrix and dismissed the appeal of the Revenue, considering the decision of Hon'ble Calcutta High Court in the case of Dhanuka & Sons (339 ITR 319), relied upon by the Revenue. The decision from Hon'ble jurisdictional High Court in the case of Reliance Utilities and Power Ltd. (2009) 313 ITR 340 was also considered and then reached to a conclusion, upholding the stand of the Ld. CIT(A) by rejecting the appeal of the Revenue. Identically, for Assessment Year 2009-10 (ITA No.202 and 207/Mum/2013), the Tribunal, vide order dated 27/03/2015, on the issue of disallowance made under rule-8D(2)(iii) of the Rules, considered the decisions from Hon'ble jurisdictional High Court in Godrej & Boyce Co. Ltd. vs DCIT (328 ITR 81)(Bom.) and dismissed the appeal of the Revenue. If all these cases are kept in juxtaposition with the facts of the present appeal, we find that the assessee company made investment by reflecting the same in the balance-sheet. The investments are largely in the group companies and the primary activity is construction, infrastructure development and the investment are in support of the main business. In the

assessment proceedings for Assessment Year 2008-09 to 2011-12 (impugned year) the ld. Assessing Officer accepted the working of disallowance, out of interest and for indirect expenses, he applied rule-8D of the Rules. As mentioned earlier, the issue of disallowance of interest was considered by the Ld. Commissioner of Income Tax (Appeal) as well as by the Tribunal and decided the issue in favour of the assessee. The assessee has identified and quantified specific amount of interest expenses and also the investment with borrowed funds in the past and the investments have been co-related. It is also noted that even the Ld. Assessing Officer, as in the past, allowed the interest. The Assessing Officer was satisfied with the disallowances, *suo-moto* made by the assessee. It is noted that in all the earlier years i.e. Assessment Year 2008-09 to 2010-11, the issue of disallowance was considered by the Ld. Commissioner of Income Tax (Appeal) as well as the Tribunal. On the issue of disallowance, out of interest expenses, the Ld. Commissioner of Income Tax (Appeal) reduced the disallowance to Rs.10 lakh and the Tribunal affirmed the order of the First Appellate Authority. For the year under appeal, the Ld. Commissioner of Income Tax (Appeal) affirmed the order of the Assessing Officer on the point of disallowance out of expenses. The Ld. Commissioner of Income Tax (Appeal) issued enhancement notice dated 20/02/2015, asking the assessee to file the reply. The assessee requested for adjournment but the

request was denied and order was passed by the Ld. CIT (Appeal) applying Rule-8D(ii) in respect of disallowance of interest. Considering the totality of facts, we find that so far as the disallowance out of indirect expenses is concerned, as claimed by the assessee, the issue is covered by the decision of earlier years.

3.3. So far as, the issue of disallowance of other amount out of interest by applying rule-8D(ii) is concerned, we find that the amounts are identified and quantified and specific amount of interest expenses were incurred towards investment. The assessee duly maintained the books and followed the appropriate method. The method adopted by the assessee can only be rejected with objective reasons based upon books of accounts of the assessee. Except for saying that the investment are more than own funds, the Ld. CIT (Appeal) has not pointed any error in the working of the assessee. Hon'ble Delhi High Court in the case of CIT vs. Taikisha Engineering India Ltd. (2015) 370 ITR 338 (Del.) clearly held that Rule-8D can only be applied if the objective reasons are given for rejection of method, adopted by the assessee. From pages 103 to 129 (copy of balance sheet and investment) it is evidently clear that the investment are very old and no much time and energy was employed by the assessee while making the investment or in collection of dividend. Section 14A of the Act says, where the assessee has made *suo-moto* disallowance, then the books of accounts has to be looked into. So far as, the

dissatisfaction is concerned, it cannot be merely on the basis of volume as was held by Hon'ble jurisdictional High Court in various decisions which will be discussed in later part of this order, like Reliance Utilities and Power Ltd. (2009) 313 ITR 340 (Bom.) and East India Pharmaceutical Works Ltd. vs CIT (224 ITR 624)(SC) and Gujarat High Court in CIT vs Suzlon Energy Ltd. (354 ITR 630)(Guj.) and also by Hon'ble Delhi High Court in COMMISSIONER OF INCOME TAX vs. TAIKISHA ENGINEERING INDIA LTD.(2015) 275 CTR 0316 (Del) : (2015) 114 DTR 0316 (Del) : (2015) 370 ITR 0338 (Delhi) : (2015) 229 TAXMAN 0143 (Delhi), the relevant portion of the order is reproduced hereunder for ready reference and analysis:-

> "8. The Income Tax Appellate Tribunal ('Tribunal', for short) by a common order dated 27th September, 2013 has dismissed the appeals filed by the Revenue. Rule 8D of the Rules it was held was applicable and the issue related to computation under sub Rule (2) and the three sub-clauses.Reference was made to clause (ii) of sub Rule (2) to Rule 8D of the Rules and it has been held:-
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> "2.4. ... Only clause (ii) is involved in the present appeal. The AO considered the total interest paid by the assessee for allocating a sum of [Rs.] 36.76 lakh to the investments yielding exempt income. At the threshold it needs to be determined as to whether any interest expenditure can be attributed to the securities on which such exempt income was earned. The question of disallowance of such interest u/s 14A would arise only if some expenditure is said to have been incurred in relation to investment in such securities. In this regard, it is observed that the assessee made total investment of [Rs.] 6.33 crore in shares or securities resulting into exempt income. As against that share holder funds stood at [Rs.] 53.79 crore at the end of the year. Thus, it is evident that the amount invested in such shares or securities is far in excess of share holders' funds."
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> 9. Reference was made to the decision of the Delhi High Court in CIT vs. Tin Box Co. [2003] 260 ITR 637 (Del) to hold that when the assessee had sufficient funds and non interest funds were advanced to a sister concern, no disallowance was justified. Further, the Bombay High Court in CIT vs. Reliance Utilities and Power Ltd. [2009] 313 ITR 340 (Bom.) had similarly held that when sufficient non interest funds were available for investment then no disallowance of interest should be made. The

Bombay High Court had placed reliance on the decision of East India Pharmaceutical Works Ltd. vs. CIT [1997] 224 ITR 624 (SC) to the effect that if the assessee had sufficient non interest funds, then investment made in shares and securities resulting in exempt income should not lead to disallowance of interest expenditure, as there was no question of attributing any interest to such investments. Lastly, reference was made to the decision of the Gujarat High Court in CIT vs. Suzlon Energy Ltd. [2013] 354 ITR 630, to the same effect.

10. Having heard the Counsel for the parties, we feel that the respondent assessee is entitled to succeed on somewhat different grounds and reasons, than those elucidated by the Tribunal.

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18. It is in this context we feel that the findings recorded by the CIT(A) and the Tribunal are appropriate and relevant. The clear findings are that the assessee had sufficient funds for making investments in shares and mutual funds. The said findings coupled with the failure of the Assessing Officer to hold and record his satisfaction clinches the issue in favour of the respondent assessee and against the Revenue. The self or voluntary deductions made by the assessee were not rejected and held to be unsatisfactory, on examination of accounts. Judgments in Tin Box Co. (supra), Reliance Utilities and Power Ltd. (supra), Suzlon Energy Ltd. (supra) and East India Pharmaceutical Works Ltd. (supra) would be relevant if the satisfaction of the Assessing Officer is in issue, and such question of satisfaction is with reference to the accounts.

19. However, the decisions relied upon by the Tribunal in the case of Tin Box Co. (supra), Reliance Utilities and Power Ltd. (supra), Suzlon Energy Ltd. (supra) and East India Pharmaceutical Works Ltd. (supra) could not be now applicable, if we apply and compute the disallowance under Rule 8D of the Rules. The said Rule in sub Rule (2) specifically prescribes the mode and method for computing the disallowance under Section 14A of the Act. Thus, the interpretation of clause (ii) to sub Rule (2) to Rule 8D of the Rules by the CIT(A) and the Tribunal is not sustainable. The said clause expressly states that where the assessee has incurred expenditure by way of interest in the previous year and the interest paid is not directly attributable to any particular income or receipt then the formula prescribed would apply. Under clause (ii) to Rule 8D(2) of the Rules, the Assessing Officer is required to examine whether the assessee has incurred expenditure by way of interest in the previous year and secondly whether the interest paid was directly attributable to particular income or receipt. In case the interest paid was directly attributable to any particular income or receipt, then the interest on loan amount to this extent or in entirety as the case may be, has to be excluded for making computation as per the formula prescribed. Pertinently, the amount to be disallowed as expenditure relatable to exempt income, under sub Rule (2) is the aggregate of the amount under clause (i), clause (ii) and clause (iii). Clause (i) relates to direct expenditure relating to income forming part of the total income and under clause (iii) an amount equal to 0.5% of the average amount of value of investment, appearing in the balance sheet on the first day and the last day of the assessee has to be disallowed.

> 20. However, in the present case we need not refer to sub Rule (2) to Rule 8D of the Rules as conditions mentioned in sub Section (2) to Section 14A of the Act read with sub Rule (1) to Rule 8D of the Rules were not satisfied and the Assessing Officer erred in invoking sub Rule (2), without elucidating and explaining why the voluntary disallowance made by the assessee was unreasonable and unsatisfactory. We do not find any such satisfaction recorded in the present case by the Assessing Officer, before he invoked sub Rule (2) to Rule 8D of the Rules and made the re-computation. Therefore, the respondent assessee would succeed and the appeal should be dismissed."

3.4. In the aforesaid decision, Hon'ble High Court duly analyzed section 14A of the Act r.w.r 8D of the Rules. Reference was also made to the decision from Hon'ble Delhi High Court in CIT vs Tin Box Company (2003) 260 ITR 637 (Del.) by holding that when the assessee had sufficient funds and non-interest funds were advanced to sister concern, no disallowance was justified. Even the Hon'ble jurisdictional High Court in CIT vs Reliance Utilites and Power Ltd. (2009 313 ITR 340 (Bom.), had similarly held that when sufficient non-interest funds were available for investment then no disallowance of interest should be made. The Hon'ble High Court placed reliance upon the decision from Hon'ble Apex Court in East India Pharmaceutical Works Ltd. vs CIT (1997) 224 ITR 624 (SC) to the effect that if the assessee had sufficient non-interest bearing funds, then investment made in shares and securities resulting in exempt income should not lead to disallowance of interest expenditure as there was no question of attributing any interest to such investment. Reference can also be made to the decision from Hon'ble Gujarat High Court in CIT vs Suzlon Energy Ltd. (2013) 354 ITR 630 to the same effect. In the light of the foregoing

discussion, we are reproducing hereunder section 14A of the Act, which is very much relevant for analysis of facts.

> "14A. (1) For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.
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> (2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.
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> (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.
>
> Provided that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001."

3.5. Section 14A of the Act postulates and states that no deduction shall be allowed in respect of expenditure incurred by an assessee in relation to income which does not form part of the total income under the Act. Under sub Section (2) to Section 14A of the Act, the Assessing Officer is required to examine the accounts of the assessee and only when he is not satisfied with the correctness of the claim of the assessee in respect of expenditure in relation to exempt income, he can determine the amount of expenditure which should be disallowed in accordance with such method as prescribed, i.e. Rule 8D of the Rules (quoted and elucidated below). Therefore, the Assessing Officer at the first instance must examine the disallowance

made by the assessee or the claim of the assessee that no expenditure was incurred to earn the exempt income. If and only if the Assessing Officer is not satisfied on this count after making reference to the accounts, that he is entitled to adopt the method as prescribed i.e. Rule 8D of the Rules. Thus, Rule 8D is not attracted and applicable to assessee who have exempt income and it is not compulsory and necessary that an assessee must voluntarily compute disallowance as per Rule 8D of the Rules. Where the disallowance or 'nil' disallowance made by the assessee is found to be unsatisfactory on examination of accounts, the assessing officer is entitled and authorised to compute the deduction under Rule 8D of the Rules. This pre-condition and stipulation as noticed below is also mandated in sub Rule (1) to Rule 8D of the Rules.

3.6. Now, we shall analyze Rule-8D of the Rules, which is reproduced hereunder:-

> "8D. (1) Where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with—
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> (a) the correctness of the claim of expenditure made by the assessee; or
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> (b) the claim made by the assessee that no expenditure has been incurred,
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> in relation to income which does not form part of the total income under the Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2).
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> The expenditure in relation to income which does not form part of the total income shall be the aggregate of following amounts, namely:—

(i) the amount of expenditure directly relating to income which does not form part of total income;

(ii) in a case where the assessee has incurred expenditure by way of interest during the previous year which is not directly attributable to any particular income or receipt, an amount computed in accordance with the following formula, namely : — A x B/C

Where A = amount of expenditure by way of interest other than the amount of interest included in clause (i) incurred during the previous year ;

B = the average of value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year ;

C = the 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 ;

(iii) an amount equal to one-half per cent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year.

(3) For the purposes of this rule, the "total assets" shall mean, total assets as appearing in the balance sheet excluding the increase on account of revaluation of assets but including the decrease on account of revaluation of assets."

Sub Rule (1) categorically and significantly states that the Assessing Officer having regard to the account of the assessee and on not being satisfied with the correctness of the claim of expenditure made by the assessee or claim that no expenditure was incurred in relation to income which does not form part of the total income under the Act, can go on to determine the disallowance under sub Rule (2) to Rule 8D of the Rules. Sub Rule (2) will not come into operation until and unless the specific pre-condition in sub Rule (1) is satisfied. Thus, Section 14A(2) of the Act and Rule 8D(1) in unison and affirmatively record that the computation or disallowance made by the assessee or claim

that no expenditure was incurred to earn exempt income must be examined with reference to the accounts, and only and when the explanation/claim of the assessee is not satisfactory, computation under sub Rule (2) to Rule 8D of the Rules is to be made.

3.7. Now, we shall analyze scope of sub-section (2) and (3) of Section 14A of the Act. Sub-section (2) of Section 14 A of the Act provides the manner in which the Assessing Officer is to determine the amount of expenditure incurred in relation to income which does not form part of the total income. However, if we examine the provision carefully, we would find that the Assessing Officer is required to determine the amount of such expenditure only if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the said Act. In other words, the requirement of the Assessing Officer, embarking upon a determination of the amount of expenditure incurred in relation to exempt income would be triggered only if the Assessing Officer returns a finding that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Therefore, the condition precedent for the Assessing Officer entering upon a determination of the amount of the expenditure incurred in relation to exempt income is that the Assessing Officer must record that he is

not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Sub-section (3) is nothing but an offshoot of sub-section (2) of Section 14A of the Act. Sub-section (3) applies to cases where the assessee claims that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act. In other words, sub-section (2) deals with cases where the assessee specifies a positive amount of expenditure in relation to income which does not form part of the total income under the said Act and sub-section (3) applies to cases where the assessee asserts that no expenditure had been incurred in relation to exempt income. In both cases, the Assessing Officer, if satisfied with the correctness of the claim of the assessee in respect of such expenditure or no expenditure, as the case may be, cannot embark upon a determination of the amount of expenditure in accordance with any prescribed method, as mentioned in sub-section (2) of Section 14A of the said Act. It is only if the Assessing Officer is not satisfied with the correctness of the claim of the assessee, in both cases, that the Assessing Officer gets jurisdiction to determine the amount of expenditure incurred in relation to such income which does not form part of the total income under the said Act in accordance with the prescribed method. The prescribed method being the method stipulated in Rule 8D of the said Rules. While rejecting the claim of the assessee with regard to the expenditure or no expenditure, as the

case may be, in relation to exempt income, the Assessing Officer would have to indicate cogent reasons for the same.

3.8. Rule 8D, as we have already noticed, sub-section (2) of Section 14A of the said Act refers to the method of determination of the amount of expenditure incurred in relation to exempt income. The expression used is - "such method as may be prescribed". We have already mentioned above that by virtue of Notification No.45 of 2008, dated March 24, 2008, the Central Board of Direct Taxes introduced Rule 8D in the said Rules. The said Rule 8D also makes it clear that where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with

> (a) the correctness of the claim of expenditure made by the asses see; or
>
> (b) the claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act for such previous year. The Assessing Officer shall determine the amount of the expenditure in relation to such income in accordance with the provisions of sub-rule (2) of Rule 8D.

3.9. We may observe that Rule 8D(1) places the provisions of Section 14A(2) and (3) in the correct perspective. As we have already seen, while discussing the

provisions of Subsections (2) and (3) of Section 14A of the Act, the condition precedent for the Assessing Officer to himself determine the amount of expenditure is that he must record his dissatisfaction with the correctness of the claim of expenditure made by the assessee or with the correctness of the claim made by the assessee that no expenditure has been incurred. It is only when this condition precedent is satisfied that the Assessing Officer is required to determine the amount of expenditure in relation to income not includable in total income in the manner indicated in sub-rule (2) of Rule 8D of the said Rules. It is, therefore, clear that determination of the amount of expenditure in relation to exempt income under Rule 8D would only come into play when the Assessing Officer rejects the claim of the assessee in this regard. If one examines sub-rule (2) of Rule 8D, we find that the method for determining the expenditure in relation to exempt income has three components.

i. The first component being the amount of expenditure directly relating to income which does not form part of the total income.
ii. The second component being computed on the basis of the formula given therein in a case where the assessee incurs expenditure by way of interest which is not directly attributable to any particular income or receipt. The formula essentially apportions the amount of expenditure by way of interest (other than

the amount of interest included in clause (i)) incurred during the previous year in the ratio of the average value of investment, income from which does not or shall not form part of the total income, to the average of the total assets of the assessee.

iii. The third component is an artificial figure - one half percent of the average value of the investment, income from which does not or shall not form part of the total income, as appearing in the balance sheets of the assessee, on the first day and the last day of the previous year. It is the aggregate of these three components which would constitute the expenditure in relation to exempt income and it is this amount of expenditure which would be disallowed under Section 14A of the said Act. It is, therefore, clear that in terms of the said Rule, the amount of expenditure in relation to exempt income has two aspects –

(a) The direct expenditure is straightaway taken into account by virtue of clause (i) of sub-rule (2) of Rule 8D. and

(b) The indirect expenditure, where it is by way of interest, is computed through the principle of apportionment, as indicated above. And, in cases where the indirect expenditure is not by way of interest, a rule of thumb figure of one half percent of the average value

of the investment, income from which does not or shall not form part of the total income, is taken."

3.10. Even earlier the Bombay High Court in Godrej and Boyce Mfg. Co. Ltd. versus Deputy Commissioner of Income Tax (2010) 328 ITR 81 (Bom.) had referred to Section 14(2) of the Act and observed:-

> "Under sub-section (2), the Assessing Officer is required to determine the amount of expenditure incurred by an assessee in relation to such income which does not form part of the total income under the Act in accordance with such method as may be prescribed. The method, having regard to the meaning of the expression "prescribed" in section 2(33), must be prescribed by rules made under the Act. What merits emphasis is that the jurisdiction of the Assessing Officer to determine the expenditure incurred in relation to such income which does not form part of the total income, in accordance with the prescribed method, arises if the Assessing Officer is not satisfied with the correctness of the claim of the assessee in respect of the expenditure which the assessee claims to have incurred in relation to income which does not part of the total income. Moreover, the satisfaction of the Assessing Officer has to be arrived at, having regard to the accounts of the assessee. Hence, sub-section (2) does not ipso facto enable the Assessing Officer to apply the method prescribed by the rules straightaway without considering whether the claim made by the assessee in respect of the expenditure incurred in relation to income which does not form part of the total income is correct. The Assessing Officer must, in the first instance, determine whether the claim of the assessee in that regard is correct and the determination must be made having regard to the accounts of the assessee. The satisfaction of the Assessing Officer must be arrived at on an objective basis. It is only when the Assessing Officer is not satisfied with the claim of the assessee, that the Legislature directs him to follow the method that may be prescribed. In a situation where the accounts of the assessee furnish an objective basis for the Assessing Officer to arrive at a satisfaction in regard to the correctness of the claim of the assessee of the expenditure which has been incurred in relation to income which does not form part of the total income, there would be no warrant for taking recourse to the method prescribed by the rules.
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> For, it is only in the event of the Assessing Officer not being so satisfied that recourse to the prescribed method is mandated by law. Sub-section (3) of section 14A provides for the application of sub-section (2) also to a situation where 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 the Act. Under the proviso, it has been stipulated that nothing in the section will empower the Assessing Officer, for an assessment year beginning on or before April 1, 2001, either to reassess under section 147 or pass an order enhancing the assessment or

reducing the refund already made or otherwise increasing the liability of the assessee under section 154."

3.11. Equally illuminating are the following observations in Godrej and Boyce Mfg. Co. Ltd. (supra)

However, if the assessee does not maintain separate accounts, it would be necessary for the Assessing Officer to deter-mine the proportion of expenditure incurred in relation to the dividend business (i.e., earning exempt income). It is for exactly such situations that a machinery/method for computing the proportion of expenditure incurred in relation to the dividend business has been provided by way of section 14A(2)/(3) and rule 8D."

3.12. More important and relevant for us are the observations in Godrej and Boyce Mfg. Co. Ltd. (supra) on requirement and stipulation of satisfaction being recorded by the Assessing Officer with reference to the accounts under Section 14(2) of the Act and Rule 8D(1) of the Rules. It was observed:-

"Parliament has provided an adequate safeguard to the invocation of the power to determine the expenditure incurred in relation to the earning of non-taxable income by adoption of the prescribed method. The invocation of the power is made conditional on the objective satisfaction of the Assessing Officer in regard to the correctness of the claim of the assessee, having regard to the accounts of the assessee. When a statute postulates the satisfaction of the Assessing Officer "Courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated". (M. A. Rasheed v. State of Kerala [1974] AIR 1974 SC 2249*). A decision by the Assessing Officer has to be arrived at in good faith on relevant considerations. The Assessing Officer must furnish to the assessee a reasonable opportunity to show cause on the correctness of the claim made by him. In the event that the Assessing Officer is not satisfied with the correctness of the claim made by the assessee, he must record reasons for his conclusion. These safeguards which are implicit in the requirements of fairness and fair procedure under article 14 must be observed by the Assessing Officer when he arrives at his satisfaction under sub-section (2) of section 14A. As we shall note shortly hereafter, sub-rule (1) of rule 8D has also incorporated the essential requirements of sub-section (2) of section 14A before the Assessing Officer proceeds to apply the method prescribed under sub-rule (2)."

3.13. The sum and substance of the foregoing discussion is that section 14A of the Act postulates and states that no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income, which does not form part of the total income under the Act. Under sub-section (2) of Section 14A of the Act, the Assessing Officer is required to examine the accounts of the assessee and only when he is not satisfied with the correctness of the claim of the assessee in respect of expenditure in relation to exempt income, the Assessing Officer can determine the amount of expenditure, which should be disallowed in accordance with such method as prescribed i.e. Rule-8D of the Rules, therefore, the Assessing Officer at the first instance must examine the disallowance made by the assessee or the claim of the assessee that no expenditure was incurred to earn the exempt income. If and only if the Assessing Officer is not satisfied on the count after making reference to the accounts only then he is entitled to adopt the method as prescribed under Rule-8D of the Rules, thus, Rule-8D is not attracted and applicable in a situation, where, the assessee has voluntarily computed the disallowance as per Rule-8D of the Rules.

3.14. So far as the argument of the assessee with respect to rule of consistency is concerned, we note that in the previous and subsequent assessment years, the Assessing Officer treated the assessee as an investor,

therefore, we are of the view that unless and until contrary facts are brought on record by the Revenue, no U-turn is permissible. The learned Assessing Officer is bound by rule of consistency. The ratio laid down in following cases supports the case of the assessee:-

i. Parshuram Pottery Works Ltd. vs ITO 106 ITR 1 (SC)
ii. CIT vs A.R.J. Security Printers 264 ITR 276(Del.)
iii. CIT vs Neo Polypack Pvt. Ltd. 245 ITR 492 (Del.)
iv. CWT vs Allied Finance Pvt. Ltd. 289 ITR 318 (Del.)
v. Berger Paints India Ltd. vs CIT 266 ITR 99 (SC)
vi. DCIT vs United Vanaspati (275 ITR 124) (AT)(Chandigarh ITAT)
vii. Union of India vs Kumudini N. Dalal 249 ITR 219 (SC)
viii. Union of India vs Satish Pannalal Shah 249 ITR 221
ix. B.F.Varghese vs State of Kerala 72 ITR 726 (Ker.)
x. CIT vs Narendra Doshi 254 ITR 606 (SC)
xi. CIT vs Shivsagar Estate 257 ITR 59 (SC)
xii. Pradip Ramanlal Seth vs UOI 204 ITR 866 (Guj.)
xiii. Radhaswamy Satsang vs CIT 193 ITR 321 (SC)
xiv. Aggarwal warehousing & Leasing Ltd. 257 ITR 235 (MP)

3.15. The sum and substance of the aforesaid judicial pronouncements is that on the basis of principle of judicial discipline, consistency has to be followed and once in a particular year, if any view is taken, in the absence of any contrary material, no contrary view is to be taken as finality to the litigation is also a principle which has to be followed.

Before us, no contrary facts or any adverse material was brought on record by the Revenue, therefore, on the principle of consistency also, the assessee is having a good case in her favour. The Hon'ble Delhi High Court in the case of CIT vs A.R.J. Security Printers 264 ITR 276(Del.) held as under:-

> *"True that each assessment year being independent of the other, as a general rule, the principle of res judicata or estoppel by record, which applies to civil Courts, does not apply to income-tax proceedings but, yet for the sake of consistency and for the purpose of finality in all litigations, including litigation arising out of fiscal statutes, earlier decisions on the same question should not be reopened unless some fresh facts are found in the subsequent year.—Radhasoami Satsang vs. CIT (1991) 100 CTR (SC) 267 : (1992) 193 ITR 321 (SC)* ***applied.***
>
> **(Para 6)**
>
> The same issue, namely, whether the assessee is entitled to relief under s. 80-I or not, was decided by the Tribunal in favour of the assessee in respect of asst. yr. 1992-93, which order has now been followed by the Tribunal while disposing of appeals for the three years in question. The AO disallowed assessee's claim only on the ground that similar claim had been disallowed in earlier years. No fresh material has been brought on record by the lower authorities, warranting fresh consideration. Admittedly, order of the Tribunal for asst. yr. 1992-93 has not been challenged by the Revenue. Similarly, orders of the Tribunal on the issue, pertaining to asst. yrs. 1995-96 and 1997-98 have attained finality. In the aforenoted factual background, one fails to appreciate as to how, when there is no change in the business of the assessee, relief under s. 80-I can be denied to it in respect of some of the assessment years when similar relief is granted for previous and subsequent years. Having accepted at least in three assessment years that the assessee's business activity fell within the ambit of s. 80-I, the Revenue cannot be allowed to now turn around and contend that deduction under the said section is not available to it in respect of the present assessment years. For the foregoing reasons, without going into the merits of the issue raised, the appeals are not entertained.
>
> **(Paras 7, 8 & 10)**
>
> Conclusion :
>
> *Having accepted in three assessment years that the assessee's business activity of printing lottery tickets fall within the ambit of s. 80-I, the Revenue cannot be allowed to turn around and contend*

that deduction under the said section is not allowable in respect of assessment years in question; appeal not entertained."

3.16. In the case of CIT vs Neo Polypack Pvt. Ltd. 245 ITR 492 (Del.), the Hon'ble Delhi High Court held as under:-

"No fault can be found with the order of the Tribunal declining to make a reference on the proposed question. It is true that each assessment year being independent of the other, the doctrine of res judicata does not strictly apply to income-tax proceedings, but where an issue has been considered and decided consistently in a number of earlier assessment years in a particular manner, for the sake of consistency, the same view should continue to prevail in subsequent years, unless there is some material change in the facts. In the present case, counsel for the Revenue has not been able to point out even a single distinguishing feature in respect of the assessment year in question which could have prompted the AO to take a view different from the earlier assessment years, in which the same income was brought to tax as income from business. The petition is accordingly dismissed.

(Para 3)

Conclusion :

Since rental income derived by assessee was assessed as business income all along, finding of the Tribunal that it was still assessable as business income in the year in question, in absence of any distinguishing feature, did not give rise to any referable question of law."

3.17. The Mumbai Bench of the Tribunal in the case of Smt. Darshana B. Doshi ITA No.5462/Mum/2012, order dated 07/06/2016 deliberated upon the issue of consistency and decided in favour of the assessee, therefore, the ratio laid down therein, squarely covers the present appeal before us. We are aware that the doctrine of res-judicata does not strictly apply to the Income Tax Proceedings, however, where the Department had been taking consistent stand in a particular way (in the case of the present assessee in its favour) and the Department has not pin pointed any distinguished facts, therefore, U-turn is

not permitted. More specifically, when in earlier and later years, the identical issue was decided in favour of the assessee. Respectfully following the ratio laid down in the aforementioned cases, from the view point of consistency. In the impugned year before us, the assessee filed return declaring income of Rs.15,63,72,847/- on 28/11/2011 and also declared books profit of Rs.132,62,63,171/- u/s 115JB of the Act which was later revised to Rs.13,98,29,240/- on 22/03/2013 under normal provisions of the Act and Rs.132,62,63,170/- of book profit u/s 115JB of the Act. The ld. Assessing Officer scrutinized the return of income u/s 143(3) of the Act, determining total income at Rs.143,97,49,493/- vide assessment order dated 17/02/2014, as book profit u/s 115JB of the Act after making certain disallowances and adjustment. Thus, the assessee suffered the disallowance of Rs.4,62,71,213/- u/s 14A of the Act. The Assessing Officer noted that the assessee earned exempt income as per the following details:-

Sr. No.	*Particulars*	*Amount (Rs.)*
1	*Dividend*	*14,76,49,893*
2	*Income from Partnership Firm*	*63,05,233*
3	*Long Term Capital Gain*	*128,78,88,114*

It is noted that the assessee has already made suo-moto disallowance of Rs.1,09,16,417/- relating to interest expenditure and Rs.1 lakh for dividend collection charges, thus attributable expenses worked out to Rs.1,10,16,417/-

for exempt income. It is also found that the Assessing Officer accepted the interest disallowance made by the assessee and observed that Rs.1 lakh, incurred as dividend collection charges were disproportionate to the dividend income of Rs.14.76 crores. The Ld. Assessing Officer made disallowance of administrative expenses under Rule-8D(2)(iii) of the rules and worked out the disallowance of Rs.4,62,71,213/- in the following manner:-

Balance Sheet as on 31.03.2010		*Rs.*
In Shares of Companies		*736,94,53,407*
In Partnership Firms		*6,78,57,677*
In Shares of Co-Op. Banks/Soc.		*1,24,477*
Current Invest: In shares of Companies		*11,54,66,296*
		755,29,01,857
Balance Sheet as on 31.03.2011		
In shares of companies		*1092,35,46,038*
In Partnership Firms		*7,19,12,911*
In Shares of Co-Op. Banks/Soc.		*1,24,477*
Current Invest: In shares of Companies		
		1099,55,53,426
Rule 8D(iii)	*Average Investments*	*927,42,42,641*
	0.5% of Average Investments	*4,63,71,213*
Total Disallowance as per Rule 8D		*4,63,71,213*
Less: Already Disallowed		*1,00,000*
Addition u/s 14A		***4,62,71,213***

3.18. It is noted that before the Ld. Assessing Officer as well as before the Ld. Commissioner of Income Tax

(Appeal), the assessee took the stand that the Department, in preceding years, accepted the *suo-moto* disallowance made by the assessee, therefore, in the present Assessment Year also, the same has to be followed. However, we find that instead of following the rule of consistency, the Ld. Commissioner of Income Tax (Appeal) enhanced the disallowance under Rule-8D(2)(ii) for an amount of Rs.60,04,84,033/-, which is under challenge before us. We find that the Tribunal vide order dated 27/03/2015 (ITA No. 202/Mum/2013 and 207/Mum /2013) for Assessment Year 2009-10, followed the decision of the Tribunal in the case of assessee itself for Assessment Year 2008-09 with respect to disallowance made by the Assessing Officer under rule-8D(2)(ii) and 8D(2)(iii) of the Rules along with the disallowance of the administrative expenses. In that case, the Ld. Commissioner of Income Tax (Appeal) restricted the disallowance to Rs.10 lakh against the *suo-moto* disallowance made to the tune of Rs.1 lakh. The disallowance to the tune of Rs.10 lakh was upheld by the Tribunal against the claim of Rs.1 lakh by the assessee. So far as, the contention of the ld. counsel for the assessee that the disallowance may be restricted to Rs.1 lakh only, is concerned, we are not satisfied with such reasoning because the rule of consistency applies to both sides and since, the Tribunal for Assessment Year 2008-09, 2009-10, being on identical facts, directed the Assessing Officer to restrict the disallowance as contained in the order of the

Tribunal dated 27/03/2015 (for Assessment Year 2009-10), for the present Assessment Year also, the disallowance is directed to be restricted to Rs.10 lakh under section 14A of the Act r.w.r. 8D(2)(iii), against the claim of the assessee at Rs.1 lakh, consequently, the Ld. Assessing Officer is directed to follow the ratio laid down in order dated 27/03/2015 (Assessment Year 2009-10). Thus, ground no. 2 & 3 are disposed off in terms indicated hereinabove.

4. So far as, ground no.4 is concerned, the assessee has challenged disallowance of interest of Rs.19.74 crores on the alleged basis that borrowed funds were utilized for non-business purposes, more specifically when in preceding years, the Tribunal has held that the funds were advanced for the purposes of the business of the assessee. Before us, the ld. counsel for the assessee, contended that some advances were given to Mr. Thakur. Our attention was invited to page-1 to 79 of the paper book, where the facts are identical. It was explained that for Assessment Year 2008-09 and 2009-10, the First Appellate Authority allowed the appeal of the assessee and the Tribunal also decided in favour of the assessee. Our attention was invited to pages-52 (para-3), page-61 (para-3.1), page-77 of the paper book and assessment order pages 5 to 29 and more specifically para 8.9 (page-25). The crux of the argument is that it was merely a business transaction and same transaction is going on. The ld.

counsel also explained that the assessee went before the Hon'ble High Court, wherein, the money was ordered to be refunded to the assessee. It was empathetically argued that in earlier and later years, the Tribunal, identically, examined the factual matrix and held the same as business advances. The ld. CIT-DR, though defended the addition but did not controvert the factual matrix explained by the assessee.

4.1. We have considered the rival submissions and perused the material available on record. Without going into much deliberation, we are reproducing hereunder, on identical facts, the relevant portion from the order of the Tribunal dated 10/04/2015 (ITA No.5766 and 5767/Mum/2013) for Assessment Year 2008-09 & 2009-10 for ready reference and analysis:-

> "*2.3. If the observation made in the assessment order, reasons for reopening the reassessment, material available on record, reasoning contained in the impugned order and the assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, we find that the facts, in brief, are that the assessee declared income of Rs.188,50,28,066/- in its return filed on 29/09/2008 which was processed on 27/07/2009, u/s 143(1) of the Act. Since the case was selected for scrutiny notice u/s 143(2) of the Act was issued to the assessee on 04/08/2009. The Assessing Officer vide order dated 27/12/2010, framed u/s 143(3) of the Act, determining the total income at Rs.191,99,06,040/-(Assessment Year 2008-09). The Assessing Officer received information from ITO-25(1)(4), Mumbai, vide letter dated 25/04/2012 (received by*

the Assessing Officer on 01/05/2012) that certain payments amounting to Rs.43,50,00,000/- were made by the assessee company by way of advances to M/s PRS Developers (proprietor Shri Nilesh J. Thakur) on various dates in Financial year 2007-08 and the said parties accounted such receipts towards expenses related to development works at Kandivali Project for which no documentary evidences were maintained by the said concern. The Assessing Officer made enquiries with the assessee company and found that the assessee company made substantial payments to M/s PRS Developers. There was also information with the Assessing Officer that M/s PRS developers had no business activity/capacity to acquire land on behalf of the assessee company besides the assessee is having its own machinery of legal/technical/marketing/financial persons for doing the job i.e. for acquisition of land. The ITO raised serious doubts about the genuineness of the transactions on the following reasons:

(i) No land has been purchased or procured by the said entity in the name of assessee company ie., M/s. Shapoorji Pallonji & Co. Ltd. (in short M/s. SPCL)
(ii) No details of progress in work were furnished by M/s SPCL
(iii) The money was received by the said entity almost four years back but so for no settlement of the account has been done by M/s. SPCL
(iv) No interest is charged on the amount received by the said entity
(v) No action for recovery has been taken by M/s. SPCL

2.4. It was also found that the assessee made the huge payments to Shri Nilesh J. Thakur without entering into any agreement for acquisition of land, meaning thereby, the assessee doled out interest bearing funds for non-business purposes under the garb of advances and further the assessee claimed 'interest and financial cost' in his accounts as the element of interest bearing funds

were siphoned off for non-business purposes having direct impact or the profit of the assessee to the extent of funds doled out for non-business purposes, reducing the taxable profit. At the same time, the source of the funds were also to be examined resulting into disallowance of proportionate interest expenses. In view of these facts/situation and the information, which came to the light/possession of the Assessing Officer, later on, the case was reopened, resulting into issuance of notice u/s 148 of the Act on 25/05/2012 after properly recording the reasons, which were also duly provided to the assessee on 06/12/2012. The assessee also objected reopening u/s 148/147 of the Act vide letter dated 07/01/2013.

2.5. Now question arises whether the ld. Commissioner of Income Tax (Appeals) was justified in holding the reassessment proceedings, initiated u/s 148 of the Act, as invalid and further whether a new material was available with the Assessing Officer for reopening the assessment?

2.6. We have perused the assessment order, reasons recorded, information provided by the ITO of Shri Nilesh Thakur, factual finding recorded in the impugned order and also considered the arguments advanced from respective side. We find that the primary facts relating to all the transactions entered by the assessee during financial year 2007-08 were very much available before the Assessing Officer when he framed the original assessment u/s 143(3) of the Act, therefore, no new material was made available at the later stage. Broadly, the reason for reopening is based upon the finding arrived at by the ITO of Shri Nilesh Thakur and it can be said it was a merely borrowed satisfaction. In a landmark decision the Hon'ble Apex Court in Kelvinator

of India Ltd (2010) 320 ITR 561 has evolved a broad principle as under what circumstances reassessment can be framed. Likewise in Green World Corporation vs ITO (2009) 314 ITR 81 (SC), the Hon'ble Apex Court held that the order passed by the Assessing Officer at the dictate of the CIT is 'nullity'. Likewise the Hon'ble High Court of Rajashthan in Syntex Ltd. (2009) 313 ITR 221 held that 'initiation based on the opinion of the Assessing Officer of other party, is 'borrowed satisfaction', consequently, not sufficient reason to believe for escapement of income. Further, the Hon'ble Apex Court dismissed the SLP of the Department (C No.8167 of 2009) against the aforesaid decision from Hon'ble Rajashthan High Court. We note that there is no finding in the assessment order that any independent enquiry was made by the Assessing Officer of the present assessee rather he reopened the assessment merely on the information received from ITO of another party. We further find that there is no 'new tangible material' came to the light of the Assessing Officer and he acted merely on the borrowed satisfaction/information. The Assessing Officer merely says that there was no documentary evidence regarding payment of huge amount rather a decree from the Hon'ble High Court was already with him. Confirmation of the acquisition of about 900 acres of land, letter dated 16/07/2007 (page-31 to 35) supports the case of the assessee. Shri Nilesh Thakur (PRS Enterprises) was given advances from time to time in terms of resolution passed by the Board of Directors. The amount advanced by the assessee to Shri Nilesh Thakur, was duly reflected in the audited accounts of the assessee under the head 'advances for land' and since Shri Nilesh Thakur could not perform in terms of appointment letter a suit bearing 2576 of 2011 was filed before the Hon'ble Bombay High Court and in terms of the consent terms,

a decree was passed in favour of the assessee by Hon'ble High Court, the facts of payments were duly mentioned in the suit/plaint filed before the Hon'ble High Court. The assessee was having common pool of funds i.e. own fund and borrowed funds and at the time of advancing excess funds were available in comparison to advanced money. The assessee gets the benefit of the decision from Hon'hle Apex Court in Munjal Sales & Corporation vs CIT and from Hon'ble Bombay High Court in Reliance utilities and Power Ltd., wherein, it was held that where the capital and profits are more than the interest free funds advanced, then it has to presumed that interested free advances were given out of interest free capital available. As on 31/03/2008 the assessee was having total amount of Rs.500,81,91,218/- (Rs. 203,02,00,000 as share capital and Rs.297,79,91,248 as reserve and surplus) and as on 31/03/2009, total Rs.621,01,17,406/-. The totality of facts clearly indicates that the notice u/s 148 was solely issued on the basis of information received from ITO 25(1)(4), having jurisdiction upon Shri Nilesh Thakur. The basic requirement section 148 is that the Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment, thus, the law does not permit such a action. The following decisions supports our view:-

1) *CIT vs Kelvinator of India Ltd. (2002) 256 ITR 1 (Del.)*
2) *Sheth Brother vs JCIT (2001) 251 ITR 270 (Guj.)*
3) *CIT vs Corporation Bank Ltd. (2002) 254 ITR 791 (SC)*
4) *Garden Silk Mills P. Ltd. Vs DCIT (1999) 237 ITR 668 (Guj.)*
5) *CIT vs Hickson & Dadajee Ltd. (1980) 121 ITR 368 (Born.)*
6) *Jindal Photo Films Ltd. vs DCIT (1998) 234 ITR 170 (Del.)*
7) *Garden Silk Mills vs DCIT (1996) 222 ITR 68 (Guj.)*
8) *Mercury Travels DCIT (2002) 258 ITR 533 (Cal.)*
9) *JCIT vs George Williamson (Assam) Ltd. (2002) 258 ITR 126 (Gauhati)*

10) CIT vs Sambhar Salt ltd. (2003) 262 ITR 675 (Raj.)

We find that there was no new tangible material with the Assessing Officer to form a belief that income chargeable to tax had escaped assessment, thus, in view of the decision from Hon'ble Rajasthan High Court (supra) reopening is not permissible on the basis of borrowed satisfaction rather there should be live link with the formation of belief and conclusion for escapement of income. The ratio laid down by Hon'ble jurisdictional High Court in Aventis Pharma Ltd. vs ACIT 323 ITR 570 (Born.) supports our view. Even after 01/04/1989, concept of 'change of opinion' was not removed. Prior to direct tax laws (amendment) Act, 1987, reopening could be done under two conditions viz, if (a) the ITO had reason to believe that, by reason of the omission or failure on the part of the assessee to make a return u/s 139 for any assessment year to the ITO or to disclose fully and truly all material facts for his assessment for that year, income chargeable to tax had escaped assessment for that year, or (b) the ITO had in consequence of information in his possession had reason to believe that income chargeable to tax has escaped assessment for any assessment year. The fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 with effect from 01/04/1989 those conditions are given go-by and only one condition has remained where the Assessing Officer has 'reason to believe' that income chargeable to tax had escaped assessment, consequently, the section itself confers jurisdiction to reopen the assessment. Therefore, post 01/04/1989, power to reopen is much wider. At the same time, powers u/s 147 also does not give arbitrary power to the Assessing Officer to reopen the assessment

merely on the basis of 'change of opinion'. One must keep in mind, the conceptual difference between power to review and power to reassess. The Hon'ble Apex Court in CIT vs Bhanji Lavaji 79 ITR 582 (SC) held that mere change of opinion cannot form the basis of reassessment. In Shri Krishna Pvt. Ltd. Vs ITO 221 ITR 538 (SC), it was held that the power conferred upon the ITO by section 147 and 148 are not unbridled one. Identical ratio was laid down in Sirpur Paper Mills Ltd. Vs ITO 114 ITR 404 (AP) supports our view. The Hon'ble Calcutta High Court in S.P. Agrawal vs ITO 140 ITR 1010 held that statement by third parties cannot form the basis for reopening. We find that the ld. Assessing Officer merely on the basis of information received from another ITO without ascertaining the correctness of the information mechanically issued notice u/s 148. The only basis of issuing the notice u/s 148 was merely the later information received from ITO 25(1)(iv). The totality of facts clearly indicates that no new material came to the possession of the Assessing Officer leading to conclude that the income has escaped assessment, thus, issuance of notice for reopening and reassessment order passed u/s 143(3) r.w.s.147 of the Act was rightly held to be unsustainable in law. The existence of tangible material is necessary to ensure against an arbitrary exercise of power, thus, we find no infirmity in the conclusion drawn by the ld. Commissioner of Income tax (Appeals). This ground of the Revenue is, therefore, dismissed.

3. So far as, deleting the disallowance of Rs.34,01,095/-, u/s 36(1)(iii) of the Act is concerned, we are reproducing hereunder the relevant finding of the ld. First Appellate Authority for ready reference:-

"13.3. I have considered the A.O.'s order as well as the appellant's AIR submission. Further 1 *have perused the matter in its entirety and the aforesaid findings of the A.*0, *I have also perused the copy of the plaint along with the records and documents filed before the Hon'ble Bombay High Court in Suit No.* 2576 *of 2011 and the order of Hon'ble Bombay High Court. On perusal of the plaint and the records and documents it is seen that the appellant, by its letter of appointment dated 16.7.2007, had appointed Shri Nilesh Thakur for land aggregation in Panvel, Aligabh, Pen and Raigad areas. The said Letter of appointment was accepted by Shri Nilesh Janardhan Thakur/PRS Enterprises by letter dated 19th July, 2007. In terms of the said letter-agreement, the appellant has provided funds to Shri Nilesh Thakur, by way of advances for purchase of lands. The payments to Shri Nilesh Thakur have been made in terms of the resolution of the Board of Directors of the appellant company. The appellant has made payments of on aggregate amount of Rs.141.50 crores from time to time (i.e. between July 2007 and mid 2009, A.Y- 08-09-Rs.43.50crores, A.Y,09-10-Rs.53.00 crores, A.Y-I0-11- Rs. 45.00 crores) by account payee cheques to Shri Nilesh Janardhan Tahkur's concerns i.e. PRS Enterprises and Acecard Infrasol Pvt. Ltd. The said amounts have been reflected in the Balance Sheets of the appellant as 'Advances/or land'. Shri Nilesh Janardhan Thakur by his letter dated 22nd March 2010, informed the appellant that the payment received was used for acquiring properties and that the surplus funds had been kept in fixed deposit and that the properties would be transferred in favour of the appellant as soon as possible. However thereafter, Shri Nilesh Janardhan Thakur, neither refunded the monies nor transferred the properties to the appellant. In these*

circumstances, the appellant filed Suit No. 2576 of 2011 against Shri Nilesh Janardhan Thakur, PRS Enterprises & others in. September 2011. Subsequent thereto Shri Nilesh Janardhan Thakur agreed to settle the matter by transferring all the moveable and immoveable assets in favour of the appellant. The Hon'ble Bombay High Court passed an order dated 19th October 2011 in the aforesaid Suit and decreed the monies, assets and properties, illegally misappropriated by ShriJanardhan Thakur and his entities in favour of the appellant.

13.3. Having regard to the above admitted facts recorded in the suit filed by the appellant before the Hon'ble Bombay High Court which are duly supported by records and documents filed as annexure before the Hon'ble Bombay High Court, the amounts advanced by the appellant are only for acquisition of lands in the Project areas of Panvel, Alibaugh, Pen and Raigad district. The appellant has produced records and documents in support of the transactions entered into with Shri Nilesh Janardhan Thakur and his group entities. All facts obtained from the records and documents reveal that the appellant had provided funds to Shri Nilesh Thakur for land acquisition in the project areas. In view of the same, any contrary submissions/explanations given by Shri Nilesh Thakur during the course of his assessment and appellate proceedings cannot be considered as a foundation for arriving at any negative inference in the case of the appellant.

13.4. The fact that Shri Nilesh Thakur, during the course of his assessment proceedings for A.Y.2008-09 and 2009- 10 had explained that he had received amounts towards the development of project at Samata Nogar, Kandivali (E) Mumbai and (or development of World Trade City at Garodia Nagar, Goregaon. Mumbai is clearly borne from the findings recorded in his assessment order for A. Y

2008-09 and 2009-10. But it is equally relevant note that Shri Nilesh Thakur could not produce/furnish any evidence in support of the said claim. The appellant, during the course of the inquiry before the various Authorities has taken a consistent stand that the advances were given for land aggregation in the project areas. The claim of the appellant is supported by the various records and documents. Credence cannot be given 10 explanations given by Shri Nilesh Thakur during his assessment proceedings for A. Y 2008-09 and 2009-10 since he himself, in the appellate proceedings for A. Y 2009-10, has admitted to having received the funds from the appellant company for land aggregation. He has also admitted that the record and documents furnished by the appellant company before the Hon'ble Bombay High Court depicted the true nature transaction in between them. Thus it is seen that Shri Nilesh Thakur has taken a diametrically opposite stand on the nature and purpose of advances given by the appellant 10 him as compared to the stand taken by him during the course of assessment proceedings for A. Y 2008-09 and 2009-10. In case the stand taken by Shri Nilesh Thakur in the appellate proceedings for A.Y. 2009-10 is considered, there is no contradiction in between the explanation given as regards the nature and purpose of advances given by the appellant to Shri Nilesh Thakur. The admitted stand of Shri Nilesh Thakur in the appellate proceedings for A.Y. 2009-10 is duly supported by the records. Hence, the only inevitable conclusion that can be inferred is that the appellant had advanced monies for acquisition of lands at Alibaug, Pen, Panvel and other areas in and around Raigad district, which is explicitly evident from the 'letter of appointment issued by the appellant company dated 16/07/2007 in favour of Shri Nilesh J Thakur and subsequent

acceptance fetter dated 19/07/2007given by Shri Nilesh J. Thakur to the appellant. The land acquisition in project areas is during the course of the regular business activity of the appellant. The funds advanced by the appellant to Shri Nilesh Janardhan Thakur are thus held to be for appellant's business purposes. Accordingly, it is held that the disallowance computed out of claim of deduction of interest u/s. 36(1)(iii) was not called for In the aforesaid facts.

13.5. Even further to the afore-stated facts, the appellant's A.R's have also submitted that the appellant has a common pool of funds i.e. own funds and borrowed funds and that the appellant had sufficient own funds as on the date of advancing funds to Shri Nilesh Janardhan Thakur. It was submitted that the funds in the bank account were fungible and merely because there was negative balance in the current account on a particular date, it cannot be inferred that the payments made was out of borrowed fund It was also submitted that the factum that the funds were fungible has been accepted by the AD himself in so *far as the AD has restricted the disallowance of interest only till the date when there was positive balance in the current account maintained with the bank. The appellant's A.R's in support, relied on the decisions in cases of Hon'ble Supreme Court in the case of Munjal Sales Corporation* v *CIT (supra) and Hon'ble Bombay High Court in CIT* v *Reliance Utilities and Power Ltd. (supra) wherein it was held that where the capital and profits are more than the interest free funds advanced, then it has to be presumed that such interest free advance were given out of interest free capital available.*
13.6 I find that the appellants own funds as on 31.3.2007 and 31.3.2008 were as under:

	As on 31.3.2007	As on 31.3.2008
Share Capital	82,00,000	203,02,00,000
Reserves & Surplus	171,45,01,507	297,79,91,248
Total	172,27,01,507	500,81,91,248

13.7 I also find that the net profit for the year is Rs. 126,19,01,513/-. The profits of the year are also included in the current overdraft account maintained with the banks. Thus the funds in the bank account are fungible. The appellant has not made any specific borrowing for the purposes of advancing funds for purchase of land by Sheri Nilesh J. Thakur. Respectfully following the decisions of the Hon'ble Supreme Court in case of Munjal Sales Corporation (supra) and Hon 'ble Bombay High Court in the case of CIT v Reliance Utilities and Power Ltd. (supra), the advances given to Shri Nilesh J. Thakur are presumed to be from the Interest free own funds of the appellant. In the recent decision of the Hon'ble ITAT in the case 01 Reliance Industries Ltd. v DCIT (ITA No. 30821Muml2006 dated 28105/2012) it was held as under:

"5.1. The A 0 has slated that assessee has advanced interest free loans to its subsidiary companies. The AD has stated that assessee was asked to prove the nexus between source of funds out of which advances were given to its subsidiary companies and interest free or own funds available with the assessee. The assessee filed details and stated that the assessee had given loans and advances of Rs. 2988.98 crores to its subsidiaries as on 3110312002, out its own funds and internal accruals except to the extent of relying upon the decision of Hon'ble Kerala High Court in the case of V.I. Baby &: Company, 254 ITR 248 and decision of the Hon'ble Bombay High Court in the case of Phalton Sugar Works Lid, 208 ITR 989 disallowed the said interest of Rs. 11,19,382/-. Being aggrieved the assessee filed appeal before the first appellate authority.

5.2 It was contended on behalf of the assessee that assessee's own funds were far in excess of the interest free loans given to its subsidiaries: It was

contended that as per audited accounts .. assessee's own funds as on 31/3/2002 stood at Rs.25, 136.76 *crores and, therefore, interest free loans given to its subsidiaries should be considered as having been given out of its own funds. It was contended that assessee had' not taken any specific interest bearing loans for advancing interest free loans to its subsidiaries. It was submitted that in view of the fungibility of the funds available, it can be legitimately presumed that the interest free loans given to the subsidiaries had been given out of own funds of the assessee company deployed in the business. It was also contended that the net profit after tax and before depreciation during the year stood at Rs. 7054.84 crores. Thus, the net profit for the year under consideration exceeded not only the incremental loans given to the subsidiaries during the year but even exceeded the total interest free loans of Rs.* 2988.98 *crores given to the subsidiaries as on 31/3/2002. It was also contended that in the absence of any nexus between the interest bearing borrowed funds and the interest free loans given to subsidiaries and considering the fungibility of funds and the fact that own funds far' exceeded such loans, it has to be presumed that such interest free loans had been given out of own funds.*

5.3 The ld. CIT(A) after considering the submissions of the assessee and cases relied upon on behalf of the assessee, details given at page 18 of the impugned order, held that borrowed funds to the extent of Rs. 9.89 *crores was actually utilized for advancing interest free advances to subsidiaries. Therefore, ld C1T(A) confirmed the action of the 110 in disallowing interest on account of diversion of funds for non-business purposes, which comes to Rs.* 11,19,382/- *Hence, the assessee is in appeal before the Tribunal.*

5.4 During the course of hearing the Id. A.R reiterated the submissions as were made before the first appellate authority that the assessee had its own funds far more than the interest free loans

and advances given to its subsidiary company. The Id. A.R relying Oil the decision of the Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd., vs. CIT 313 *ITR 340 submitted that no disallowance out of interest expenditure is to be made if interest free funds were sufficient to meet the investment made. He further submitted that the Hon 'ble Apex Court has also held in the case of SA. Builders Ltd., vs. CIT,* 288 *ITR* 1 *that when loan to its subsidiary is given in the course and for the purpose of business of its business, no disallowance of interest has to be made. He submitted that in view of above decisions, the disallowance of interest is not justified and the same should be deleted.*

5.5 On the other hand, ld. D.R relied on the orders of the authorities below.

5.6 We have carefully considered the submissions of the ld. representatives of the parties and orders of the authorities below. We have also considered the cases relied upon by the authorities below as well as the cases cited by ld. A.R (supra). There is no dispute to the fact that the assessee's own funds are far in excess of the interest free loans and advances given by the assessee to its subsidiary companies. The Hon'ble Bombay High Court has held in the case of Reliance Utilities & Power Ltd. (supra) that if there were funds available both interest free and overdraft / or loans taken, then presumption would arise that investment would be out of interest free funds generated or available with the company. It was held that if interest free funds were sufficient 10 meet the investments mode, in that case a presumption is established that the borrowed capital was used for the purpose of business and the interest expenditure is deductible under section 36(1)(iii) of the Act. The similar view has also been considered by the Hon 'ble Calcutta High Court in Wool Combers of India Ltd., J 34 *ITR* 219 *(Cal)* s *wherein it was held that if there were sufficient profits available to meet*

the advance fax liability and the profits were deposited in the overdraft account of the assessee,' in such a case it should be presumed that the taxes were paid out of profits of the year and not out of the overdraft account for the running of the business. Considering subsequent decision of the Hon'ble Jurisdictional High Court in the case of Reliance Utilities & Power Ltd. (supra), wherein it was specifically held that if interest free funds available to an assessee is sufficient to meet its investment, it can be presumed that the investments were made from the interest free funds available with the assessee. Therefore, considering the fact that the assessee had its own funds more than the loans given to its subsidiaries and also in the absence of any nexus establishing that the interest bearing 'borrowed funds were given us interest free to its subsidiaries, we *hold that the disallowance of interest is not justified. Therefore, interest is allowable under section 36(1)(iii) of the Act. Hence, ground No.2 of the appeal taken by the assessee is allowed. "*

13.8 Thus, having taken note of the entire facts available on record and also after taking note of appellant's own fund availability, which is evident from the appellant's Balance Sheet, the appellant's own fund was Rs.500.81 crores, which consists of capital and reserves as on 31/03/08, whereas during the year under consideration, the appellant has advanced Rs.43.50 crores to Shri Nilesh J Thakur for the purpose of aggregating land in terms of appointment letter dated 16/07/2007. In view of the same and also keeping reliance on the decision of Apex Court in the case of Munjal Sales Corporation v *CIT (298ITR* 298) *and the decision of the Hon'ble Bombay High Court in the case of CIT vs Reliance Utilities and Power LId* [313 *ITR 340] & also the jurisdictional ITA T, Mumbai in the case of Reliance Industries Ltd.* v *DCIT (ITA No. 30821Muml2006 dated 28105/2012), I consider it proper and appropriate to hold that the disallowance made by the A.O. U/S 36(1)(iii) of the Act of Rs.34,01,095/- in the given facts of the case is completely unjustified and incorrect. In view of the same, the addition so made by the A.*

O. is deleted. Thus, this ground of appeal is allowed.

3.4 In view of my decision in appeal for A.Y-08-09, wherein the facts are identical to the facts as in the year under consideration, the reopening of assessment in annulled and the disallowance of interest of Rs. 2,46,16,438/- is deleted in the year under consideration for the reasons stated in my appellate order For A. Y2008-09. Thus, taking note of all the factual position of the case, I consider in proper and appropriate to hold that the A.O. was not justified in his action. Accordingly the appellant's these grounds of appeal arc allowed. "

3.1. If the observation made In the assessment order, conclusion drawn in the impugned order, material available on record, assertion made by the ld. respective counsel, if kept in juxtaposition and analyzed, we find that the assessee was having 500.81 crores consisting of capital and reserves as on 31/03/2008, whereas, the assessee advanced Rs.43.50 crores to Nilesh Thakur for aggregating land in terms of appointment letter dated 16/07/2007, thus, we find no infirmity in the conclusion drawn in the impugned order as the ld. CIT (A) has already placed reliance upon the decision from Hon'ble Apex Court in Munjal Sales Corporation, from Hon'ble jurisdictional High Court in Reliance Utilities & Powers Ltd. (supra) and the decision of the Tribunal in Reliance Industries ltd. (ITA No.3082/Mum/2006) order dated 28/05/2012. His stand is affirmed. This ground of the Revenue is also dismissed.

4. So far as, the merits of the case is concerned the factual finding recorded by the ld. Commissioner of Income Tax (Appeals) is reproduced hereunder for ready reference and analysis:-

"13.1. As held by me hereinabove, the order passed by the AO is not sustainable since the notice issued for reopening of assessment was invalid. However, the issue raised in ground of appeal no.3 is also adjudicated hereunder since the A.R.'s have made detailed submissions on merits of the case also. On merits of the case also, I find that the AO has computed disallowance of interest for the reasons discussed at para 5 of the assessment order. According to the AO, the transactions of the appellant with Shri Nilesh J. Thakur, through his proprietorship concern PRS Enterprises and Acecard Infrasol Pvt. Ltd., were for non-business purposes. For arriving at this conclusion, the AO has referred to the enquiries made by the DDIT (Inv), Unit I(2), Mumbai; the statement recorded of Mr. Feroze K. Bhatena Director & Principal Officer of the appellant company; assessment order for A.Y. 2008-09 in case of Shri Nilesh Thakur and the appellate order passed by the CIT(A) for A.Y. 2008-09 in case of Shri Nilesh Thakur. Based on the above, the AO in para 5 has held as under:-

a. Para 5.1 " In the balance-sheet of the assessee as on 31-03-2008 under the head 'current assets' an amount of Rs.43.50 crore has been shown as advance towards land purchase. The said amount has been paid by the company to M/s. PRS Enterprises, a proprietorship concern of one Shri N.J. Thakur.

b. Para 5.2 The assessee states that these amounts are in the nature of advance payments towards acquisition of land with clear and marketable title in an around Aliabagh and other areas of Raigad District.

c. Para 5.3 The transactions with Shri N.J. Thakur and his group of concerns have received detailed attention from various authorities in the Department namely Investigation Wing, ITO-25(1)(4) in the assessment of Shri N.J. Thakur for A.Y.2008-09 and 2009-10 and CIT(A)-35 in the appellate order in the case of Shri N.J. Thakur in the A.Y.2008-09. Exhaustive submissions have been made by both the assessee as well as Shri N.J. Thakur with respect to these transactions. The same are discussed hereunder:

d. Para 5.4 At this point it may be noted that the assessee has not debited such amount of Rs.43.50 crore in his profit and loss account as expenses nor has he included this amount in his work-in-progress. It is an

admitted fact that these amounts stands as 'advance for land purchase' under 'current assets' in his balance-sheet as on 31-03-2008. We will now examine the submission of the assessee and Shri N.J. Thakur before various authorities and their findings as under:"

e. Para 5.4.5 From the above it is clear that the assessee and Shri NJ Thakur are contracting each other. On one hand the assessee claims that these payments were made towards acquisition of land in and around Alibaugh and other areas in Raigad District. While Shri N. J. Thakur states that the amounts were received towards the development of project at Samata Nagar, Kandivali (E), Mumbai and for development of World Trade City at Garodia Nagar, Goregaon, Mumbai. Further light on the .nature of these transactions is thrown by the findings of the ITO-25(1)(4), Mumbai and C!T(A)-35, Mumbai in the individual assessments of Shri N.J Thakur for the A.Y.2008-09. This is discussed hereunder:

f. Para 5.4.7 From the above it is clear that Shri NJ Thakur claimed to be a partner with my assessee and claims to have received money as advance for various projects in Bombay. However, neither Shri NJ Thakur nor my assessee have submitted a single documentary evidence regarding their association with each other through partnership or through appointment as consultant / agent / any other relationship. My assessee has not recognized Shri N. J. Thakur as a partner and no partnership agreement was made. Shri N. J. Thakur could not produce any evidence whatsoever regarding the alleged projects he has undertaken on behalf of my assessee. Based on the above findings, the AO of Shri N. J. Thakur proceeded to assess the amounts received by his proprietorship concern viz., PRS Enterprises u/s.56(2)(vi) as an amount received without consideration. The AO of Shri N. J. Thakur has clearly given the findings that there is no business relation between Shri NJ Thakur and my assessee.

g. Para 5.5 From the detailed facts narrated above it is very clear that there is a clear contradiction between the claim of my assessee and Shri NJ Thakur. The assessee claims to have paid the sum as advance towards purchase of land in and around Raigad District. While Shri NJ Thakur claimed to have received this money for project development at Samata Nagar, Kandivali (E), Murnbai and World Trade City, Garodia Nagar, Goregaon. Mr. Feroz K. Bhatena Director and Principal Officer of the assessee on oath admitted that

the assessee has released all the payments withou.t any kind of bills raised on them by Shri NJ Thakur and his concerns and also that in no other companies, it has released such payments without invoices."

h. Para 5.6 My assessee has stated that there is no written agreement with Shri NJ Thakur before or after advancing these funds. This action on my part of the assessee clearly goes against commercial logic. Shri NJ Thakur has admitted on oath before his AO that he has not acquired any land/right/asset on behalf of my assessee. In light of these facts the series of doubts cast over the genuineness of the nature of transactions.

i. *Para 5.7 The payments have been made over three financial years including the assessment year under consideration and at no point of time did my assessee even check whether any properties are being acquired or in the process of being acquired by Shri N J Thakur. Without conducting this basic due diligence the assessee would have me believe that they kept on releasing* the payment over the three years for the same. My assessee has also denied entering into any partnership agreement or project development with Shri N. J. Thakur as partner/director.

j. Para 5.8 In view of the above discussion it is amply clear that the sum paid by SPCL to PRS Enterprises and Ace Card Infrasol Pvt. Ltd., allegedly for the purpose of business being land aggregation is not for the stated purposes. There is no evidence brought out on record either by my assessee or Shri N. J. Thakur to show what is the business purpose between them._It is therefore held that the sums paid has not been utilized by my assessee for the purpose of its business. I therefore hold that no deduction out of the same can be allowed either as expenditure or allowed to be capitalized under the head 'work-in-progress'. This being the case, the only other issue to be seen is the source in the hands of the assessee for having advanced this Doney and the tax implication thereon. Accordingly, in the course of assessment proceedings, the AR of the assessee has been asked to explain as to why proportionate disallowance for the interest bearing funds utilized for non business purposes should not be disallowed for which the assessee simply stated that the payments are wholly and exclusively for the purpose of business. The submission of the assessee has been considered, however the same is not acceptable in absence of any evidences. Accordingly, the interest disallowance on

such payments is discussed hereunder;"

13.2 Amid appellate proceedings, the appellant's AIR has strongly pleaded against the A.O's action and filed a detailed written submission in. support of his contention, the relevant portion of the same is extracted as under.:

l. On the merits of the case we have to reiterate the submissions mode by us before the AO vide our letter dated 7.1.2013

2. We further reiterate and submit that we had given advances to Shri Nilesh Thakur and his group concerns for acquiring large tracts of land in the Panvel, Aligabh, Pen and Raigad areas (" Project Areas").

3. The lands proposed to be acquired in the project areas were wholly and exclusively for the purposes of our business activities.

4. We had appointed Shri Nilesh Janardhan Thakur 10 acquire the lands in the project areas, vide our letter of appointment dated 16th July, 2007 (copy enclosed at pages 279 to 282 of paper book).

5. Shri Nilesh Janardhan Thakur/FRS Enterprises accepted the appointment letter vide his letter dated 19th July, 2007 and agreed to acquire the lands in the project orcas on the basis of the terms and conditions staled in the appointment letter (copy enclosed at page 283 of paper book).

6. Shri Nilesh Janardhan Thakur/PRS Enterprises were given advances from time to time in terms of the resolutions passed by the Board of Directors and on the basis of the representations made by Shri Nilesh Janardhan Thakur on the status of land acquisitions.

7. The amounts advanced by us to Shri Nilesh Janardhan Thakur were reflected in our Audited Balance Sheets under the head Advances/or land'.

8. As Shri Nilesh Janardhan Thakur did not perform in terms of the appointment letter, a suit bearing No. 2576 of 2011 was filed by us before the Hon'ble Bombay High Court.

9. The Hon'ble Bombay High Court in terms of the consent terms arrived (It in between Shri Niles" Janardhan Thakur and us, passed a decree in our favour.

10. The entire set of facts in relation to the transaction in between Shri Nilesh Janardlian Thakur arc set out in the suit plaint and the annexures filed before the Hon'ble Bombay High Court in Suit No. 2576 of 2011.
11. It is submitted that merely because Shri Nilesh Thakur had given certain explanations, which are bereft of any facts, records or documents, it could not be said that there was any income which has escaped assessment in the hands of your assessee.

12.It is also submitted that the appellant had borrowed funds solely for the purposes of its business activities. The lands proposed to be acquired in the project areas was wholly and exclusively for the purposes of our business. The entire amount of advance was reflected in the Balance sheet under the head 'Current Assets-Advance for land.'

1.The appellant has a common pool of funds i.e. own funds and borrowed funds and the own funds, as on the date of advancing funds to Shri Nilesh Janardhan Thakur, were in excess of the amounts lent. We rely on the decisions in cases of Hon'ble Supreme Court in the case of Munjal Sales Corporation vs CIT and Hon'ble Bombay High Court in CIT vs Reliance Utilities and Power Ltd. wherein it was held that where the capital and profits are more than the interest free funds advanced, then it has to be presumed that such interest free advance were given out of interest free capital available. The appellants own funds as on 31.3.2007 and 31.3.2008 were as under:-

	As on 31.3.2007	***As on 31.3.2008***
Share Capital	*82,00,000*	*203,02,00,000*
Reserves & Surplus	*171,45,01,507*	*297,79,91,248*
Total	***172,27,01,507***	***500,81,91,248***

2. Even for the previous year the net profit of the appellant company was Rs. 126,19,01,513/- which is in excess of the amounts given to Shri Nilesh J. Thakur of Rs. 43.50 crores.

3. It is further submitted that the AO has not established any nexus in between the borrowed funds and tile amounts given to Shri Nilcsh J. Thakur for land aggregation. The AO has merely computed the disallowance on the basis of the entries in the 'Over draft Account' maintained by the appellant with its bankers. The AO has computed the disallowance of interest only for the period during which there was' a negative balance the moment the balance in the overdraft account turned positive, the AO has not computed any disallowance. Disallowance computed 011 this basis was recently considered in the decision of the Hon'ble ITAT in the case of Reliance industries Ltd. v DCIT (ITA No. 3082/Mum/2006 dated 28/05/2012) and the Hon'ble ITAT has deleted the disallowance of interest.

13.3 .I have considered the A.O.'s order as well as the appellant's A/R submission. Further 1 have perused the matter in its entirety and the aforesaid findings of the AO, J have also perused the copy of the plaint along with the records and documents filed before the Hon'ble Bombay High Court in Suit No. 2576 of 2011 and the order of Hon'ble Bombay High Court. On perusal of the plaint and the records and documents it is seen that the appellant, by its letter of appointment dated 16.7.2007, had appointed Shri Nilesh Thakur for land aggregation in Panvel, Aligabh, Pen and Raigad areas. The said Letter of appointment was accepted by Shri Nilesh Janardhan Thakur/PRS Enterprises by letter dated 19th July, 2007. In terms of the said letter-agreement, the appellant has provided funds to Shri Nilesh Thakur, by way of advances for purchase of lands. The payments to Shri Nilesh Thakur have been made in terms of the resolution of the Board of Directors of the appellant company. The appellant has made payments 0/ on aggregate amount of Rs.141. 50 crores from time to time (i.e. between July 2007 and mid 2009, A.Y.-08-09-Rs.43.50 crores,A.Y-09-10- Rs.53.00 crores, A.Y.-10-11-Rs.45.00 crores) by account payee cheques to Shri Nilesh Janardhan Tahkur's concerns i.e. PRS Enterprises and Acecard Infrasol Pvt. Ltd. The said amounts have been reflected in the Balance Sheets of the appellant as 'Advances/or land'. Shri Nilesh Janardhan Thakur by his letter dated 22nd March 2010, informed the appellant that the payment received was used for acquiring properties and that the surplus funds had been kept in fixed deposit and that the

properties would be transferred in favour of the appellant as soon as possible. However thereafter, Shri Nilesh Janardhan Thakur, neither refunded the monies nor transferred the properties to the appellant. In these circumstances, the appellant filed Suit No. 2576 of 2011 against Shri Nilesh Janardhan Thakur, PRS Enterprises & others in. September 2011. Subsequent thereto Shri Nilesh Janardhan Thakur agreed to settle the matter by trans/erring all the moveable and immoveable assets in favour of the appellant. The Hon'ble Bombay High Court passed an order dated 19th October 2011 in the aforesaid Suit and decreed the monies, assets and properties, illegally misappropriated by Shri Janardhan Thakur and his entities in favour of the appellant .

13.3 Having regard to the above admitted facts recorded in the suit filed by the appellant before the Hon'ble Bombay High Court which are duly supported by records and documents filed as annexures before the Hon'ble Bombay High Court, the amounts advanced by the appellant are only for acquisition of lands in the Project areas of Panvel, Allbaugh, Pen and Raigad district. The appellant has produced records and documents in support of the transactions entered into with Shri Nilesh Janardhan Thakur and his group entities. All facts obtained from the records and documents reveal that the appellant had provided funds to Shri Nilesh Thakur for land acquisition in the project areas. In vievv of the same, any contrary submissions/explanations given by Shri Nilesh Thakur during the course of his assessment and appellate proceedings cannot be considered as a foundation for arriving at any negative inference in the case of the appellant . The fact that Shri Nilesh Thakur, during the course of his assessment proceedings for A. Y 2008-09 and 2009-10 had explained that he had received amounts towards the development of project at Samata Nogar, Kandivali (E) Mumbai and (or development of World Trade City at Garodia Nagar, Goregaon. Mumbai is clearly borne /1'0171 the findings recorded in his assessment order for A.Y. 2008-09 and 2009-10. But it is equally relevant [0 note that Shri Nilesh Thakur could not produce/furnish any evidence in support of the said claim. The appellant, during the course of the inquiry before the various Authorities has takena consistent stand that the advances were given for land aggregation in the project areas. The claim of the

appellant is supported by the various records and documents. Credence cannot be given 10 explanations given by Shri Nilesh Thakur during his assessment proceedings for A. Y. 2008-09 and 2009-10 since he himself, in the appellate proceedings for A. Y 2009-10, has admitted to having received the funds from the appellant company for land aggregation. J-Je has also admitted that the record and documents furnished by the appellant company before the Hon'ble Bombay High Court depicted the true nature 0/ transaction in between them. Thus it is seen that Shri Nilesh Thakur has taken a diametrically opposite stand on the nature and purpose of advances given by the appellant 10 him as compared to the stand taken by him during the course of assessment proceedings for A. Y. 2008-09 and 2009-10. In case the stand taken by Shri Nilesh Thakur in the appellate proceedings for A. Y 2009-10 is considered, there is no contradiction in between the explanation given as regards the nature and purpose of advances given by the appellant to Shri Nilesh Thakur. The admitted stand of Shri Nilesh Thakur in the appellate proceedings for A. Y 2009-10 is duly supported by the records. Hence, the only inevitable conclusion that can be inferred is that the appellant had advanced monies for acquisition of lands at Alibaug, Pen, Panvel and other areas in and around Raigad district, which is explicitly evident from the 'letter of appointment issued by the appellant company dated 16/07/2007 in favour of Shri Nilesh J Thakur and subsequent acceptance fetter dated 19/07/2007given by Shri Nilesh J Thakur to the appellant. The land acquisition in project areas is during the course of the regular business activity of the appellant. The funds advanced by the appellant to Shri Nilesh Janardhan Thakur are thus held to be for appellant's business purposes. Accordingly, it is held that the disallowance computed out of claim of deduction of interest u/s. 36(J)(iil) was not called for In the aforesaid facts.

13.5. Even further to the afore-stated facts, the appellant's A.R's have also submitted that the appellant has a common pool of funds i.e. own funds and borrowed funds and that the appellant had sufficient own funds as on the date of advancing funds to Shri Nilesh Janardhan Thakur. It was submitted that the funds in the bank account were fungible and merely because there was negative balance in the current account on a particular date, it cannot be inferred that

the payments made was out of borrowed fund. It was also submitted that the factum that the funds were fungible has been accepted by the AO himself in so far as the AO has restricted the disallowance of interest only till the date when there was positive balance in the current account maintained with the bank. The appellant's A.R"s in support, relied on the decisions in cases of Hon'ble Supreme Court in the case of Munjal Sales Corporation v CIT (supra) and Hon'ble Bombay High Court in CIT v Reliance Utilities and Power Ltd. (supra) wherein it was held that where the capital and profits are more than the interest free funds advanced, then it has to be presumed that such interest free advance were given out of interest free capital available.

13.6 I find that the appellants own funds as on 31.3.2007 and 31.3.2008 here as under:

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Reserves & Surplus	*171,45,01,507*	*297,79,91,248*
Total	***172,27,01,507***	***500,81,91,248***

13.7 I also find that the net profit for the year is Rs. 126,19,01,513/-. The profits of the year are also included in the current overdraft account maintained with "the banks. Thus the funds in the bank account are fungible. The appellant has not made any specific borrowing for the purposes of advancing funds for purchase of land by Sheri Nilesh J. Thakur. Respectfully following the decisions of the Hon'ble Supreme Court in case of Munjal Sales Corporation (supra) and Hon'ble Bombay High Court in the case of CIT v Reliance Utilities and Power Ltd. (supra), the advances given to Shri Nilesh J. Thakur are presumed to be from the Interest free own funds of the appellant. In the recent decision of the Hon'ble ITAT in the case 0/ Reliance Industries Ltd. v DCIT (ITA No. 3082/Mum/2006 dated 28/05/2012) it was held as under:

"5.1. The A 0 has slated that assessee has advanced interest free loans to its subsidiary companies. The AD has stated that assessee was asked to prove the nexus between source of funds out of which advances were given to its subsidiary

companies and interest free or' own funds available with the assessee. The assessee filed details and stated that the assessee had given loans and advances of Rs.2988.98 crores to its subsidiaries as on 31/03/2002, out its own funds and internal accruals except to the extent of relying 'upon the decision of Hon'ble Kerala High Court in the case of V.I. Baby &: Company, 254 ITR 248 and decision of the Hon'ble Bombay High Court in the case of Phalton Sugar Works Lid, 208 ITR 989 disallowed the said interest of Rs. 11,19,382/-. Being aggrieved the assessee filed appeal before the first appellate authority.

5.2 It was contended on behalf of the assessee that assessee's own funds were far in excess of the interest free loans given to its subsidiaries: It was contended that as per audited accounts.. assessee's own funds as on 31/3/2002 stood at Rs.25,136.76 crores and, therefore, interest free loans given to its subsidiaries should be considered as having been given out of its own funds. It was contended that assessee had' not taken any specific interest bearing loans for advancing interest free loans to its subsidiaries. It was submitted that in view of the fungibility of the funds available, it can be legitimately presumed that the interest free loans given to the subsidiaries had been given out of own funds of the assessee company deployed in the business. It was also contended that the net profit after tax and before depreciation during the year stood at Rs. 7054.84 crores. Thus, the net profit for the year under consideration exceeded not only the incremental loans given to the subsidiaries during the year but even exceeded the total interest free loans of Rs. 2988. 98 crores given to the subsidiaries as on 31/3/2002. It was also contended that in the absence of any nexus between the interest bearing borrowed funds and the interest free loans given to subsidiaries and considering the fungibility of funds and the fact that own funds far' exceeded such loans, it has to be presumed that such interest free loans had been given out of own funds.
5.3 The ld. CIT(A) after considering the submissions of the assessee and cases relied upon on behalf of the assessee, details given at page 18 of the impugned order, held that borrowed funds to the extent of Rs. 9.89 crores was actually utilized for advancing interest free advances to subsidiaries. Therefore, ld C1T(A) confirmed the action of the 110 in disallowing interest on account of diversion of funds for non-business

purposes, which comes to Rs. 11,19,382/- Hence, the assessee is in appeal before the Tribunal.
5.4 During the course of hearing the Id. A.R reiterated the submissions as were made before the first appellate authority that the assessee had its own funds far more than the interest free loans and advances given to its subsidiary company. The Id. A.R relying Oil the decision of the Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd., vs. CIT 313 ITR 340 submitted that no disallowance out of interest expenditure is to be made if interest free funds were sufficient to meet the investment made. He further submitted that the Hon'ble Apex Court has also held in the case of S.A. Builders Ltd., vs. CIT, 288 ITR 1 that when loan to its subsidiary is given in the course and for the purpose of business of its business, no disallowance of interest has to be made. He submitted that in view of above decisions, the disallowance of interest is not justified and the same should be deleted.

5.5 On the other hand, ld. D.R relied on the orders of the authorities below.

5.6 We have carefully considered the submissions of the ld. representatives of the parties and orders of the authorities below. We have also considered the cases relied upon by the authorities below as well as the cases cited by ld. A.R (supra). There is no dispute to the fact that the assessee's own funds are far in excess of the interest free loans and advances given by the assessee to its subsidiary companies. The Hon'ble Bombay High Court has held in the case of Reliance Utilities & Power Ltd. (supra) that if there were funds available both interest free and overdraft / or loans taken, then presumption would arise that investment would be out of interest free funds generated or available with the company. It was held that if interest free funds were sufficient 10 meet the investments mode, in that case a presumption is established that the borrowed capital was used for the purpose of business and the interest expenditure is deductible under section 36(1)(iii) of the Act. The similar view has also been considered by the Hon'ble Calcutta High Court in Wool Combers of India Ltd., 134 ITR 219 (Cal), wherein it was held that if there were sufficient profits available to meet the advance fax liability and the profits were deposited in the overdraft account of the assessee,' in such a case it should be presumed that

the taxes were paid out of profits of the year and not out of the overdraft account for the running of the business. Considering subsequent decision of the Hon'ble Jurisdictional High Court in the case of Reliance Utilities & Power Ltd. (supra), wherein it was specifically held that if interest free funds available to an assessee is sufficient to meet its investment, it can be presumed that the investments were made from the interest free funds available with the assessee. Therefore, considering the fact that the assessee had its own funds more than the loans given to its subsidiaries and also in the absence of any nexus establishing that the interest bearing 'borrowed funds were given us interest free to its subsidiaries, we hold that the disallowance of interest is not justified.
Therefore, interest is allowable under section 36(1)(iii) of the Act. Hence, ground No.2 of the appeal taken by the assessee is allowed. "

13.8 Thus, having taken note of the entire facts available on record and also after taking note of appellant's own fund availability, which is evident from the appellant's Balance Sheet, the appellant's own fund was Rs.500.81 crores, which consists of capital and reserves as on 3! 103108, whereas during the year under consideration, the appellant has advanced Rs.43.50 crores to Shri Nilesh J Thakur for the purpose of aggregating land in terms of appointment letter dated 16/07/2007. In view of the same and also keeping reliance on the decision of Apex Court in the case of Munjal Sales Corporation v CIT (298 ITR 298) and the decision of the Hon'ble Bombay High Court in the case of CIT v Reliance Utilities and Power Ltd. [313 ITR 340] & also the jurisdictional ITA T, Mumbai in the case of Reliance Industries Ltd. v DCIT (ITA No. 3082/Mum/2006 dated 28/05/2012), I consider it proper and appropriate to hold that the disallowance made by the A.O. u/s 36(1)(iii) of the Act of Rs.34,01,095/- in the given facts of the case is completely unjustified and incorrect. In view of the same, the addition so made by the A. 0. is deleted. Thus, this ground of appeal is allowed.

3.4 In view of my decision in appeal for A.Y.-08-09, wherein the facts are identical to the facts as in the year under consideration, the reopening of assessment in annulled and the disallowance of

interest of Rs. 2,46,16,438/- is deleted in the year under consideration for the reasons stated in my appellate order For A.Y.2008-09. Thus, taking note of all the factual position of the case, I consider in proper and appropriate to hold that the A.O. was not justified in his action. Accordingly the appellant's these grounds of appeal are allowed."

4.1. If the factual finding recorded by the ld. Commissioner of Income Tax (Appeals), we note that (as contained in para-13.4) Shri Nilesh Thakur, during the course of assessment proceedings for AY 2008-09 and 2009-10 duly explained that he received the amounts and during the course of enquiries before various authorities he took a consistent stand that advances were given for land aggregation and admitted to have received the funds from the assessee company. Shri Nilesh Thakur also admitted before the Hon'ble High Court regarding true nature of transaction and took a diametrically opposite stands on the nature of purpose of advances. The admitted stand of Nilesh Thakur in appellate proceeding for AY 2009-10 is duly supported by the record, which is further supported by the letter of the assessee company dated 16/07/2007 and subsequent acceptance vide letter dated 19/07/2007 given by Shri Thakur to the assessee company. In para 13.6 (page-45) of the impugned order the ld. Commissioner of Income Tax (Appeals) has duly examined the availability of own funds as on 31/03/2007 and 31/03/2008, wherein the net profit of the year was Rs.126,19,01513/- which includes current years overdraft maintained with the bank and the assessee has not made any specific borrowing for advancing the funds to Shri Nilesh Thakur. The ld. Commissioner of Income Tax (Appeals) has already placed reliance from the decision from Hon'ble Apex Court in Munjal Sales Corporation, CIT vs Reliance Utilities and Power Ltd. from Hon'ble Bombay High Court and the decision of the Tribunal in Reliance Industries Ltd. vs DCIT (ITA No.3082/Mum/2006) order dated 28/05/2012. In para 13.8 (page-48), there is a finding that the own funds of the assessee were to the tune

of Rs.500.81 crores which is consisting of capital and reserves as on 31/03/2008 and the assessee advanced Rs.43.50 crores to Shri Nilesh Thakur for aggregating the land. We further note that the ld. Commissioner of Income Tax (Appeals) while deliberating upon the issues has duly met with the observation made in the assessment order and justifiably reached to a conclusion. Thus, on merit also, the assessee is having a strong case; consequently, we affirm the uncontroverted finding of the ld. Commissioner of Income Tax (Appeals). Thus, from this angle also the Revenue has no case at all."

4.2. In the aforesaid order, the Tribunal has duly deliberated upon the issue and considering the factual matrix, dismissed the appeal of the Revenue, affirming the stand of the Ld. Commissioner of Income Tax (Appeal). The Ld. Commissioner of Income Tax (Appeal) as well as the Tribunal found that the advances were given to Mr. Thakur for land aggregation and Mr. Thakur admitted of having received the funds from the assessee company. It is also noted that the assessee filed recovery proceedings before the Hon'ble High Court, wherein, the money was ordered to be refunded to the assessee. In the aforesaid order, the Ld. Commissioner of Income Tax (Appeal) as well as the Tribunal held that the amounts were given by the assessee are business advances. Shri Nilesh Thakur admitted before the Hon'ble High Court as the true nature of transaction which was duly supported by record and a letter of the assessee company dated 16/07/2007 and subsequent acceptance vide letter dated 19/07/2007, given by Mr. Thakur to the assessee company. While

coming to a particular conclusion, the decision from Hon'ble Apex Court in Munjal Sales Corporation, CIT vs Reliance Utilities and Power Ltd. from Hon'ble Bombay High Court and another decision of the Tribunal in the case of Reliance Industries vs DCIT (ITA No.3082/Mum/2006) order dated 28/05/2012 were considered. No contrary decision was produced before us from either side and more specifically the Revenue, contradicting the finding contained therein. As mentioned earlier, the Department in earlier and subsequent Assessment Year, accepted the stand of the assessee, therefore, no U-turn is permissible at this stage, when the facts are identical. Even otherwise, the issue of consistency has already been discussed by us in preceding paras of this order. Thus, the Ld. Assessing Officer is directed to follow the ratio laid down in the aforesaid order of the Tribunal dated 10/04/2015 and hold that the funds were utilized for business purposes as the same were advanced by the assessee for the business exigencies of the assessee. This ground of the assessee, is therefore, allowed.

5. The next ground i.e. ground no. 5 pertains to disallowing expenses of Rs.1,14,192/- by treating them to be bogus purchases. No serious arguments were advanced by the assessee towards disallowance of Rs.1,14,192/- as treating them to be bogus purchases, and hence, the same is dismissed as not pressed.

6. In ground no.6, the book profit u/s 115JB of the Act was adjusted for additional disallowance made u/s 14A r.w.r. 8D(2). This issue is consequential in nature, hence, the Ld. Assessing Officer is directed to adjust the book profit of the assessee in terms of our above order.

Finally, the appeal of the assessee is partly allowed.

This order was pronounced in the open court on 03/03/2017.

Sd/-	Sd/-
(Manoj Kumar Aggarwal)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** /JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 03/03/2017
Shekhar, P.S./नि.स.

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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