IN THE INCOME TAX APPELLATE TRIBUNAL " A " BENCH, AHMEDABAD

(BEFORE SHRI G.C.GUPTA VICE PRESIDENT & SHRI ANIL CHATURVEDI, A.M.)

I.T. A. Nos. 2572/AHD/2006, 4386,4388/AHD/2007 & 790/AHD/2012
(Assessment Year: 2004-05,2002-03,2004-05 & 07-08)

UTI Bank Limited "Trishul", Opp. Samtheshwar Mahadev Near Law Garden Ellisbridge Ahmedabad-380 006	Vs.	The ACIT Circle 8, Ahmedabad
(Appellant)		(Respondent)

ITA Nos. 2737/AHD/2006, 236 & 238/AHD/2008
(Assessment Years: 2004-05, 2002-03 & 2004-05)

The ACIT Circle 8, Ahmedabad	Vs.	UTI Bank Limited "Trishul", Opp. Samtheshwar Mahadev Near Law Garden Ellisbridge Ahmedabad-380 006
(Appellant)		(Respondent)

PAN:AACU2414K

Appellant by	: Shri Arvind Sonde. A.R.
Respondent by	: Shri Subhash Bains, CIT D.R.

(आदेश)/ORDER

Date of hearing	: 23-08-2013
Date of Pronouncement	: 10-09-2013

PER SHRI ANIL CHATURVEDI,A.M.

1. These are seven appeals out of which four appeals are filed by Assessee namely ITA NO. 2572/Ahd/2006 (for A.Y. 2004-05), ITA No. 4386/Ahd/2007 (for A.Y. 2002-03), ITA No. 4388/Ahd/2007 (for A.Y. 2004-05) & ITA No. 790/Ahd/2012 (for A.Y. 2007-08) against the order of CIT(A) dated 25.09.2006, 05.10.2007, 05.10.2007 & 05.01.2012 respectively. The three appeals of Revenue namely in ITA No. 2737/Ahd/2006 (for A.Y. 2004-05), ITA No. 236/Ahd/2008 (for A.Y. 2004-05) & ITA No. 239/Ahd/2012 (for A.Y. 2007-08) are against the order of CIT(A) dated 25.09.2006, 05.10,2007 & 5.10.2007 respectively. We proceed to dispose of all these appeals by way of consolidated order for the sake of convenience.

We first take up Assessee's appeal (in ITA No. 2572/Ahd/2006 for AY 2004-05)

2. The facts as culled out from the order of lower authorities are as under:

3. Assessee is a company engaged in the business of banking. It filed its return of income for A.Y. 2004-05 declaring income of Rs. 465,59,74,060/-. The case was selected for scrutiny and thereafter the assessment was framed u/s 143(3) vide order dated 31.01.2006 and the total income was determined at Rs. 664,36,99,320/-. Aggrieved by the order of Assessing Officer (AO), Assessee carried the matter before CIT(A). CIT(A) vide order dated 25.09.2006 granted partial relief to the Assessee. Aggrieved by the aforesaid order of CIT(A) both the Assessee as well as Revenue are in appeal before us.

Ground no 1 and its sub grounds are with respect to depreciation on windmills.

4. During the course of assessment proceedings, AO noticed that Assessee had shown purchase of windmills amounting to Rs. 27,54,00,000/- and the same

was shown as put to use on 19.03.2004 and Assessee had also claimed depreciation at 80% amounting to Rs. 11,01,60,000/-. The Assessee was asked to justify its claim. The submissions made by the Assessee was not found acceptable to the AO as he was of the view that the Assessee is a Banking institution governed by Banking Regulation Act, 1949 and it cannot engage in any other business other than banking. The AO was further of the view that the depreciation at higher rate is available to an Assessee who is engaged in generation and distribution of electricity and since the assessee was a banking company, it cannot said to be engaged in the generation of electricity. He further noted that the lease rentals were fixed on the basis of interest on advances and other charges receivable by the Assessee as a financier but the same was not co-related to the projected income on the capacity of each wind energy generator, the Assessee was not entitled for surplus income on excess generation of power, Assessee was not to suffer any loss owing to lesser production or any other contingencies, the return of the Assessee on financing was granted by taking Interest Free Deposit, Assessee was not taking the responsibility of labour, repairs, taxes etc in running of the project. He also noted that the normal life of to wind energy generator was 20 years and the lease period adopted by the Assessee was only 10 years. He also disallowed the claim of the Assessee for the reason that the purchase of wind energy generators was in its name without land and power purchase agreement in its name with the concerned Electricity Board. He accordingly held that income from operation is shown as lease rental and not as income from generation of electricity. He therefore treated the entire transaction as financing and therefore disallowed the claim of depreciation of Rs. 11,01,60,000/-. Aggrieved by the order of AO, Assessee carried the matter before CIT(A). CIT(A) noted that the facts in the present year were similar to assessment year 2002-03 and thereafter upheld the order of AO by holding as under:-

3.4 Facts of the case for this assessment year is very similar to facts for A.Y. 02-03. The WEGs in question were manufactured by NEPC Ltd. The appellant has advanced money to the said company, but unable to recover the same. In that year for recovering the amount, the lease arrangement was done through WESCARE INDIA LTD., whereas in this year the same has been entered with new developer Sundaram Clayton Ltd.. The main objective of the appellant was only to recover outstanding dues from NEPC Ltd., and for this purpose M/s. WESCARE INDIA LTD., was assured a commission of Rs. 2,00,000/- per WEG. However, due to backing out of Sundaram Clayton Ltd., there was delay in completion of the project and hence the payment of commission was resented. On similar facts in A.Y. 2002-03 and on similar submission made by the assessee in that year, the issue was decided by CIT(A) vide order dt: 18/11/2005. The main findings were as under:-

"iv) From the contents of the tripartite agreement dt:22-9-2000, the statement of Shri V.R. Raghunathan and papers found in survey which are discussed in detail by the AO in the asst. order and in brief reproduced in para 7.1 above, it is evident that actually M/s. Wescare India Ltd.(WIL) approached UT1 Bank for financing their business in which tax saving benefit was to be passed on to UTI Bank. Thereafter, the tripartite agreement was signed. The tripartite lease agreement suggests that the payment for assets has been made by UTI Bank in the capacity of financier and not real owner. The lessee and W1L is required to suffer the losses arising out of purchase of assets and they are only amenable to all risks attached to purchase of assets."

"v) The appellant is engaged in banking business under the Banking Regulations Act. The appellant cannot engaged in generation of electricity, as it is not permissible under the Banking Regulations Act. Hence, the appellant was not permitted to purchase Windmill for generation of power in the normal course of business in the first instant."

"vi) Further, the UTI was not concerned with the operational aspect of equipment or loss or damages to the equipment. Here only W1L has taken all responsibilities for that. Even the land did not belong to the UTI Bank Ltd, but belong to WIL."

"vii) The contention of assessee that in case of wind mills stop operation due to agitation or due to change in the wind velocity resulting in short generation of power the revenue would be drastically and critically affected is contrary to the evidence. WIL has agreed to pay for the shortage vide clause 6A(i) proviso. Non receipt of deposit from WIL and non action for the lapse is a serious breach of the agreement itself."

The assessee has not followed the agreement in its true meaning as the assessee has not taken any action for non-observance of various conditions in the agreement.

Instead of taking action for the default in deposit by WIL as a violation of the agreement, the assessee is turning the same as a shield "that deposit is not received".

"The owning of the WEG without the requisite land with abundant velocity of wind is of scrap value. This may be the reason for the alleged lessee B1L belonging to TVS group did not go for the purchase of the wind mills. On the contrary by joining in the agreement without any investment and/or responsibility BIL is getting the power at 60 Ps. less per unit."

"viii) The decision in the case of Prakash Ind. Ltd. is not relevant for deciding the issue whether the assessee is entitled to depreciation or not. In that case the questions involved was of ownership between the company and bank. In the said lease agreement there was a stipulation that after the expiry of the lease period the machinery was to be returned to the Bank. The dispute was not under the Income tax Act and therefore not applicable. The decision of the ITAT in the case of Birla Chemicals and Traders (P) Ltd. is also not relevant for the issue at hand."

"ix) Therefore, in view of the discussions made above and the finding brought out on record by the A.O. and discussed in details in the asst. order, which are produced above in earlier paras, it is evident that this was not a lease transaction, but only finance transaction. Hence, the depreciation is not allowable."

"x) As per the decision of Hon. Supreme Court in the Case of McDowell & Co. Vs. CIT., 154 ITR 148, to ascertain the real nature of transaction, the veil has to be lifted. As per the decision of Hon. Karnataka High Court in the case of Avasarala Automation Ltd. Vs. JCIT 266 ITR 178, it has been held that while it is permissible for an assessee to have the tax planning, it is not permissible to prepare documents and to give the colour of real transactions on the basis of said documents, which would enable the assessee to evade the payment of tax. When an assessee makes a claim of depreciation on the ground allowed by law, it would always be open to the AO to pierce the veil of transactions put forward and find out as whether the transaction put forward for the purpose of claiming depreciation is genuine transaction or only a make believe, one intended to avoid payment of tax."

As the facts here are similar in this assessment year also and on considering the facts of the case for this asst. year also as discussed in detail by the A.O. in the asst. order, it is evident that these are in fact loan transaction which are claimed by the appellant as lease transactions. The case laws relied upon by the appellant are not applicable to the facts of the present case. The so called operation of lease transaction is nothing but a colourful device and as per the Supreme Court's decision in the case of McDowell & Co.Vs. CIT., 154 ITR 148, we have to find out the truth behind the fact and decide the case accordingly.

Therefore, it is held that transaction made was only loan transaction and not genuine lease transaction and the A.O. was justified in disallowing the depreciation and the action of the A.O. is hereby confirmed."

5. Aggrieved by the order of CIT(A), the Assessee is now in appeal before us.

6. Before us, the learned A.R. at the outset submitted that the issue of depreciation on leased assets has now been settled and decided by Hon. Supreme Court in the case of ICDS Ltd vs. CIT & Anr (2013) 350 ITR 527 (SC). He also submitted the following the aforesaid decision of Hon. Apex Court, the Mumbai Tribunal on identical facts in the case of Development Credit Bank Ltd. vs. DCIT ITA No. 300/Ahd/2001 and 4892/Ahd/2003 has decided the issue in assessee's favour. The learned A.R. further submitted that the Assessee had entered into lease transaction in the normal course of business as the same was permissible by the Banking Regulation Act. He further submitted that the lease income earned by the Assessee is also disclosed in its Profit and Loss account. He also urged that in Assessee's own case for earlier assessment year the issue has been decided in its favour. He placed on record the order of the Tribunal. He thus urged that the addition made be the AO be deleted.

7. We have heard the rival submissions and perused the material on record. It is an undisputed fact that the income from lease has been considered by Assessee as income. It is also an undisputed fact that the AO has considered the lease entered by the Assessee to be a Finance lease to arrive at the conclusion that the assessee is not entitled to depreciation. On identical facts, in the Assessee's own case for AY 2002-03 (in ITA No. 2572/Ahd/2006 order dated 25.09.2006 the issue has been decided in favour of Assessee by holding as under:

25. We have heard the rival submissions and perused the material on record. It is an undisputed fact that the income from lease has been considered by Assessee as income it is an undisputed fact that the A.O. has considered the lease entered by the Assessee to be a Finance lease to arrive at the conclusion

that the Assessee is not entitled to depreciation. We find that the issue of depreciation on leased assets has been decided by Honourable Apex Court in the case of ICDS Ltd (supra). One of the question before the Hon. Supreme Court was "whether the Assessee is entitled to depreciation vehicles finance by it which is neither owned nor used by the Assessee by virtue of the business" the Hon. Supreme Court held as under:

"The provision on depreciation in the Income-tax Act, 1961, reads that the asset must be "owned, wholly or partly, by the assessee and used for the purposes of the business". Therefore, it imposes a twin requirement of "ownership" and "usage for business" for a successful claim under section 32 of the Act.
The section requires that the assessee must use the asset for the "purpose, of business". It does not mandate usage of the asset by the assessee itself. As long as the asset is utilized for the purpose of business of the assessee, the requirement of section 32 will stand satisfied, notwithstanding non-usage of the asset itself by the assessee.
The definitions of "ownership" essentially make ownership a function of legal right or title against the rest of the world. However, it is "nomen generalissimum", and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied. As long as the assessee has a right to retain the legal title against the rest of the world, it would be the owner of the asset in the eyes of law.
Held, affirming the decision of the Tribunal, (i) that the assessee was a leasing company which leased out the trucks that it purchased. Therefore, on a combined reading of section 2(13) and (24) of the Act the income derived from leasing of the trucks would be business income, or income derived in the course of business, and had been so assessed. Hence, it fulfilled the requirement of section 32 of the Act, that the asset must be used in the course of business. The assessee did use the vehicles in the course of its leasing business. The fact that the trucks themselves were not used by the assessee was irrelevant for the purpose of the section."

26. In the case of Development Credit Bank Ltd. the issue before Mumbai Tribunal was with respect to depreciation on assets given on lease. The Co-ordinate Bench of Tribunal decided the issue in favour of Assessee by holding as under:

"28 We have heard the arguments of both the sides and we are of the view that cross appeals on the issue of allowance of depreciation in the current year have to be decided simultaneously. In so far as disallowance of depreciation on the assets involved in SLB transactions, the issue stands settled in favour of the assessee. From the synopsis filed by the AR, it is seen that the assessee provided the AO with all the information as was asked for, i.e. lease agreements, copies of bills for purchase of assets, inspection reports, copies of

insurance cover etc., which, in our considered opinion, was identical circumstance, which was before the Hon'ble Delhi High Court in the case of Cosmo Films (supra), i.e. SLB transactions, revenue authorities applying McDowell's case and arguing that it is a devise for lowering the tax effect and relying on the Board's circular (supra), and more importantly, that, that case also pertained to assessment year 1996-97. The Hon'ble Delhi Court took the view that SLB transactions are genuine and cannot be considered to be sham.

29. On appreciation of the records, as produced before us, the decision of Hon'ble Delhi High Court in the case of Cosmo Films Ltd. (supra) has arguments of the assessee on the impugned issue, thereby, impliedly, reversed the ratio in the decisions of MidEast (supra) and Induslnd (supra). We find that tests laid down in MidEast case was primarily to ascertain the genuineness of the transaction entered by the assessee with its lessee, which was done by the CIT(A) in each case.

31. In any case, the issue of SLB transaction and in particular the issue of ownership of asset, also has been laid to rest by the Hon'ble Apex Court in the case of ICDS Ltd. Vs CIT, in CA No. 3286 to 3290 of 2008, wherein the question that was sought to be answered was whether the appellant (assessee) is the owner of the vehicles which are leased out by it to its customers". The Hon. supreme Court of India, concluded, extracted from para 28, "From a perusal of the lease agreement and other related factors, as discussed above, we are satisfied of the assessee's ownership of the trucks in question" (para28, page28).

32. Coming to the issue of finance lease, wherein the CIT(A) sustained the disallowance because the usage of the equipment lease out could not be substantiated. On going through the decision of the jurisdictional High Court of Bombay, we find that the issue now is at rest, in so far as the lessor is concerned, because, while dealing the case of the lessor, i.e. the assessee in the instant case, the asset has left its corridors for being utilized, and in return, rent had been received by the assessee. The Hon. Bombay High Court in the case of Kotak Securities Ltd. has held that what is to be seen is that the asset has been given on lease and the lease rent has been received, given in that case, so far as lessor is concerned, the asset has been used.

34. After having examined all the transactions which have been impugned before us, we are of the opinion that the assessee is entitled to the claim of depreciation under all the three circumstances, i.e. sale lease back, genuineness of transaction and asset having being put to use. We, therefore, allow ground no. 1 the assessee's appeal and dismiss both the grounds of the department's appeal.

27. In view of the aforesaid facts, we are of the view that in view of the decision of H'ble Apex Court in the case of ICDS (supra) and the decision of Mumbai Tribunal in the case of Development Credit Bank Ltd, Assessee is eligible for

depreciation and we thus delete the addition made by the Assessing Officer. Thus this ground of the Assessee is allowed.

9. Since the facts in the year under appeal are identical to that of earlier year, following the decision of the co-ordinate bench in the Assessee's own case for AY 2002-03, the decision of H'ble Apex Court in the case of ICDS (supra) and the decision of Mumbai Tribunal in the case of Development Credit Bank Ltd, we decide the issue in favour of assessee. Thus this ground of the Assessee is allowed.

Ground No. 2 is with respect to disallowance under 14A.

8. AO noticed that Assessee has claimed interest on tax free bonds and dividend on shares and mutual funds amounting to Rs. 24,76,97,844/- as exempt income. The assessee had also made suo motto disallowance under Section 14A of Rs. 2,20,000,000/-. He further noted that on identical facts in A.Y. 2003-04, the claim of Assessee was rejected. He accordingly worked out the disallowance of interest and other expenditure by working out the disallowance of Rs. 30.78 Cr. by holding as under:

a)	Total borrowed fund at year end available for investment		16720
b)	Total interest free funds of the appellant	7430	

	comprising of shares, capital, reserves, demand deposits and other liabilities		
	Less:- Funds deployed for CRR and SLR (Rs. 725 + 4837)	5562	
c)	Interest free funds available for investment		1868
d)	Total borrowed funds available for investment		14852
e)	Ratio of borrowed funds to interest		87.43:12.57

	free funds available for investment is, therefore, 87.43 (borrowed) 12.57 (interest free)		
f)	Tax free investments as per Balance Sheet		311
	Add: Share Application Money as at 31/03/2003		-
g)	Total tax free investments		311
h)	Interest expenditure		

	attributable to Rs. 311 crores which ought to be related to tax free investments		
	[Borrowed deployed funds in tax free investment] (Rs. 311 crores) x 1022 x Total Interest Total borrowings (Rs. 14852 crores)		21.22
i)	All other expenditure which can be attributed to tax free		

	investment would be		
	[Borrowed deployed funds in tax free investment] (Rs. 311 crores) x1022 x Total operative exp. Total funds borrowed and (Rs. 562 Crores) interest free (Rs. 14852 Crores.)		11.76
	Total disallowance (h+j) Total		32.98
	Less: Disallowed		2.20

	by the assessee		
	Net Disallowance		30.78

9. Aggrieved by the order of AO, Assessee carried the matter before CIT(A). CIT(A) granted partial relief to the Assessee by holding as under:

"4.3 After considering the submissions of the appellant and the case laws relied upon, I am of the opinion that the action of the Assessing Officer is not correct as regards disallowing interest expenses amount after allocating it to the investments for exempted income. The appellant has filed the details before the Assessing Officer admitting that only part of the interest bearing funds is used for investing in the investments giving tax exempted income. The interest cost is calculated at Rs. 2.2 Cr. which is offered for taxation. Hence the A.O. is not justified in further allocating the interest expenditure for this purpose disregarding the fact that the appellant has surplus funds. However as regards the other operating expenses are concerned, the appellant has not filed any details as to how much expenditure is to be apportioned for earning the exempted income. Therefore, proportionate expenditure has to be allocated out of the total operative expenditure for earning the exempt income under the provisions of Sec. 14A. This view is supported by the decision of ITAT Chennai Bench in the case of Southern Petro Chemicals Industries v. DCIT, 93 TTJ 181. As per this decision, the investment decisions are very strategic decisions in which top management is involved and, therefore, proportionate management expenses are required to be deducted while computing the exempted income. The appellant has submitted that even if earlier year appellate order is followed, the disallowance out of operating expenses comes to Rs. 4.47 Cr. This submission is not accepted. The Assessing Officer has already given detailed

working in asst. order for calculating Rs. 11.76 Cr., which is justified. Hence, the disallowance is confirmed to be extent of Rs. 11.76 Cr. and the balance amount is deleted.

10. Aggrieved by the order of CIT(A) the Assessee and Revenue are in appeal before us.

11. Before us, the learned A.R. submitted that the interest free funds available with the Assessee in the form of Capital, Reserves and Surplus and interest free demand deposit are far in excess of the Tax Free Investment at the end of the year and therefore no disallowance under Section 14A is called for. He further submitted that on identical facts in the Assessee's own case, the Hon. Tribunal had deleted the addition made under 14A and which has also been upheld by Hon. Gujarat High Court in Tax Appeal No. 118/Ahd/2013. He therefore submitted that in the present case no disallowance under Section 14A was called for.

12. The learned D.R. on the other hand pointed to the relevant paragraphs of the order of AO and relied on the order of AO and further submitted that the AO has rightly made the disallowance under section 14A and thus supported his order.

13. We have heard the rival submissions and perused the material on record. It is an undisputed fact that the Assessee has earned Rs. 24.77 Crore on account of Interest on tax free bonds, debentures and dividend income which has been claimed as exempt. It is also a fact that Assessee while computing the total income had suo motu disallowed Rs. 2.20 Crores under section 14A. AO worked out the disallowance under section 14A at Rs. 30.78 Crore. We find that on identical facts for A.Y. 2003-04 in ITA No. 2571/Ahd/2006, the Co-ordinate Bench of Tribunal had restricted the disallowance to be made by

Assessee. We further find that in Assessee's own case for A.Y. 2002-03 in ITA No. 2572/Ahd/2006 order dated 25.09.2006, the matter has been decided by holding as under:

14. *19. We have heard the rival submissions and perused the material on record. It is an undisputed fact that the Assessee has earned Rs. 39.65 Crore on account of interest on tax free bonds, debentures and dividend income which has been claimed as exempt. It is also a fact that the Assessee while computing the total income has suo motu disallowed Rs. 6.32 Crore u/s 14A. AO worked out the disallowance under Section 14A at Rs. 36.68 Crore and after setting off disallowance made by the assessee, he disallowed Rs. 30.45 Crore. We find that before AO, Assessee has not raised the contention about no disallowance u/s 14A and therefore the AO had proceeded ahead on the basis of suo moto disallowance made by the Assessee. CIT(A) had deleted the addition to the extent of Rs. 25.35 Crore. We further find that on identical facts for A.Y. 2003-04, (ITA No 2571/Ahd/2006), the Co-ordinate Bench of Tribunal had restricted the disallowance to that made by the Assessee by holding as under:*

33. *We have heard the rival contentions and perused the material on record. The undisputed facts are that during the year the assessee has earned interest of Rs 17.45 crore on tax free bond and debentures as against which the assessee had suo moto disallowed Rs 5.53 crore being the interest expenses u/s 14A as against which the AO has worked out the disallowance of Rs 32.76 crore. After giving the credit of disallowance of Rs 5.53 crore made by the Assessee, the AO disallowed Rs 27.23 crore u/s 14A. As on 31st March 2003, the interest free funds available with the assessee was to the tune of Rs 3404 crore (comprising of share capital of Rs 230 crore, Reserves of Rs 689 crores and interest free demand deposits of Rs 2485 crores) as against which the tax free investments were to the tune of Rs 589 crore. Thus the interest free funds were far in excess of the investments. CIT (A) has given a finding that the facts in AY 2003-04 are identical to the facts of the case in AY 2002-03 and accordingly he has followed the decision of CIT (A) for AY 2002-03. These facts have not been controverted by the Ld. D.R. nor have they brought on record any facts to the contrary. Hon'ble Bombay High Court in the case of CIT Vs Reliance Utilities & Power Ltd (supra) has held that if there are interest free funds available to an assessee sufficient to meet its investments and at the same time the assessee has raised a loan it can be presumed that the investments were from interest free funds available. In the present case, since the assessee has suo moto disallowed Rs 5.53 crore u/s 14A, respectfully following the decision of Bombay High Court, we are of the view that in the facts of the present case, no further disallowance over and above than what has been disallowed by the Assessee is called*

for. As far as disallowance of other administrative expenses is concerned, the undisputed fact is that the disallowance has been made by the AO without giving a finding as to how much administrative expenditure has been incurred to earn the exempt income. In the case of Hero Cycles (supra) the Hon'ble High Court has held that the contention of the Revenue that directly or indirectly some expenditure is always incurred which must be disallowed u/s 14A cannot be accepted. Disallowance u/s 14A requires finding of incurring of expenditure. In the present case, the AO has presumed that the assessee might have incurred expenditure to earn the exempt income. He has not given any finding of incurring of expenditure. In view of these facts and respectfully following the decision of High Court, we are of the view that no disallowance of administrative expenses can be made. We accordingly direct for the deletion of the addition made by the AO and allow this ground of the assessee.

20. Before us, the learned A.R. has raised a new argument wherein it was submitted that even the suo motu disallowance made by the Assessee while computing the income should be deleted and for which he placed reliance the decision of Hon. Calcutta High Court and the decision of Supreme Court. We find that this ground was not taken by the assessee before A.O. and CIT(A). AO had proceeded on the basis of the suo-moto disallowance made by the Assessee. Thus the AO or CIT(A) did not had any opportunity to examine the aforesaid contention and therefore there is no finding on it either by the A.O. and CIT(A). In view of these facts, we are of the view that the matter with respect to Nil disallowance under 14A be remitted back to the file of AO for examining it afresh. Thus the matter is remitted to the file of AO and he is directed to admit the issue and decide the issue afresh on merits. as per law after considering the submissions made by the Assessee and after giving a reasonable opportunity of hearing to the Assessee. Assessee is also directed and furnish promptly the details called for by the AO to decide the issue. Thus this ground of the Assessee is allowed for statistical purposes.

15. Since the facts in the year under appeal are identical to that of A.Y. 2002-03, as admitted before us by both the parties, we for similar reasons remit the matter back to the file of AO for examining the issue afresh with directions similar to that given while deciding the appeal for AY 2002-03 and direct him to decide the issue afresh on merits as per law and after considering the submissions made by the Assessee and after giving reasonable opportunity of hearing to the Assessee. Assessee is also directed to furnish promptly the

details called for by the AO to decide the issue. Thus this ground of Assessee is allowed for statistical purposes.

Ground No. 3 is with respect to disallowance u/s 36(1)(vii)

16. During the course of assessment proceedings, AO noticed that Assessee has claimed write off under Section 36(1)(vii) at Rs.156,42,85,257/- and had not considered the provision in the bad and doubtful debt account at the end of accounting year amounting to Rs. 162.51 Crore. The Assessee was asked to substantiate its stand. The Assessee interalia submitted during the year as per the Income Tax Account, there was no incremental provision made and therefore no disallowance was called for. It was further submitted that identical disallowance made in A.Y. 2002-03 was deleted by CIT(A). AO did not accept the contentions of Assessee as he was of the view that the order of CIT(A) for A.Y. 2002-03 was not accepted by the Department and a second appeal has been filed. He was further of the view that the credit balance of Rs. 162.51 Crore as at the end of the financial year was required to be disallowed. Since the Assessee had claimed write off bad debts only to the extent of Rs. 156,42,85,257/- the AO limited the disallowance to the extent of the bad debts claimed by Assessee and accordingly disallowed Rs. 156,42,85,257/- under Section 36(1)(vii). Aggrieved by the order of AO, Assessee carried the matter before CIT(A). CIT(A) granted partial relief to the Assessee by holding as under:

5.3 I have carefully considered the facts of the case and the submissions as advanced by the appellant along with various judicial decisions. Similar issue arose in earlier asst. year, i.e. 2002-03, wherein I have, vide order dated 18.11.2005, held after considering the decision of South Indian Bank Ltd. V. CIT, 262 ITR 579 (Ker.) DCIT V. Catholic Syrian Bank Ltd., 88 ITD 185 (Coch) (SB) & Karnataka Bank Ltd. V. ACIT, 78 TTJ 996 (Bang) as under:-

"The actual bad debt written off would be limited to the excess amount of write off over the amount standing to the credit of the provision account created under cl. (viia) to sec. 36(1) allowed under cl.(viia) to section 36(1). Thus, it is clear from the decision of Cochin ITAT special bench that it is the provision made and allowed u/s Sec 36 (1) (viia) which has to be considered for restricting the deduction u/s 36 (1) (vii). The AO. has understood it and instead of restricting the disallowance of bad .debt u/s 36(1)(vii) by this provisions made and allowed U/s 36(1)(viia) amounting to Rs. 8.24 cr he has restricted it and disallowed by an amount of Rs. 59.03 Cr.plus 31.603 Cr. This is not correct and cannot be upheld.

The provision made and allowed ui/s. 36(l)(viia) is although independent allowance, it will restrict the disallowance u/s. 36(l)(vii) by application of proviso to sec. 36(l)(ii), which restricts to the credit balance of the provision made and allowed in assessment for doubtful debts u/s. 36(l)(viia).

Now, the only dispute remains is that of restricting the disallowance u/s. 36(1)(vii) by applying the proviso to this sec., whether it should be restricted by the opening balance of the provisions for bad and doubtful debts u/s. 36(1)(viia) or by the closing balance of provision for bad and doubtful debts u/s. 36(1)(viia) of the I.T. Act.

In earlier assessment year, i.e. A.Y. 2002-03 and 2003-04, it was held by CIT(A) that it should be restricted by closing balance of the provision for bad and doubtful debt u/s. 36(1)(viia) of the I.T. Act. Following the same order to adopt a consistent view, it is held for this year also that it should be restricted by closing balance of provision of bad and doubtful debt u/s. 36(1)(viia) of the I.T. Act. Therefore, in my view the correct deduction allowable to the appellant is as under:-

Deduction allowable u/s. 36(1)(vii):	
Gross bad debt actually written off during previous year.	*Rs. 157.43 Cr.*
Less: closing balance in the provision for bad & Doubtful debts u/s. 36(1)(viia) as on 31-03-04.	*Rs. 37.76 Cr.*
Balance allowable u/s. 36(1)(vii)..	*Rs. 119.67 Cr.*

Hence, the allowable deduction u/s. 36(1)(vii) is Rs. 119.67 Cr. as against the claim made by the appellant Rs. 142. 59 Cr. Therefore, the disallowance comes to Rs. 22. 92 Cr. which is confirmed and the balance amount it deleted

17. Aggrieved by the order of CIT(A), the Assessee is now in appeal before us.

18. Before us at the outset, the learned A.R. submitted that the issue in the present ground is identical to that of the facts of the case in earlier years. He

further submitted that in earlier years, the Hon. Tribunal has decided the issue for A.Y. 2003-04 in its favour. He further submitted that Hon. Gujarat High Court in Assessee's own case for A.Y. 1998-99, 2000-01 & 2001-02 in Tax Appeal No. 1077 to 1080/Ahd/2010 has decided the issue in favour of Assessee. He thus submitted that since the facts in the year under appeal are identical to that earlier years, the issue be decided in its favour following the decision of High Court and Tribunal. The learned D.R. on the other hand relied on the order of Assessing Officer.

19. We have heard the rival submissions and perused the material on record. We find that the Revenue in tax appeal no. 1077 to 1080/Ahd/2010 (for AY 1998-99, 2000-01 & 2001-02) had preferred appeal before High Court against the order of Tribunal and the question raised before Hon. Gujarat High Court reads as under:

"whether the appellate Tribunal is right in law and on facts in holding that for the purpose of section 36(1)(vii) only the closing credit balance in the previous account of the earlier years is to be considered. Despite the provision of section 36(1)(vii) of the Act?"

The Hon. Guj. H. C. held as under:-

15. In the present case, however, the question of method of operation of proviso to section 36(l) (vii) arises. Such proviso as noted, provides that in case of an assessee to which clause (viia) applies, the amount of deduction relating to any such debt or part thereof shall be limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for account made under that clause. The revenue's contention is that by virtue of such proviso, the claim of the assessee for deduction for debts write off, should be reduced by the closing balance of the assessee in his account for the provision of bad and doubtful debts. On the other hand, the assessee contents that such diminution be limited to the opening balance of such account.

16.We notice that in this respect the provision is silent. We may therefore record that the interpretation adopted by the Tribunal in the impugned judgment would ordinarily give rise to a question of law particularly when it is pointed out that there is no previous decision of any High Court on the subject. However,

the issue has been made sufficiently clear by the CBDT Circular No.17/2008 dated 26-11-2008. In the said circular, this very issue has been examined and clarified in the following manner:-

" 2. In a recent review of assessment of Banks carried out by C&AG, it has been observed that while computing the income of banks under the head 'Profit and Gains of Business & Profession, deductions of large amounts under different sections are being allowed by the Assessing Officers without proper verification, leading to substantial loss of revenue. It is, therefore, necessary that assessments in the cases of banks are completed with due care and after proper verification. In particular, deductions under the provisions referred to below should be allowed only after a thorough examination of the claim on facts and on law as per the provisions of the I.T, Act, 1961.

(i) Under section 36(I)(vii) of the Act, deduction on account of bad debts which are written off as irrecoverable in the accounts of the assessee is admissible. However, this should be allowed only if the assessee had debited the amount of such amounts to the provision for bad and doubtful debt account under section 36(1)(vii) of the Act, as required by section 36(2) (v) of the Act.

(ii) While considering the claim for bad debts u/s 36(1)(vii), the assessing officer should allow only such amount of bad debts written off as exceeds the credit balance available in the provision for bad and doubtful debt account created u/s 36(1) (viia) of the Act. The credit balance for this purpose will be the opening credit balance i.e., the balance brought forward as on 1st April of the relevant accounting year."

17. As already noted, in absence of such clarification by CBDT, we would have been inclined to admit the appeals. However, when such circular issued under section 119(2) of the Act clarifies-the position beyond any doubt, we have no reason to entertain the revenue's appeals. As already noted, the statutory provision is silent on the precise method of working out the deduction. It is by now well-settled that such circulars issued by the Board in exercise of its statutory powers under section 119(2) of the Act, may have the effect of relaxing the rigors of a statutory provision. In the case of Catholic Syrian Bank Ltd. (supra) itself, the Apex Court touched on the effect of the circular issued by the Board. It was observed as under:-

"Now, we shall proceed to examine the effect of the circulars which are in force and are issued by the Central Board of Direct Taxes (for short, "the Board") in exercise the power vested in it under section 119 of the Act. Circulars can be issued by the Board to explain or tone down the rigours of law and to ensure fair enforcement of its provisions. These circulars have the force of law and are binding on the income-tax authorities, though they cannot be enforced adversely against the assessee. Normally, these circulars cannot be ignored. A circular may not override or detract from the provisions of the Act but it can

seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specified circumstances so long as the circular is in force, it aids the uniform and proper administration and application of the provisions of the Act. (Refer to UCO Bank v. CIT(1999) 4 SCC 599). "

18. In case of UCO Bank vs. Commissioner of Income Tax reported in 237 ITR 889 the Supreme Court in connection with effect of circulars issued by the Board under section 119 of the Act observed:

" Such instructions may be by way of relaxation of any of the provisions of the sections specified there or otherwise. The Board, thus, has powers inter alia, to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing circulars in exercise of its statutory powers under section 119 which are binding on the authorities in the administration of the Act. Under section 119(2)(a), however, the circulars as contemplated therein cannot be adverse to the assessee. Thus, the authority which wields the power for its own advantage under the Act is given the right to forgo the advantage when required to wield it in the manner it considers just by relaxing the rigour of the law or in other permissible manners as laid down in section 119. The power is given for the purpose of just, proper and efficient management of the work of assessment and in public interest. It is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. Hard cases which can be properly categorised as belonging to a class, can thus be given the benefit of relaxation of law by issuing circulars binding the taxing authorities."

19. In the result, bearing in mind the circular issued by CBDT dated 26.11.2008 no further controversy should arise.
In the result, the tax appeals are dismissed."

20. Before us, the Ld.D.R. could not controvert the submissions made by the Ld.A.R. nor could bring any material on record to demonstrate that the decision of High Court has been overturned by Superior Court. Further, since the facts the year under appeal are identical to that of earlier years, we respectfully, following the decision of Hon. Gujarat High Court, in Assessee's own case allow this ground in favour of Assessee and thus this ground of Assessee is allowed.

Ground no. 4 is with respect to disallowance of fraud expenses.

21. Assessing Officer noticed that the Assessee has claimed loss on account of fraud expenses amounting to Rs. 52.31lacs. Assessee submitted the details to the extent of Rs. 29.51 lacs but no details were furnished with respect to the remaining amount of Rs. 22.80 lacs as according to the Assessee they consisted of smaller amounts pertaining to retail and demat accounts and the numbers were very high. The Assessing Officer did not accept the contention of the Assessee. In the absence of details of Rs. 22.80 lacs, he considered the same has not allowable. Aggrieved by the order of Assessing Officer, Assessee carried the matter before CIT(A). CIT(A) confirmed the order of Assessing Officer by holding as under:-

"7.2 During the appellate proceedings, the appellant submitted that these are genuine losses and should be allowed. The appellant filed copy of newspaper article showing that the same person Shri G.N. Sharma has done fraud at various other places, hence it should be allowed. However no details or any other evidence were submitted in support of this claim of loss. Hence, it is held that the Assessing Officer was justified in disallowing the loss of Rs. 22. 80 lacs in respect of which no details were submitted. This ground is, therefore, rejected."

22. Aggrieved by the order of CIT(A), Assessee is now in appeal before us.

23. Before us, the learned A.R. strongly submitted that the losses were genuine and were incurred during the course of business and therefore submitted the same should be allowed. The Ld. D.R. on the other hand submitted that in the absence of details the expenditure cannot be allowed and thus supported the order of AO and CIT(A).

24. We have heard the rival submissions and perused the material on record. We find that the Assessee did not furnish details of loss of Rs. 22.80 lacs before the Lower Authorities nor were the same submitted before us. In view of these facts, we find no reason to interfere with the order of CIT(A). Thus this ground of Assessee is dismissed.

ITA No. 2737/AHD/2002006 (for A.Y. 2004-05) Revenue's Appeal)

25. The grounds raised reads as under:-

1.The Ld. CIT(A) has erred in law and on facts in restricting the disallowance u/s. 14A at Rs. 11.76 Crores as against Rs. 30.78 Crores made by the Assessing Officer, thereby granting relief of Rs. 19.02 Cr.
2.The Ld. CIT(A) has erred in law and on facts in restricting the disallowance u/s. 36(1)(viia) at Rs. 22.92 Cr. as against Rs. 156.42 Cr. disallowed by the Assessing Officer thereby granting relief of Rs. 133.5 Cr.
3.The Ld. CIT(A) has erred in law and on facts in allowing compensation for of lease agreement of Rs. 32 lacs. The Assessing Officer has rightly disallowed this claim holding that the assessee company after the expiry of lease agreement in 2001 was under no contractual obligation to pay the compensation to lessor specially so when it had regularly made the payments of rent during the period 2001 to 2004.

26. Before us, both the parties submitted that Ground No 1 is connected with Ground No 2 of Assessee's appeal in ITA No. 2572/A/2006 and the submissions made by them while arguing the ground in Assessee's appeal are equally applicable to the present grounds.

27. We have heard the rival submissions and perused the material on record. Since ground no. 1 of the present Revenue's appeal are connected with ground no. 2. of Assessee's appeal in ITA No. 2572/Ahd/2006 and since Ground No 2 of Assessee's appeal in ITA No 2572/Ahd/2006 hereinabove has been has been discussed and decided in favour of Assessee, we therefore for similar reasons dismiss this ground of the Revenue.

28. Before us, both the parties submitted that Ground No 2 is connected with Ground No 3 of Assessee's appeal in ITA No. 2572/A/2006 and the submissions made by them while arguing the ground in Assessee's appeal are equally applicable to the present grounds.

29. We have heard the rival submissions and perused the material on record. Since ground no. 2 of the present Revenue's appeal are connected with ground no. 3. of Assessee's appeal in ITA No. 2572/Ahd/2006 and since Ground No 2 of Assessee's appeal in ITA No 2572/Ahd/2006 hereinabove has been has been discussed and decided in favour of Assessee, we therefore for similar reasons dismiss this ground of the Revenue.

Ground no. 3 is with respect to compensation expenses for termination of rent agreement.

30. During the course of Assessment proceedings, AO noticed that Assessee had taken premises at Baroda known as Arundeep Complex on "Leave and Licence" basis on 1.12.1996 from one Shri Dilip Kumar Patel for the period of 5 years with stipulation to extend the same for another 5 years. A Non Interest Bearing Security deposit of Rs. 35 lakhs was also paid. In the year 2001, the bank did not renew the agreement as per the original terms but however continued to pay the increased rent on month to month basis. Thereafter, the landlord was asked to return the security deposit initially given. The landlord did not return the security deposit but on the contrary made a claim of rent for period from 2003 to 2006 as if the leave and licence agreement was extended for another 5 years with effect from 2001. The bank entered into a compromise with the landlord and forego the deposit and paid compensation of Rs. 32 lakhs which included 6 months rent equivalent to Rs. 16,08,936/- (inclusive of opportunity cost on security deposit) for the notice period (b) an estimated cost of Rs. 12 lakhs towards restoration and (c) the reminder for other expenses. AO did not accept the contention of the Assessee as he was of the view that there was no legal obligation on the part of Assessee to pay such compensation. He was further of the view that no businessman will forego the right to recover the deposit as there were no arrears of rent and accordingly disallowed the security deposit of Rs 32 lacs which was claimed by Assessee

as revenue expenditure. Aggrieved by the order of AO, Assessee carried the matter before CIT(A). CIT(A) after considering the submissions of the Assessee decided the issue in favour of Assessee by holding as under:

6.2 During the course of appellate proceedings, the appellant has submitted that the existing premises did not have good view and entrance to the premises was small and not suitable. hence the appellant vacated the same. Although the lease agreement was not renewed in writing in 2001, the appellant was using the premises beyond that period and the landlord claimed compensation by implication "lease agreement continues". The landlord claimed compensation and demanded Rs. 80 lakhs which was ultimately settled for Rs. 32 lakhs and it was paid to the landlord to avoid future litigation cost etc. It is a fact tat this expenditure is genuine and was paid to the landlord and this should be allowed as business expenditure. The appellant relied on the following decisions saying that the A.O is prohibited from sitting in the judgment ovcrprudence or wisdom of judgment after businessman:-

i. CIT v Dhanrajgirji Raja Narasingirji, 191 ITR 544....50(SC)

ii. CIT v Walchand & Co. (P) Ltd., 65 ITR 381...385 (SC) and J.K. Woolen CIT, 72 ITR 612 (SC).

iii. F.E. Dinshaw Ltd. V. CIT, 36 ITR 114… 120 (Bom)

iv. CIT v Vijayalakshmi Mills Ltd., 94 ITR 173… 178…179 (MAD).

v. CIT v Dalmia Cement (Bharat) Ltd. (2001) 254 ITR 377 (Del)

vi. Extracts from the law and practice of income tax by Kanga, Palkhiwala and Vyas-Volume I- Ninth Edition Page 899.

6.3 I have carefully considered the facts of the case and the submissions along with the case laws relied upon. I am in agreement with the appellant's view. It is a fact that the expenditure is genuine and it was paid to the landlord as compensation for vacating the premises. It was necessary to avoid the litigation cost. If any expenditure is genuine and incurred in the course of business, its quantum or sufficiency cannot be examined by the Assessing Officer, unless the payment is made to a related concern. Therefore, in view of the above discussion and by following the case laws as relied upon by the

appellant, I hold that there is no justification on the part of the Assessing Officer to disallow the claim of compensation paid by the appellant amounting to Rs. 32 lakhs. The appellant gets relief on this point."

31. Aggrieved by the order of CIT(A), the Revenue is now in appeal before us. Before us, the learned D.R. relied on the order of AO, on the other hand the learned A.R. supported the order of CIT(A).

32. We have heard the rival submissions and perused the material on record. We find that CIT(A) while deleting the addition has noted that the landlord claim compensation and demanded Rs. 80 lakhs which was ultimately settled for 32 lakhs and it was paid to landlord to avoid future litigation cost etc. He has further held that the cost was necessary to avoid litigation cost and the expenditure was genuine and incurred in the course of business. Before us, the Revenue could not controvert the findings of CIT(A). Thus we find no reason to interfere with the order of CIT(A). Thus this ground of Revenue is dismissed.

ITA No: 4386/Ahd/2007 (Assessee's appeal) and ITA No 236/Ahd/2008 (Revenue's appeal) for AY 2002-03

33. These two appeals, one by the Assessee and the other by the Revenue, arise out of the order of CIT(A) dated 5.10.2007 wherein the dispute is with respect to penalty u/s 271(1)(c).

34. The appeal of Assessee is against the order of AO dated 25.01.2007 for AY 2002-03 whereby penalty was levied u/s 271(1)(c) at 300% (Rs 24,09,75,000/-) by AO. Assessee is aggrieved by the levy of penalty whereas Revenue is aggrieved by the order of CIT(A) dated 05.10.2007 whereby he reduced the penalty at 100% (Rs.8,03,25,000/-). Since the issue is common, both the appeals are considered together for disposal for the sake of convenience.

35. In this appeal, Assessee has raised various grounds but they all relate to levy of penalty under Section 271(1)(c) amounting to Rs.8,03,25,000/-.

The facts as culled out are as under:

36. While passing the order under Section 143(3) for A.Y. 2002-03,AO apart from other disallowances, had made disallowance on account of fraud expenses (Rs 22,80,000/-) and depreciation on wind energy generators of Rs. 11,01,60,000/-. The aforesaid 2 disallowances was also sustained by CIT(A). Assessing Officer noted that Assessee knowingly committed the default of furnishing inaccurate particulars of income by claiming depreciation of Rs. 22,50,00,000/- on wind energy generators and therefore levied penalty on it at 300% of the tax sought to be evaded (Rs. 24,09,75,000/-).

37. Aggrieved by the order of AO, Assessee carried the matter before CIT(A). CIT(A) granted partial relief by reducing the penalty from 300% to 100%. Assessee is aggrieved by the order of CIT(A) because he has retained the penalty and on the other hand the Revenue is aggrieved by the action of CIT(A) in reducing penalty from 300% to 100%.

38. Before us, the learned A.R. submitted that Assessee had disclosed and made known to the Assessing Officer all the particulars and facts material to the computation of income accurately. He further submitted that the there is no finding of concealment of any primary facts and or furnishing of inaccurate particulars of income and that the explanation given by the Assessee is false. He further submitted that each of the claims made in the return was bonafide and based on honest understanding of law or judicial precedents as also was made under the guidance of professional. He further submitted that the impugned disallowance involved a legal proposition on understanding or interpretation whereof two views were possible. He further submitted that

penalty proceedings are materially different from the assessment proceedings and that mere assessment of an item as income does not per se justify conclusion of concealment and or furnishing of inaccurate particulars. He further submitted that the disallowance involved a legal proposition on understanding or interpretations where two views were possible. He further submitted that the Assessee had disclosed and made all particulars and facts material to the computation of its income accurately the claim made in the return was bonafide and based on honest and bonafide understanding of law and judicial precedent. The learned A.R. further submitted that the Assessee has discharged its burden of satisfactorily explanation of its claim. He further submitted that no penalty was leviable as the Assessee was neither guilty of contumacious conduct nor any element of mens rea was present. He further submitted that mere difference of opinion as primarily law based debatable complex question of interpretation cannot be a ground for sustaining penalty. He further relied on the decision of the Apex Court in the case of Reliance Petroproducts (2010) 322 ITR 158 (SC). He thus urged that the penalty levied be deleted. The learned D.R. on the other hand relied on the order of Assessing Officer.

39. We have heard the rival submissions and perused the material on record. In the present case, the penalty has been levied on the disallowance of depreciation on wind energy generators. While deciding the quantum appeal in ITA No. 2572/Ahd/2006, hereinabove, the quantum addition has been deleted by us and the matter has been decided in favour of the Assessee. Since the quantum addition on which the penalty has been levied itself has been deleted, the question of levy of penalty under Section 271(1)(c) on such disallowance therefore does not arise, We therefore delete the penalty. Thus this ground of Assessee is allowed and the ground of Revenue is dismissed.

ITA No: 4388/Ahd/2007 (Assessee's appeal) and ITA No 238/Ahd/2008 (Revenue's appeal) for AY 2004-05

40. These two appeals, one by the Assessee and the other by the Revenue, arise out of the order of CIT(A) dated 5.10.2007 wherein the dispute is with respect to penalty u/s 271(1)(c).

41. The appeal of Assessee is against the order of AO dated 25.1.2007 for AY 2004-05 whereby penalty was levied u/s 271(1)(c) at 300% (Rs 12,10,13,550/-/-) by AO. Assessee is aggrieved by the levy of penalty whereas Revenue is aggrieved by the order of CIT(A) dated 5.10.2007 whereby he reduced the penalty at 100% (Rs.4,03,37,850/-). Since the issue is common, both the appeals are considered together for disposal for the sake of convenience.

42. While passing the order under Section 143(3) for A.Y. 2004-05,AO apart from other disallowances, AO had made disallowance on account of fraud expenses (Rs 22,80,000/-) and depreciation on wind energy generators of Rs. 11,01,60,000/-. The aforesaid 2 disallowances was also sustained by CIT(A). Assessing Officer was therefore of the view that the assessee has within the meaning of s. 271(1)(c) read with explanations has knowingly committed the default of furnishing inaccurate particulars of income and therefore levied penalty @300% of the tax sought to be evaded (Rs 12,10,13,550/-).

43. Aggrieved by the order of AO, Assessee carried the matter before CIT(A). CIT(A) granted partial relief by reducing the penalty from 300% to 100%. Assessee is aggrieved by the order of CIT(A) because he has retained the penalty and on the other hand the Revenue is aggrieved by the action of CIT(A) in reducing penalty from 300% to 100%.

44. Before us the learned A.R. submitted that the Assessee has disclosed and made known to the AO all the particulars and facts material to computation of its income accurately. The impugned amount represented loss incurred in the

normal course of business. He further submitted that each of the claims made in the return was bonafide and based on honest understanding of law or judicial precedents as also was made under the guidance of professional. He further submitted that the impugned disallowance involved a legal proposition on understanding or interpretation whereof two views were possible. He further submitted that penalty proceedings are materially different from the assessment proceedings and that mere assessment of an item as income does not per se justify conclusion of concealment and or furnishing of inaccurate particulars. He further submitted that the disallowance involved a legal proposition on understanding or interpretations where two views were possible. He further submitted that the Assessee had disclosed and made all particulars and facts material to the computation of its income accurately the claim made in the return was bonafide and based on honest and bonafide understanding of law and judicial precedent. The learned A.R. further submitted that the Assessee has discharged its burden of satisfactorily explanation of its claim. He further submitted that no penalty was leviable as the Assessee was neither guilty of contumacious conduct nor any element of mens rea was present. He further submitted that mere difference of opinion as primarily law based debatable complex question of interpretation cannot be a ground for sustaining penalty. He further relied on the decision of the Apex Court in the case of Reliance Petroproducts (2010) 322 ITR 158 (SC). He thus urged that the penalty levied be deleted. The learned D.R. on the other hand relied on the order of Assessing Officer.

45. We have heard the rival submissions and perused the material on record. In the present case, one of the addition on which the penalty has been levied is on the disallowance of depreciation on wind energy generators. While deciding the quantum appeal in ITA No. 2572/Ahd/2006, hereinabove, the quantum addition has been deleted by us and the matter has been decided in favour of the Assessee. Since the quantum addition on which the penalty has been levied

itself has been deleted, the question of levy of penalty under Section 271(1)(c) on such disallowance therefore does not arise,

46. The other addition on which the penalty is levied is on fraud expenses. The penalty under s. 271(1)(c) of the Act is leviable if the AO is satisfied in the course of any proceedings under the Act that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. It is well settled that assessment proceedings and penalty proceedings are separate and distinct and the finding in the assessment proceedings cannot be regarded as conclusive for the purposes of the penalty proceedings.

47. The necessary ingredients for attracting Expln. 1 to s. 271(1)(c) are that : (i) the person fails to offer the explanation, or (ii) he offers the explanation which is found by the AO or the CIT(A) or the CIT to be false, or (iii) the person offers explanation which he is not able to substantiate and fails to prove that such explanation is bonafide and that all the facts relating to the same have been disclosed by him. If the case of any assessee falls in any of these three categories, then according to the deeming provision provided in Expln. 1 to s. 271(1)(c) the amount added or disallowed in computing the total income shall be considered as the income in respect of which particulars have been concealed, for the purposes of cl. (c) of s. 271(1), and the penalty follows. On the other hand, if the assessee is able to offer an explanation, which is not found by the authorities to be false, and assessee has been able to prove that such explanation is bona fide and that all the facts relating to the same have been disclosed by him, then in that case penalty shall not be imposed.

48. In the present case the assessee had disclosed all the material facts before the AO and CIT(A). When the assessee has made a particular claim in the return of income and has also furnished all the material facts relevant thereto, the disallowance of such claim cannot automatically lead to the conclusion that there was concealment of particulars of his income by the assessee or

furnishing inaccurate particulars thereof. This is a case of bona fide difference of opinion regarding the allowability of a claim of deduction between the Assessee and Department. What is to be seen is whether the said claim made by the assessee was bona fide and whether all the material facts relevant thereto have been furnished and once it is so established, the assessee cannot be held liable for concealment penalty under s. 271(1) (c) of the Act. In the present case all the necessary facts were furnished by Assessee. In the case of CIT Vs. Reliance Petroproducts (supra) the Hon. Apex Court has held that there making a claim which is not sustainable in law by itself will not amount to furnishing inaccurate particulars regarding the income of Assessee. In view of the totality of facts we are of the view that the addition does not call for levy of penalty under s. 271(1)(c).

49. We thus cancel the penalty levied by the AO on both the additions made by the AO. Thus this ground of Assessee is allowed and the ground of Revenue is dismissed.

ITA No. 790/Ahd/2012 (for A.Y. 2007-08) Assessee's appeal

50. Assessee electronically filed its Return of Fringe Benefit on 20.10.2007 for AY 2007-08 declaring value of Fringe Benefit of Rs 16,47,56,033/-. The case was selected for scrutiny and thereafter the assessment was framed u/s 115WE(3) vide order dated 21.12.2009 and the Fringe Benefit value declared by the assessee was accepted.

51. Later, on verification of the assessment records and from the annual accounts for the year ended 31.3.2007, CIT noted that Assessee had contributed Rs 9.14 crore (Rs 9,13,67,379) to approved superannuation fund but in the return of Fringe Benefit Tax (FBT), it had shown only Rs 22,36,132 as "contribution towards approved superannuation fund for employees". He was

of the view that u/s 115W(1)(c) of the Act, any contribution by the employer to any superannuation fund for the employees attract levy of fringe benefit tax on 100% of such contribution. He was thus of the view that AO had not made any addition to FBT and therefore Rs 8,91,31,247/- has escaped assessment resulting into short levy of FBT alongwith interest to the tune of Rs 3,99,01,995/-. and accordingly the order of the AO was erroneous and prejudicial to the interest of Revenue. CIT issued show cause notice on 13.12.2011 in response to which the Assessee interalia submitted that the s. 115W(1)(c) was amended by Finance Bill 2006 wef AY 2007-08 and according to which only contribution by an employer to an approved superannuation fund in excess of Rs 1 lac per year per employee would attract levy of FBT. The Assessee further submitted that out of the total expenditure of Rs 9.14 crore towards approved superannuation fund, Rs 8.62 crores was in respect of employees having per employee contribution of less than Rs 1 lac per year and therefore Rs 8.62 crore was not liable for FBT. It was further submitted that of the balance contribution of Rs 51.36 lacs (Rs 9.14 crore less Rs 8.62 crore) , in case of 29 employees the contribution was Rs 1 lac or more and therefore the threshold of Rs 1 lac per employee for 29 employees was reduced and the amount of contribution liable to Rs 22,36,132 was worked out. It was further submitted that the assessement was framed by the AO u/s 115WE(3) after due application of mind and verification and therefore the order of the AO cannot be considered as erroneous and prejudicial to the interest of Revenue. CIT did not accept the contentions of the Assessee and held the order of the AO passed u/s 115WE(3) to be erroneous and prejudicial to the interest of Revenue and accordingly cancelled the order and directed the AO to frame fresh order.

52. Aggrieved by the order of the CIT, the Assessee is now in appeal before us.

53. Before us the Ld.A.R. submitted reiterated the submissions made before CIT and also placed on record the details of contribution made in superannuation

fund. He further submitted that in the present case the prerequisite conditions specified u/s 263 are not satisfied. He submitted that the computation of taxable FBT was as per the provisions of the Act and the AO had passed the order after detailed inquiries and verification of the books of accounts and records of the Assessee. Specific queries were raised during the course of assessment and after being satisfied, the AO passed the order. He therefore urged that the order passed u/s 263 be quashed. The Ld.A.R. further submitted that in response to the show cause notice, the AO had made detailed submissions but in the order passed u/s 263, CIT(A) has not dealt with the submissions and therefore the order passed by CIT needs to be quashed.

54. On the other hand the Ld.D.R. supported the order of CIT.

55. We have heard the rival submissions and perused the material on record.

The relevant clause of Fringe Benefit reads as under:

SECTION 115WB-FRINGE BENEFITS

(1) For the purposes of this Chapter, "fringe benefits" means any consideration for employment provided by way of-

(a) .....;

(b) ......;

(c) any contribution by the employer to an approved superannuation fund for employees; and

SECTION 115WC-VALUE OF FRINGE BENEFITS.

(1) For the purposes of this Chapter, the value of fringe benefits shall be the aggregate of the following namely:-

(a) ..... ;

(b) the amount of contribution, referred to in clause (c) of sub-section (1) of section 115WB, which exceeds one lakh rupees in respect of each employee;

55. On reading the relevant provisions of section 115WB and 115WC it can be seen that the value of contribution by an employer to an approved superannuation fund for employees in excess of Rs one lac in respect of each employee is chargeable to FBT. Before us, the Ld.A.R. has placed on record the total contribution in superannuation fund to be Rs 9,13,67,379 which includes list of 29 employees where the contribution in superannuation fund was more than Rs 1 lac and their aggregate amount was Rs 51,36,132. From the aforesaid amount, the Assessee had reduced Rs 29 lacs, being the exemption limit in respect of 29 employees,(the contribution was in excess of rs 1 lacs each) and the balance of Rs 22,36,132 was considered as taxable FBT. Before us, the Revenue could not controvert the submissions made by the Ld.A.R nor could point out any mistake in the calculation of FBT.

56. In the case of Malabar Industrial Co. vs CIT (supra) the H'ble Apex Court has held that CIT has to be satisfied of twin conditions, namely (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue so as to invoke the provisions of s. 263. If one of them is absent if the order of the ITO is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue recourse cannot be had to s. 263(1).In the present case, the Revenue could not point out any error in the calculation of working of FBT and therefore order of the AO which is sought to be revised cannot be considered to be erroneous and therefore the provisions of s. 263 could not be invoked in the present case. We therefore quash the order of CIT. Thus this ground of the Assessee is allowed.

57. In the result the appeal of the Assessee is allowed.

58. In the result ITA No. 2572/Ahd/2006 Assessee's appeal is partly allowed, ITA No. 2737/Ahd/2006 Revenue's appeal is dismissed, ITA No. 4386/Ahd/2007 Assessee's appeal is allowed, ITA No. 236/Ahd/2008 Revenue's appeal is dismissed, ITA No. 4388/Ahd/2007 Assessee's appeal is allowed, ITA No. 238/Ahd/2008 Revenue's appeal is dismissed and ITA No. 790/Ahd/2012 Assessee's appeal is allowed.

Order pronounced in Open Court on 10 - 09 - 2013.

Sd/- Sd/-

(G.C.GUPTA) (ANIL CHATURVEDI)
VICE PRESIDENT ACCOUNTANT MEMBER
Ahmedabad. TRUE COPY

Rajesh

Copy of the Order forwarded to:-
1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad