आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 760/JP/2018
निर्धारण वर्ष/Assessment Years : 2014-15

The ACIT, Circle-2, Jaipur.	बनाम Vs.	M/s A U Financiers (India) Ltd. (Now A.U Small Finance Bank Ltd.), 19A, Dhuleshwar Garden, Ajmer Road, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAACL 2777 N		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Sanjay Jhanwar (Adv.)
राजस्व की ओर से/ Revenue by : Shri Varinder Mehta (CIT)

सुनवाई की तारीख/ Date of Hearing : 09/10/2018
उदघोषणा की तारीख/Date of Pronouncement : 07/01/2019

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the Revenue against the order of ld. CIT(A), Jaipur dated 28.03.2018 for the Assessment Year 2014-15 wherein the Revenue has taken the following grounds of appeal:-

"1 Whether in the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the entire addition of Rs. 10,62,00,000/- with the observation that the transactions were spot

transaction without appreciating the fact that the contract notes only state about the derivative transactions?
2. Whether in the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in not appreciating the fact that the transactions made by assesee is not valid as per section 45V of the RBI Act since the transaction were derivative transactions?

3. Whether in the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in deleting the disallowance made U/s 14A r.w.r. 8D of the Act and whether the show cause notice issued to the assessee with regard to applicability of sec. 14A r.w.r. 8D is not sufficient compliance to the observation of the Hon'ble Supreme Court in Maxopp Investment Pvt. Ltd. vs. CIT in Civil Appeal No. 104-109 of 2015 dated 12.02.2018?"

2. Briefly the facts of the case are that during the course of assessment proceedings, the Assessing Officer received certain information that the assessee company has carried out trading through certain registered brokers on National Spot Exchange Limited (NSEL) and for various reasons, the trading on the NSEL exchange platform had stopped on 31.07.2013 and in respect of many traders, their outstanding receivable amounts had remained unsettled. The Hon'ble Bombay High Court had subsequently set up a committee which has started recovery proceedings and certain amounts have been recovered. However, like other Brokers/Traders, the assessee company has claimed the outstanding amount as bad debts of Rs. 11.04 Crore.

3. A Show cause was accordingly issued to the assessee by the Assessing officer. In response, the assessee submitted that it has utilized its short term funds for trading in commodities on NSEL through

various brokers to earn assured marginal income by purchase and sale of commodities on same day. It was further submitted that it has earned income of Rs. 36.54 lacs on these transactions in the initial period of 2-3 months which has been shown as income from investments under the head "other income". It was further submitted that as recovery from NSEL was doubtful, the assessee has written off the sum of Rs. 10.62 Crore pertaining to NSEL in its books of account during the financial year 2013-14 and whenever subsequent recovery will be made, it will account for the same in its books of account.

4. The reply so filed by the assessee was considered but not found acceptable to the Assessing Officer. As per the Assessing Officer, the committee which has been set up by the Hon'ble Bombay High Court is pursuing the recovery with full thrust and an amount of Rs. 381.52 crores of total outstanding dues has been recovered by NSEL which shows that process is still alive and there is very possibility of recovery of dues in near future. The Assessing Officer accordingly held that it is quite abnormal on part of the assessee company to write off the same as bad debts due to uncertainty of recovery.

5. The Assessing Officer further held that the investment made by the assessee is out of its business activities which prima facie comprise small loans, vehicle loans, small and medium enterprise loans in rural and semi-urban areas and such investment in commodities is no where related with the business activities of the assessee as permitted by the RBI. Therefore, it was held by the Assessing officer that bad debts

written off as claimed by the assessee during the year to the tune of Rs. 10.62 Crores are not allowable expenses U/s 36(1)(vii) of the Act.

6. The Assessing Officer further held that as per Section 45V of RBI Act, NBFC companies are restricted from trading in any derivative contracts, unless the counter party is a bank. In the instance case, the counter party was not a bank and therefore the activity carried out by NBFC is illegal, restricted and contrary to public policy. Accordingly, the claim is also not eligible U/s 37(1) read with Explanation thereto.

7. In light of the aforesaid reasoning, the Assessing Officer disallowed the claim of bad debts of Rs. 10.62 Crores so claimed by the assessee and added the same to the total income of the assessee. Being aggrieved the assessee carried the matter in appeal before the ld. CIT(A) who has allowed the necessary relief to the assessee company. Against the said findings of the ld CIT(A), the Revenue is now in appeal before us.

8. During the course of hearing, ld CIT DR submitted that the assessee company has undertaken certain transactions in commodities on the NSEL platform during the year and has claimed deduction of Rs 10.62 crores by way of write off of amount in relation to such transactions. It was submitted that the ld. CIT(A) was not justified in deleting the addition of Rs 10.62 crores holding these transactions as spot transactions without appreciating the fact that the contract notes only state about the derivative transactions and there is nothing on record to suggest that the transactions involves delivery of

commodities. It was accordingly submitted that loss in respect of derivate transactions is in the nature of speculative loss and the same cannot be allowed as set off against normal business income. It was further submitted that the derivate transactions so undertaken by the assessee company were also not valid as per section 45V of the RBI Act and as per explanation to section 37(1) of the Act, the same cannot be allowed as an allowable deduction in the hands of the assessee company. Further, he has placed reliance on the decision of the Assessing officer which we have already noted above and have not reproduced the same for sake of brevity. It was accordingly submitted that the order of the ld CIT(A) should be set-aside and the order of the Assessing officer should be sustained.

9. Per contra, the ld AR submitted that the assessee company had carried out certain commodity transactions through registered Brokers with NSEL during the year under consideration. The assessee company had entered into paired contracts and purchases were made at T+2 cycle and sales were made at T+25 or T+35 cycle. The stockiest put up these contracts for sale at T+2 cycle on the NSEL, which were bought by the assessee company. In this paired contracts, the stockiest of commodity deposited the commodity with the Exchange accredited warehouse and received a warehouse receipt. The assessee company made full payment for purchase immediately and delivery lying in the warehouse was assigned to it and the transaction was subject to VAT and delivery charges. As far as sale is concerned, the assessee company immediately put a contract for sale on T+25 or T+35. The said contracts were bought by the users/stockists and delivery was assigned

from the buyer to the seller. It was accordingly submitted that these transactions were subject to VAT and delivered charges, and are basically spot transactions made by the assessee company in commodities on NSEL which require compulsory delivery.

10. It was further submitted by the ld AR that these spot delivery based transactions are different in nature from derivative transactions as envisaged U/s 45V of the RBI Act and therefore, there is no violation of the RBI Act as so contended by the ld CIT DR. It was further submitted that the said transactions also does not fall in the definition of term 'speculative transaction' as the same were settled through delivery. It was submitted that in respect of sales transactions, it has received the payment against the sales made in the month of April and May 2013, however it could not receive the amount against the last sales transaction done at NSEL in the month of June and July, 2013 and in view of the scam in NSEL, neither the stock nor money could be recovered. The dues from the NSEL to the tune of Rs. 10.62 crore became doubtful and were written off as bad debts in the books of account. At the same time, it was submitted that the assessee company is regularly following the recovery process in the legal pursuit as the recovery and distribution of money of investors is under the control of Hon'ble Bombay High Court. It will account for the same in its books of accounts as and when the money will be received by it. It was further submitted that the transactions were covered by the main object clause as stated in its memorandum of association and the claim of written off of bad debts from NSEL amounting to Rs. 10.62 Crore is completely legal and fully allowable as bad debts U/s 36(1)(vii) of the Act as well as

U/s 37(1) of the Act. It was submitted that the ld CIT(A) has examined and rightly appreciated the nature of the transactions being in the nature of spot transactions and not derivate transactions and there is no infirmity in his findings which should be confirmed.

11. It was further submitted by the ld AR that once the assessee company has written off the bad debts in its books of accounts, the same is in compliance with the provisions of section 36(1)(vii) of the Act. In support of his contentions, he drawn our reference to the decision of the Hon'ble Supreme Court in case of T.R.F. Ltd. vs. CIT 323 ITR 397, Circular No. 12/2016 dated 30.05.2016 issued by CBDT, decision of Hon'ble Bombay High Court in case of DCIT (International Taxation) vs. Oman International Bank SAOC 184 Taxman 314 (Bom) and decision of Hon'ble Delhi High Court in case of CIT vs. Samara India (P.) Ltd. 356 ITR 12.

12. We have heard the rival contentions and purused the material available on record. Broadly, the Revenue has contested the findings of the ld CIT(A) on two accounts. Firstly, the transactions undertaken by the assessee company are in the nature of derivate transactions and loss arising therefrom is in the nature of speculative loss which cannot be allowed set off against normal business income. Secondly, the speculative transactions are not in compliance with Section 45V of the RBI Act and hence, in view of explanation to section 37(1), the same cannot be allowed as an allowable deduction in the hands of the assessee company.

13. It would, therefore, be relevant to examine the reasoning which has been adopted by the ld. CIT(A) and his findings in relation thereto while allowing the claim of the assessee company.

14. In his order, the ld. CIT(A) has referred to the NSEL functioning as a spot exchange for trading in commodities and stated that it provides an electronic trading platform to willing participants for spot trading of commodities, such as bullion, agricultural produce, metals, etc. The ld. CIT(A) observed that the investors/traders purchases commodities by taking delivery of these commodities through warehouse receipts and then selling the commodities by giving delivery in the form of the warehouse receipts. These transactions were being done on a regular and systematic basis and therefore constitute a business and the difference between the purchase and sale price was taxable as business profits. It was further observed by the ld CIT(A) that on account of scam which broke out at the NSEL during the financial year 2013-14, a large number of investors/traders lost their money as the NSEL failed to fulfill its commitments. It was accordingly held by the ld. CIT(A) that where there is a loss on account of transactions at NSEL, such a loss would be a trading loss. Since the trade under consideration is not one that is settled without delivery but is a transaction which cannot be completed due to regulatory issues, such a loss is more a type of bad debt in relation to trade receivables.

15. Thereafter coming to the specific factual matrix of the assessee company, the ld CIT(A) stated that the assessee company has executed a number of transactions on regular basis at NSEL platform from

22.04.2013 to 16.07.2013 through four brokers and has earned a profit of Rs. 36,54,098/- which has been duly declared in its profit and loss account under the head "other Income" in view of requirements of Schedule II of the Companies Act. It was also noted by the ld CIT(A) that the assessee company has paid VAT on purchase and sale of these transactions along with delivery charges. Therefore, it was held by the ld CIT(A) that these systematic and regular transactions in the commodities at NSEL platform are nothing but business activities of the appellant which were discontinued by the appellant because of crises at NSEL.

16. Regarding the contentions of the Assessing Officer that the subject transactions are in the nature of derivative transactions which are prohibited by the RBI Act. The ld. CIT(A) has gone through the provisions of RBI Act in detail and in particular, Section 45V, 45U, explanation to section 17(6A) of the RBI Act and also the guidelines on derivatives issued by the RBI vide its circular dated 20.04.2007 and held that the derivative is a financial instrument whose value changes in response to the change in the underlying assets and that requires no initial net investment or little initial net investment and that is settled at a future date. As against that in respect of transaction under consideration executed on NSEL platform, full payment was made immediately for purchase of contracts thereon and the contract was settled on the same date as the corresponding quantity of goods purchased were also sold on the same date. Thus, the full investment was required for conducting trade on NSEL in spot market against nil or a little investment as required in derivatives. Further, the ld. CIT(A) held

that purchase as well as sale price was fixed on the date of transactions itself and it did not vary as a result of variation in the price of underlying assets. Further, the ld. CIT(A) stated that the commodity derivative in the form of commodity futures and options are being traded on Multi Commodity Exchange and National Commodity & Derivative Exchange. It was accordingly held that a derivative transaction is completely different from the spot transaction. In the derivative transactions, the transactions are not delivery based but are based on future prices, however in respect of spot transaction, transaction is done at the spot itself at the price prevailing at the time of transaction itself and the realization of the transaction may be at a future date. Therefore, the transaction on the spot market are delivery based having certainty of their values. It was accordingly held that the transactions done by the assessee company are not derivative transactions and therefore, not recovered by the provisions of Section 45V of RBI Act. Further, the ld CIT(A) held that the transactions being spot transactions are not prohibited or restrained by RBI and therefore, the same cannot be held to be illegal and against the public policy and consequently, the Explanation 1 to Section 37(1) of the Act is not applicable.

17. We agree with the findings of the ld CIT(A) that conceptually, the derivative transactions are not delivery based but are based on future prices, however the transaction on the spot market are delivery based having certainty of their values. However, question that arises for consideration is whether in the instant case, the transaction of purchase and sell of commodities are delivery based or not and a related issue of

whether they are speculative transaction or not. Both the issues are closely linked and connected, and needs to be examined thoroughly to determine the exact nature of the transaction and treatment thereof for tax purposes. Once it is decided that the transactions are delivery based and thus not speculative in nature, the question of allowability of claim of bad debt under section 36(1)(vii) will arise for consideration.

18. A speculative transaction has been defined under section 43(5) of the Act and the relevant provisions read as under:

"(5)[66] "speculative transaction"[67] means a transaction in which a contract[67] for the purchase or sale of any commodity[67], including stocks and shares, is periodically or ultimately[67] settled[67] otherwise than by the actual delivery[67] or transfer of the commodity or scrips:

***Provided** that for the purposes of this clause—*

(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or

(b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or

(c) a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his [68]business

as such member; [69][or]

[69][(d) an eligible transaction in respect of trading in derivatives[70] referred to in clause [71][(ac)] of section 2[72] of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange; [73][or]]

[73][(e) an eligible transaction in respect of trading in commodity derivatives[70] carried out in a recognised association [74][, which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013),]]

shall not be deemed to be a speculative transaction.

[75][[76][Explanation 1].—For the purposes of [77][clause (d)], the expressions—

(i) "eligible transaction" means any transaction,—

(A) carried out electronically on screen-based systems through a stock broker or sub-broker or such other intermediary registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) and the rules, regulations or bye-laws made or directions issued under those Acts or by banks or mutual funds on a recognised stock exchange; and

(B) which is supported by a time stamped contract note issued by such stock broker or sub-broker or such other intermediary to every client indicating in the contract note the unique client identity number allotted under any Act referred to in sub-clause (A)

and permanent account number allotted under this Act;

(ii) "recognised stock exchange" means a recognised stock exchange as referred to in clause (f) of section 2[78] of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and which fulfils such conditions as may be prescribed and notified[79] by the Central Government for this purpose;]

[80][Explanation 2.—For the purposes of clause (e), the expressions—

(i) "commodity derivative" shall have the meaning as assigned to it in Chapter VII of the Finance Act, 2013;

(ii) "eligible transaction" means any transaction,—

(A) carried out electronically on screen-based systems through member or an intermediary, registered under the bye-laws, rules and regulations of the recognised association for trading in commodity derivative in accordance with the provisions of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) and the rules, regulations or bye-laws made or directions issued under that Act on a recognised association; and

(B) which is supported by a time stamped contract note issued by such member or intermediary to every client indicating in the contract note, the unique client identity number allotted under the Act, rules, regulations or bye-laws referred to in sub-clause (A), unique trade number and

permanent account number allotted under this Act;

(iii) "recognised association" means a recognised association as referred to in clause (j) of section 2[81] of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) and which fulfils such conditions as may be prescribed[82] and is notified[83] by the Central Government for this purpose;'

19. In light of above, it needs to be examined whether the purchase and sale of commodities in the instant case has been periodically or ultimately settled through actual delivery or transfer of commodity or not. It has been contended by the ld AR that the assessee company had entered into paired contracts and purchases were made at T+2 cycle and sales were made at T+25 or T+35 cycle. The stockiest put up these contracts for sale at T+2 cycle on the NSEL, which were bought by the assessee company. In this paired contracts, the stockiest of commodity deposited the commodity with the Exchange accredited warehouse and received a warehouse receipt. The assessee company made full payment for purchase immediately and delivery lying in the warehouse was assigned to it and the transaction was subject to VAT and delivery charges. As far as sale is concerned, the assessee company immediately put a contract for sale on T+25 or T+35. The said contracts were bought by the users/stockists and delivery was assigned from the buyer to the seller. It was accordingly submitted that these transactions were subject to VAT and delivered charges, and are basically spot transactions made by the assessee company in commodities on NSEL which require compulsory delivery. The said

contentions need to be supported through verifiable and demonstrative evidence which shows that there is actual delivery of commodities through assignment of warehouse receipts. However, we find that the ld CIT(A) has merely stated that the assessee company has executed a number of transactions on regular basis at NSEL platform from 22.04.2013 to 16.07.2013 through four brokers and that the assessee company has paid VAT on purchase and sale of these transactions along with delivery charges.

20. On perusal of sample contract notes available at assessee's paperbook at pages 202-205, it is noted that there is purchase of certain commodity and simultaneous sale of same quantity of commodity so purchased at the same time and date of purchase. Thus, every purchase of commodity with purported delivery is simultaneously squared off by corresponding sale marked with purported delivery. However, we find that besides the contract notes, there is nothing on record which suggest that the delivery against purchase is obtained by NSEL on behalf of the assessee on spot against payment by the assessee and is subsequently delivered on behalf of the assessee against sale at a future date and sale consideration is received on delivery of such commodity. In other words, whether there is any actual stock of commodity of requisite quantity which is physically stored in the warehouse or not, and whose purchase and sell has been contracted and delivery thereof has happened through assignment of warehouse receipt or not, these facts are not emerging from records. It is also not clear whether VAT charges so claimed to have been collected as per the contract notes have actually been deposited with relevant

authorities. Merely stating that the VAT charges have been levied as per contract notes would not make the transaction as that of sale and delivery unless the transaction is demonstrated by actual stock of commodity and transfer through delivery. Once it is determined that there was actual stock of requisite quantity which has been contracted to be purchased and sold and the delivery thereof has happened, the transaction would be considered as delivery based transaction and not a speculative transaction. Thereafter, the allowability of claim under section 36(1)(vii) will arise for consideration and need to be reconsidered by the AO in light of legal proposition so laid down by the various Courts, so relied upon by the ld AR, wherein it has been held that when the assessee treats the debt as a bad debt in his books, the decision has to be a business or commercial decision and not whimsical or fanciful. The decision must be based on material that the debt is not recoverable and the decision must be bona fide. The assessee company has to show that bad debt has been written off as irrecoverable in its books of accounts and conditions specified u/s 36(2) have been satisfied. In light of the same, the allowability of claim under section 36(1)(vii) will need to be reconsidered by the AO including on the point of satisfaction of conditions specified u/s 36(2) of the Act. In view of the above discussions and in the entirety of facts and circumstances of the case, we are setting aside the matter to the file of the Assessing officer to examine the matter afresh in light of above directions after providing reasonable opportunity to the assessee. In the result, ground of Revenue's appeal is allowed for statistical purposes.

21. Now coming to Ground No. 2 of the Revenue's appeal, briefly stated, the facts of the case are that the during the course of assessment proceedings, the Assessing Officer observed that the assessee has made huge investments and on such investments, the assessee company has earned income which has been claimed as exempt u/s 10 of the Act. A show cause dated 05.12.2016 was issued to the assessee as to why appropriate disallowance u/s 14A read with Rule 8D may not be made. In compliance, the assessee company filed its reply which was considered but not found acceptable. The Assessing officer thereafter made disallowance of Rs. 72,25,530 under amended Rule 8D at the rate of 1% of the average investment.

22. On appeal, the ld. CIT(A) noted that as on 31.03.2014, the total investments were to the tune of Rs. 113.56 crore which includes investments in subsidiary and associates companies amounting to Rs. 55.04 crore on which no dividend income has been received by the appellant. It was also noted that as on 31.03.2014, the appellant was having interest free funds of Rs. 641.27 Crore consisting of share capital, reserve & surplus and further investment in the mutual funds was to the tune of Rs. 0.20 Crore. These facts clearly reveal that interest free own funds of the appellant were sufficient to meet the investments, the income from which does not form part of the total income of the assessee company.

23. The ld. CIT(A) also referred to the decision of Bombay High Court in case of CIT vs. Sharada Erectors (P.) Ltd. [2016] 76 taxmann.com 107 (Bombay), Gujarat High Court in case of Pr. CIT vs. Sintex

Industries Ltd. [2017] 82 taxmann.com 171 (Gujarat) and CIT vs. Max India Ltd [2017] 80 taxmann.com 98 (Punjab & Haryana) and held that:

> *"it is evident from the above judicial pronouncements that in a case where the assessee was having its own interest free funds (i.e. Share Capital and Reserve and Surplus) and interest bearing borrowed funds and it has made investments, the income from which does not form part of the total income of the assessee, then it would be presumed that its own interest free funds were used for making such investment unless the AO establish a nexus between the borrowed funds and such investment. It has already been observed earlier than in the instant case under consideration, the appellant was having its own interest its own interest free funds sufficient to meet the investments, the income from which does not form part of its total income and thus, it could be very well presumed that the said investment was made out of interest free funds available with the appellant as there is no evidence on record which may establish any nexus between the borrowed funds and such investments."*

24. The ld CIT(A) further held that the appellant has itself disallowed a sum of Rs. 49,095/- u/s 14A of the Act and the AO has disallowed the expenses u/s 14A of the Act r.w. Rule 8D without elucidation and explaining that the above expenditure disallowed by the appellant itself was not correct. It is to be noted that for attracting the provisions of section 14A of the Act, there should be proximate cause for disallowance which has relationship with the tax exempt income as held by the Hon'ble Supreme Court in case of CIT Vs. Walfort Share and

Stock Brokers P. Ltd. (2010) 326 ITR 1). It may be mentioned that in the case of CIT vs. Taikisha Engineering India Ltd., (2014) 90 CCH 0344 (Del.)/(2015) 370 ITR 0338 (Del.) it was held by the Hon'ble Delhi High Court that:

> *"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."*

25. The ld CIT(A) further referred to the decision of Hon'ble Supreme Court in case of Maxopp Investment Ltd. Vs CIT *(Civil Appeal Nos. 104-109 of 2015 dated 12.02.2018)*, wherein it was held as under:

> *"41) Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said*

apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the AO."

(viii) It may be mentioned that in the case of PCIT vs. IL & FS Energy Development Company Ltd. [2017] 84 taxmann.com 186 (Delhi), vide its order dated 16.08.2017, it was held by the Hon'ble High Court of Delhi that:

"23…….Further, the mere fact that in the audit report for the AY in question, the auditors may have suggested that there should be a disallowance cannot be determinative of the legal position. That would not preclude the Assessee from taking a stand that no disallowance under section 14A of the Act was called for in the AY in question because no exempt income was earned.

24. For all the aforementioned reasons, this Court is of the view that the CBDT Circular dated 11th May 2014 cannot override the expressed provisions of Section 14A read with Rule 8D."

26. The ld CIT(A) further referred to the decisions of the Coordinate Benches in assessee's own case where, on the issue of disallowance under Section 14A, the appeals of the Department for AY 2011-12 to 2013-14 were dismissed and decided in favour of the assessee company.

27. We have heard the rival contentions and purused the material available on record. Undisputedly, in the earlier years, the matter has

been decided in favour of the assessee company and thus, what has to be seen is the fresh investments which have been made during the year. On perusal of financial statements, we find that the fresh investments have been made in subsidiary company M/s AU Housing Finance Limited and M Power Micro Finance Private limited besides investments under PTC. The investments in subsidiary companies have been made out of fresh capital raised during the year and further, there has been no dividend income in respect of investment in subsidiary during the year and hence, the said investment will not form part of disallowance under section 14A read with Rule 8D. In respect of fresh investments under PTC amounting to Rs 17.07 Crores during the year, the assessee company has sufficient interest free funds and it has been stated that tax has already been paid by the assessee company. In light of the same, following the order of the Coordinate Benches in the earlier year, the AO was not justified in making disallowance u/s 14A of the Act r.w. Rule 8D amounting to Rs. 72,22,530/- and thus the same is hereby deleted. Hence, this ground of appeal is hereby dismissed.

In the result, the appeal filed by the Revenue is partly allowed for statistical purposes.

Order pronounced in the open Court on 07/01/2019.

Sd/-	Sd/-
(विजय पाल राव) (Vijay Pal Rao) न्यायिक सदस्य/Judicial Member	(विक्रम सिंह यादव) (Vikram Singh Yadav) लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 07/01/2019.

*Santosh

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

1. अपीलार्थी/The Appellant- ACIT, Circle-2, Jaipur.
2. प्रत्यर्थी/ The Respondent- M/s A U Financiers (India) Ltd., Jaipur.
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File {ITA No. 760/JP/2018}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar