आयकर अपीलीय अधिकरण "ई" न्यायपीठ मुंबई में।

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

माननीय श्री पवन सिंह, न्यायिक सदस्य **एवं**
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।

BEFORE HON'BLE SHRI PAWAN SINGH, JM AND HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आ□करअपील सं./ I.T.A. No.6959/Mum/2013
(**निर्धारण वर्ष** / Assessment Year: 2010-11)
&
आयकरअपील सं./ I.T.A. No 1856/Mum/2015
(**निर्धारण वर्ष** / Assessment Year: 2011-12)

Tata Petrodyne Limited The Metropolitan Building 3rd Floor, Bandra Kurla Complex Bandra (East) Mumbai-400 051.	**बनाम**/ Vs.	**ACIT-2(3)** Room N. 552 Aaykar Bhavan Mumbai-400 020.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAACT-0090-N**		
(□ पीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Shri Firoze B. Andhyarujina- Ld. AR
Revenue by	:	Shri S. Abi Rama Karthikeyan - Ld.DR

सुनवाई की तारीख/ **Date of Hearing**	:	27/02/2019
घोषणा की तारीख / **Date of Pronouncement**	:	08/03/2019

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by the assessee for Assessment Years [AY] 2010-11 and 2011-12 contest separate orders of Ld. first appellate authority. Since common issues are involved, we proceed to dispose-off the same by way of this common order for the sake of convenience & brevity.

ITA No. 6959/Mum/2013, AY 2010-11

2.1 The assessee contest the order of Ld. Commissioner of Income-Tax (Appeals)-6, Mumbai, [CIT(A)], *Appeal No. CIT(A)-6/IT.134/Rg.2(3)/12-13* dated 30/09/2013. The only issue involved under the appeal is disallowance u/s 14A. For this, the assessee has raised original grounds vide revised Form No. 36 on 03/03/2015 and additional / supplemental grounds on 08/07/2016 & 06/03/2018 which do not require appreciation of new fact and hence taken on record in terms of judgment of Hon'ble Apex Court rendered in *National Thermal Power Co. Ltd. Vs. CIT [229 ITR 383].* The final grounds, for ease of reference, may be re-grouped in the following manner: -

1) Deduction U/S.14A r.w.r. 8D:

a) The CIT(A) erred in not considering the Appellant's argument that no valid reasoning was recorded by the Assessing Officer for not considering the disallowance offered by the Appellant under section 14A of the Act and further confirming the action of the Assessing Officer of computing the disallowance under section 14A of the Act by applying Rule 8D of the Income-tax Rule. 1962 ('the Rules").

b) The Appellant submits that the Assessing Officer has mechanically applied Rule 8D of the Rules for computing the disallowance under section 14A of the Act and has at no time established with valid reasons that the disallowance offered by the Appellant is erroneous.

The Appellant therefore prays that the disallowance of the Assessing Officer under section 14A of the Act by applying Rule 80 of the Rules, which action has been confirmed by the CIT(A), be deleted and the disallowance offered by the Appellant under section 14A of the Act be restored.

c) The appellant submits that the disallowance under section 14A should be restricted to INR 5,32,236 which is arrived as per a scientific method factoring costs directly allocable of the concerned employees and common corporate costs such as electricity, rent, travelling expenses, etc. and estimated time spent.

It is therefore submitted that necessary directions may be given to the DCIT to restrict the disallowance under section 14A to INR 5,32,236.

d) Without prejudice to our contention that the disallowance under section 14A should be restricted as per the scientific method, the investment in Nagarjuna Oil Corporation Limited, being Strategic Investment should be excluded for the purpose of computation of disallowance under section 14A read with rule 8D and the disallowance should be restricted to INR 61,47,743.

It is therefore submitted that necessary directions may be given to the DCIT to restrict the disallowance under section 14A to INR 61,47,743.

2) Computation of Book Profits under section 115JB

The Appellant submits that the Assistant Commissioner erred in computing the book profit under section 115JB by including the disallowance made under section 14A read with rule 8D.

Having regards to the facts and circumstances of the case, the Appellant submits that the Assistant Commissioner be directed to exclude disallowance made under section 14A for computing book profit under section 115JB.

3) Deduction under section 80 1B(9)

The appellant submits that it is entitled to deduction under section 80-IB(9) by treating each well as a separate undertaking pursuant to the judgement of the Gujarat High Court in the case Niko Resources Limited v. Union of India (374 ITR 369) whereby the Explanation to section 80-IB(9) treating each block as an undertaking has been struck down.

It is therefore submitted that necessary directions may be given to the Deputy Commissioner of Income-tax - Range 2(3) ['DCIT] to allow the claim of deduction under section 80-IB(9) by treating each well as a separate undertaking.

2.2 The assessment for impugned AY was framed by *Ld. Assistant Commissioner of Income Tax-Central Circle-2(3), Mumbai [AO]* in *scrutiny assessment* u/s. 143(3) on 11/02/2013 wherein the income of the assessee was determined at Rs.6968.15 Lacs under normal

provisions after sole disallowance u/s 14A for Rs.141.24 Lacs as against returned income of Rs.6826.90 Lacs e-filed by the assessee on 21/09/2010. Similar disallowance has been made while computing Book Profits u/s 115JB. The assessee being *resident corporate entity* was stated to be engaged in the business of *prospection, exploration of mineral oil and natural gas* during impugned AY.

2.3 Facts *qua* the same are that during assessment proceedings, its transpired that the assessee earned exempt dividend income of Rs.523.36 Lacs and offered *suo-moto* disallowance against the same u/s 14A @5% which worked out to Rs.26.16 Lacs. However, not convinced, Ld. AO opined that investments could not be managed without inherent expenses and the disallowance was to be worked out as per Rule 8D. Applying the same, administrative expense disallowance u/r 8D(2)(iii) @0.5% of average investments of Rs.334.83 Crores, was worked out to be Rs.167.41 Lacs. After adjusting the *suo-moto* disallowance of Rs.26.16 Lacs, the net disallowance i.e. Rs.141.24 Lacs was added to the income of the assessee. The same upon confirmation by first appellate authority vide impugned order dated 30/09/2013 is under appeal before us.

3. The Ld. Sr. Counsel appearing for Assessee [AR], at the outset, drew our attention to the order of this Tribunal in assessee's own case for AY 2008-09 & 2009-10, ITA Nos. 4887,5571,4914/Mum/2012, 2469/Mum/2013 dated 28/09/2018 [68 ITR (Trib) 38 Mumbai] and pleaded for similar directions in this year. Although Ld. DR supported the

impugned order, however, fairly conceded that all the aspects have already been delved upon by the Tribunal in assessee's own case.

4. We have carefully considered the same and find that all the aspects of disallowance u/s 14A has exhaustively been considered by the co-ordinate bench in assessee's own case. For ease of reference, the operative part of the order could be extracted in the following manner: -

> *27. We have considered rival submissions and perused materials on record. The first contention of learned Authorized Representative is, the Assessing Officer has not recorded satisfaction before rejecting the disallowance made by the assessee. As could be seen from the assessment order, the assessee has allocated expenditure on proportionate basis towards earning of exempt income. The Assessing Officer, though, has rejected the computation of the assessee, however, he has not provided specific reason how the disallowance computed by the assessee is incorrect having regards to its books of account. The Assessing Officer, though, has made a general observation with regard to investment made in Nagarjun Oil Corporation that there must have been some decision-making process at top executive and management level, however, he has not quantified the proportionate salary expenditure attributable to such activity which can be apportioned to the earning of exempt income. Before us, the learned Authorised Representative has furnished a fresh working of disallowance under section 14A of the Act at Rs.3,91,932 which is stated to have been arrived at on a scientific basis. However, this claim of the assessee requires verification. Further, the learned Authorised Representative submitted that the investment in the shares of Nagarjun Oil Corporation is a strategic investment as the said company is a sister concern of the assessee. He has further submitted, the investment made in Nagarjun Oil Corporation has not yielded dividend income in the impugned assessment year, therefore, such investment has to be excluded from the average value of investment for computing disallowance under rule 8D(2)(iii). Finally, the learned Authorised Representative submitted disallowance under section 14A r/w rule 8D cannot be added to the book profit under section 115JB of the Act. As regards the contention of the learned Authorised Representative that the strategic investment should be excluded for the purpose of computing disallowance under rule 8D(2), the same is unacceptable in view of the decision of the Hon'ble Supreme Court in case of Maxopp Investment Ltd. v/s CIT, [2018] 91 taxmann.com 154. As regards the contention of the assessee that the investment in Nagarjun Oil Corporation has not earned any dividend income during the year, hence, should be excluded, we find merit in the same. It has been held by the Special Bench of the Tribunal in case of Vireet Investment Pvt. Ltd. (supra) that investments which have not yielded any exempt income in the relevant previous year should be excluded while computing*

disallowance under rule 8D(2). In view of the aforesaid, we direct the Assessing Officer to verify the claim of the assessee and exclude the investment made in Nagarjun Oil Corporation from the average value of investment if it has not yielded any exempt income during the relevant previous year. As regards the final submission of the learned Authorised Representative that disallowance made under section 14A r/w rule 8D cannot be added to the book profit under section 115JB of the Act, we find merit in the said submissions. As held in the Special Bench decision of the Tribunal, Delhi Bench, in Vireet Investment Pvt. Ltd. (supra) computation under clause–(f) of Explanation-1 of section 115JB of the Act is to be made without resorting to computation as contemplated under section 14A r/w rule 8D. In view of the aforesaid, we restore the issue of disallowance under section 14A r/w rule 8D to the Assessing Officer for de novo adjudication keeping in view our observations herein above and only after affording due opportunity of being heard to the assessee. The grounds are allowed for statistical purposes.

Facts & circumstances being *pari-materia* the same, respectfully following the same, the grounds *qua* disallowance u/ 14A are disposed-off in the following manner: -

Ground Nos.	***Action***	***Result***
1) (a), (b), (c)	*Sent back to Ld. AO on similar lines*	*Allowed for statistical purposes*
1)(d)	*Dismissed*	*Dismissed*
2)	*Sent back to Ld. AO on similar lines*	*Allowed for statistical purposes*

5. By way of Ground No. 3, the assessee has made altogether a new claim u/s 80IB(9) which was not claimed / raised before any of the lower authority. The Ld. Sr. Counsel explained that this claim has arisen to the assessee in view of the subsequent judgement of Hon'ble Gujarat High Court rendered in *Niko Resources Ltd. Vs. Union of India [374 ITR 369].* Our attention has been drawn to the identical issue adjudicated by the Tribunal in assessee's own case for AYs 2008-09 & 2009-10 wherein the Tribunal, after exhaustive analysis, observed as under: -

13. We have considered rival submissions and perused materials on record in the context of provision contained under section 80IB(9) of the Act. At the outset, it needs to be observed, the activity of prospecting, exploration and production of

mineral oil and natural gas undertaken by the assessee, whether satisfies the eligibility conditions of section 80IB(9) of the Act, stands concluded in favour of the assessee by the decisions of the Tribunal as well as the Hon'ble Jurisdictional High Court in assessee's own case for the assessment years 2005–06 to 2007–08 by holding that the activities undertaken by the assessee qualifies for deduction under section 80IB(9) of the Act. Thus, assessee's eligibility to claim deduction under section 80IB(9) of the Act is no more justiciable. However, the larger issue before us is, whether assessee's claim of deduction under section 80IB(9) of the Act in respect of each well by treating them as independent undertaking is allowable qua the provision of section 80IB(9) r/w the Explanation therein. Undisputedly, the assessee all along had claimed deduction under section 80IB(9) of the Act by treating each oil well as an independent undertaking. However, the provision of section 80IB(9) of the Act was amended by Finance Act, 2009 with retrospective effect from 1st April 2000 by inserting an Explanation which provided that for the purpose of computing deduction under the said provision all blocks licensed under a single contract shall be treated as a single undertaking. Thus, by virtue of Explanation to section 80IB(9) of the Act, claiming deduction by treating each oil well as a single undertaking was done away with. The aforesaid factual and legal position has not been disputed by the assessee which is evident from the submissions made by the assessee before the Assessing Officer. In fact, because of insertion of explanation to section 80 B(9) of the Act, the assessee never raised the issue of claim of deduction under section 80IB(9) of the Act in the appeal filed before the learned Commissioner (Appeals). Thus, the Departmental Authorities never had the occasion to examine assessee s claim of deduction vis–a–vis the ratio laid down by the Hon'ble Gujarat High Court in Niko Resources Ltd, which in any case of the matter was delivered af er disposal of appeal by learned Commissioner (Appeals). Moreover, the aforesaid decision of the Hon'ble Gujarat High Court has been challenged by the Department, before the Hon'ble Supreme Court and while admitting the SLP of the Department the Hon'ble Supreme Court has passed the following order: –

"O R D E R

Delay condoned.

Issue notices on the special leave petitions as also on the prayer for interim relief returnable after 10 weeks.

Mr. Shashibhushan P. Adgaonkar, Ms. Abha R. Sharma and Ms. Bindi Girish Dave, learned counsel, have entered appearance on behalf of the respondents. No further notice need to be issued to them.

Counter affidavit, if any, be filed within six weeks. Rejoinder affidavit, if any, be filed within four weeks therefrom.

List the matters after ten weeks. The prayer for interim relief shall be considered on the next date of hearing.

As we are entertaining the matter, the High Court(s) where the appeals are pending shall not finalise the same till the matter is dealt with by this Court."

14. As could be seen from the aforesaid order, the Hon'ble Supreme Court has directed the High Courts not to finalise the pending appeals on similar issue till the issue is decided by the Hon'ble Supreme Court. Thus, on overall consideration of

facts and material on record, we are of the considered opinion, the issue relating to assessee's claim of deduction under section 80IB(9) of the Act as raised in the additional grounds has to be restored to the Assessing Officer for fresh adjudication for the following reasons. Firstly; as stated earlier, due to amendment of section 80IB(9) of the Act by insertion of Explanation, the assessee gave up its claim of deduction under section 80IB(9) of the Act by not raising the issue before the first appellate authority.

Only after the judgment of the Hon'ble Gujarat High Court in Niko Resources Ltd. (supra), the assessee at this stage has filed additional grounds claiming deduction under section 80IB(10) of the Act. Since, the issue was neither raised by the assessee before the Departmental Authorities nor the judgment of the Hon'ble Gujarat High Court (supra) was available before them, in all fairness, the issue has to be examined by the Assessing Officer. Secondly, though, it may be a fact that the Hon'ble Gujarat High Court in Niko Resources Ltd. (supra) has struck down Explanation to section 80IB(9) of the Act by declaring it as ultra-virus of Article–14 of the Constitution of India, however, it cannot be ignored that no decision of the Hon'ble Supreme Court or the Hon'ble Jurisdic ional High Court on the issue is available. Moreover, the Tribunal being a creature of the statute is not competent to examine or decide the constitutional validity/vires of a provision contained in the statute. Had it been a decision of the Hon'ble Supreme Court or the Hon'ble Jurisdictional High Court, the Tribunal would have been bound by the law declared therein.

However, the legal position is different when the decision declaring a provision in the statute as ultra vires is by a non–jurisdiction High Court, whose decision is not binding but has persuasive value. In this context we may refer to the following decisions:-

i) Comptroller of Estate Duty v/s Shri Ashok Kumar M. Parikh, [1990-] 186 ITR 212 (Bom.); and

ii) Taylor Investment Co. (India) Ltd. v/s CIT, [1998] 232 ITR 771.

15. Moreover, it is not disputed that the aforesaid decision of the Hon'ble Gujarat High Court has been challenged by the Department before the Hon'ble Supreme Court and the Hon'ble Supreme Court has directed all High Courts not to decide the pending appeals on identical issue till the issue is decided by them. Though, the aforesaid direction of the Hon'ble Supreme Court is to the High Courts, however in our view, as a matter of propriety neither the Tribunal nor the Departmental Authorities should also decide the issue either in favour or against the assessee, but, should wait for the decision of the Hon'ble Supreme Court on the issue. In the aforesaid fact situation, there are two courses open to us, i.e., either to keep the appeal pending till the issue is decided by the Hon'ble Supreme Court or to restore the issue to the Assessing Officer for deciding it by applying the law to be laid down by the Hon'ble Supreme Court on the issue. Considering the fact that the assessee has raised the issue by way of additional grounds which were never raised before the first appellate authority and further, the issue relating to assessee's claim of deduction under section 14A of the Act is restored to the Assessing Officer, we are inclined to restore the issue relating to assessee's claim of deduction under section 80IB(9) of the Act to the Assessing Officer for deciding afresh by applying the ratio

to be laid down by the Hon'ble Supreme Court in the appeal pending before them on identical issue as referred to above. Needless to mention, the Assessing Officer before deciding the issue must afford reasonable opportunity of being heard to the assessee. Additional grounds are allowed for statistical purposes.

Therefore, facts being *pari-materia* the same, while admitting the new claim as raised by the assessee, the issue stand remitted back to the file of Ld. AO for adjudication on similar lines. Ground No.3 stands allowed for statistical purposes.

6. The appeal stands partly allowed for statistical purposes.

ITA No. 1856/Mum/2015, AY 2011-12

7.1 The assessee has similarly been saddled with net disallowance u/r 8D(2)(iii) for Rs.121.83 Lacs, which is under challenge before us. The grounds of appeal raised before us as well as arguments in support of the same are identical. Therefore, facts & circumstances being *pari-materia* the same, the issue stands remitted back to Ld. AO on similar lines. The grounds stand partly allowed for statistical purposes.

7.2 The assessee has raised a new claim for deduction u/s 80IB(9) before us for the first time on similar lines. The same also stands remitted back to the file of Ld.AO for adjudication in terms of the observations of Tribunal for AYs 2008-09 & 2009-10. The ground stands allowed for statistical purposes.

8.1 The last ground of assessee's appeal concerns with disallowance of *obsolete store and spares* amounting to Rs.54.18 Lacs. Facts *qua* the same are that during assessment proceedings, it transpired that the assessee debited an amount of Rs.54.18 Lacs in the Profit & Loss

Account as provision towards stores & spares of drilling equipment. The Ld. AO, treating the same as capital expenditure and also in view of the fact that the spares did not constitute stock-in-trade, opined that the deduction of the same was not allowable to the assessee. It was also observed that deduction u/s 42 could be allowed to the assessee for capital expenditure as and when the same are certified by the Auditors.

8.2 The Ld. first appellate authority, examining the claim on the threshold of Section 42, confirmed the disallowance by observing that the assessee had already claimed joint venture expenditure to the extent of its own share and therefore, separate deduction u/s 42, in that respect, could not be allowed to the assessee.

9.1 The Ld. Sr. Counsel explaining the nature of the same submitted that the assessee was engaged in the business of prospecting, extraction and production of crude oil and natural gas and entered into *Production Sharing Contracts [PSC]* with Government of India along-with other joint venture companies for various blocks. In order to manage the operations of the blocks, one of the Joint Venture Member was appointed as *Operator* who was responsible for overall operations and management of the block including maintenance of books and records. The costs and expenses were incurred by the operator on behalf of the members and allocated to each member in proportion to their participating interest in the block. As per the Agreement, the operator prepares the statement of sources and application of funds which is audited and approved by the Government. Accordingly, the assessee incorporates its own share of assets, liabilities, income and expenditure

on the basis of audited statement provided by the operator on line-to-line basis as per *Accounting Standard-27 &* in terms of Section 293A *read with Government Notification No. GSR 117(E) dated 08/03/1996.*

9.2 It is further explained that for carrying out the operations of the block, the stores and spares are purchased, maintained and retained by the operator. These stores and spares are in relation to drilling and other day-to-day operations. As per industry practice, the stores and spares were kept so as to facilitate drilling operations Accordingly, the stores and spares are reflected by the assessee as *inventories* in the Balance Sheet and the same are expensed in the year of use and therefore, do not form capital asset for the assessee It was further submitted that the assessee was consistently following the same method of valuing the stores and spares at lower of cost or net realizable value and therefore, the impugned expenditure was allowable to the assessee.

9.2 So far as the quantification is concerned, Ld. Sr. Counsel further submitted that the loss of Rs.54.18 Lacs arises on account of stores and spares under two blocks i.e. CY-OS-90/1 & CB-OS-2 as computed in the following manner: -

Sr. No.	***Block***	***Amount (Rs.)***	***Remarks***
1.	*CY-OS-90/1*	*14,40,558/-*	*INR 68,59,802 (USD 1,74,334) *21% (Share in Block)*
2.	*CB-OS-2*	*39,77,656/-*	*USD 855409.19*46.50 (exchange rate) *10% (share in block)*
	Total	***54,18,214/-***	

Our attention is drawn to *Note No.6* of audited accounts of *unincorporated joint venture Block CY-OS-90/1* to submit that it has clearly been indicated therein that the drilling inventory available with the

operator *(Hardy Exploration & Production (India) Inc.)* includes obsolete stores & spares of USD 1,74,334 purchased before 31/03/2004. The obsolete stock is derived after carrying out technical valuation of inventories by the operator and accordingly the assessee's shares towards obsolete stock i.e. 21%, in Indian Rupees works out to Rs.14.40 Lacs, which has been claimed by the assessee.

Similarly, as regards *CB-OS/2 Block*, the concerned operator i.e. *Cairn Energy India PTY Ltd,* vide their letter dated 22/02/2010, identified the obsolete stock and quantified the same at USD 8,55,409. Most of the said spares and stores were purchased more than 10 years ago and the same are similarly identified after carrying out technical valuation of the inventories by the operator. Accordingly, the assessee's shares in the same i.e. 10% comes to Rs.39.77 Lacs which has been claimed.

It has further been submitted that each well has its own specification and the drilling material cannot be used in any other well and further, using old inventories could put the drilling operations at risk with significant financial implications. Therefore, under commercial prudence and also in view of the industry practice, the old inventories were written off as per the decision taken by the assessee during impugned AY.

Lastly, it has been submitted that the operator on a periodic basis, carries out review and valuation of inventory in order to determine its usability, the decision on utilizing the inventory is treated as final by the joint venture members. These stores and spares have not been used in any of the petroleum operations and have become obsolete over a passage of time and hence written off. This practice has consistently

been followed in all the years and the deduction of the same has been allowed in previous as well as succeeding years.

Per Contra, Ld. DR supported the stand of first appellate authority in the impugned order.

10. We have carefully considered the same. The undisputed fact that emerges are that the assessee incorporates the assets, liabilities, income & expenditure arising from unincorporated joint venture operations based on the audited statement on line-to line basis and to the extent of its participating interest in the unincorporated joint venture. The obsolete stock / spares have clearly been identified by the operator of the two blocks under question and the assessee has claimed the deduction of the same to the extent of its own share therein as computed in the manner as given in preceding *para 9.2* above. Undisputedly, these are old inventories as identified by the operator, which are found to be obsolete and no longer usable for the blocks. This being the case, both the authorities, in our opinion, fail to clinch the issue in the proper perspective. The said stock / spares could, by no stretch of imagination, be treated as capital expenditure for the assessee. Further, there is no double deduction as concluded by first appellate authority as evident from financial statements provided by the operator. Therefore, by deleting the same, we allow this ground of assessee's appeal.

11. Resultantly, the appeal stands partly allowed for statistical purposes in terms of our above order.

Conclusion

12. Both the appeal stands partly allowed for statistical purposes to the extent indicated in the order.

Order pronounced in the open court on 08th March, 2019.

Sd/- *Sd/-*

(Pawan Singh) **(Manoj Kumar Aggarwal)**
न्याि◌क सदस्य / **Judicial Member** लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 08/03/2019
Sr.PS, Jaisy Varghese
आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai.**