

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.1000/M/2016
Assessment Year: 2007-08**

M/s. Reliance Natural Resources Ltd., H Block, 1 st Floor, DhirubhaiAmbani Knowledge City, Navi Mumbai – 400 710 PAN: AABCR 7656P	Vs.	Deputy Commissioner of Income Tax, Circle 7(2), Mumbai Now- Asst. Commissioner of Income Tax, Circle 8(1)(1), Room No.624, 6 th Floor, AayakarBhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

**ITA No.1076/M/2016
Assessment Year: 2007-08**

Asst. Commissioner of Income Tax-8(1)(1), Room No.624, 6 th Floor, AayakarBhavan, M.K.Marg, Mumbai - 400020	Vs.	M/s. Reliance Natural Resources Ltd., H Block, 1 st Floor, DhirubhaiAmbani Knowledge City, Navi Mumbai – 400 710 PAN: AABCR 7656P
(Appellant)		(Respondent)

Present for:

Assessee by : ShriArvindSonde, A.R.
ShriJitendraSanghavi, A.R.
Shri Deepak Jain, A.R.

Revenue by : Shri B. Pruseth, D.R.

Date of Hearing : 01.03.2017

Date of Pronouncement : 12.05.2017

ORDER

Per D.T. Garasia, Judicial Member:

The above titled appeals one by the Revenue and the other by the assessee have been preferred against the order dated 28.12.2015 of the

Commissioner of Income Tax (Appeals) - 14, Mumbai [hereinafter referred to as the CIT(A)] relevant to assessment year 2007-08.

2. Now we will deal with Revenue's appeal i.e. ITA No.1076/M/2016.

ITA No.1076/M/2016 (Revenue's appeal)

3. Reliance Natural Resources Ltd. (RNRL) assessee has filed the return of income on 31.10.2007. The assessee is a group company of Reliance ADAG group and engaged in business of providing fuel and facilitation services to power plants. During the financial year 2006-07 relevant to A.Y. 2007-08 assessee has raised the fund equivalent to US\$ 300 million by issue of Foreign Currency Convertible Bonds (FCCB). The issue date of bond was 10.10.06 which was matured on 17.10.2011. The FCCB means a bond expressed in foreign currency, the principal and interest in respect of which is payable in foreign currency, issued by an Issuing company and subscribed to by a person who is resident outside India, in foreign currency and exchangeable into equity shares of the company after a specified period or to be redeemed. The assessee has received proceeds of FCCB of US\$ 300 million in Barclays Bank from Barclays Bank PLC as lead manager for making subscription.

4. Originally the assessment order was passed u/s.143(3) dated 07.12.2009 which is on page 14 to 27 of the paper book. The assessment proceedings were completed on 07.12.2009 and in the said assessment order, four additions / disallowances were made which read as under:

FCCB issue expenses	28,58,28,246
Legal and professional fees	49,74,139
Disallowance u/s. 14A	5,97,63,000
Withholding tax on FCCB interest	3,35,70,044

Against the above addition / disallowance, the assessee has filed the appeal before the Ld. CIT(A) and the Ld. CIT(A) has granted the partial relief which

included FCCB issue expenses treating same as revenue expenses. Against the said order, the assessee as well as revenue has filed appeal before the Tribunal and the Tribunal has granted partial relief to the assessee and dismissed the revenue appeal.

5. The AO has issued the notice dated 08.02.2013 under section 148 for reopening the assessment order. The assessee has filed the return of income in response to notice under section 148. The assessment was reopened on following grounds.

1. Source of investment in FCCB of Rs.1304.10 crores.
2. Allowability of FCCB interest of Rs.33,16,93,100 in view of diversion of proceeds of FCCB for non business purpose.
3. Allowability of FCCB expenses of Rs.28,58,28,246/- in view of diversions of proceeds of FCCB for non business purpose.
4. Income arising out of investment in Yield Management Certificate (YMC) and non reflection of losses of US\$.06 millions in final accounts and return for A.Y. 2007-08.

6. The assessee has objected to reopening of the assessment and requested AO to provide the following documents:

- a) Report of DIT (Intelligence) dated 19.11.2010 in respect of investigation carried out by them.
- b) Investigation carried out by SEBI on receipt of information from Financial Services, UK.

The copy of the letter is in the paper book page 82 to 107.

The AO did not provide the said documents. He passed the re-assessment order under section 143(3) read with section 147 of the Act on 27.3.2014 in which following additions/disallowances were made:

	<u>Rs.</u>
FCCB proceeds – USD 300 million	1304,10,00,000
FCCB issue expenses	28,58,28,246
FCCB interest (including withholding tax of Rs.3,35,70,044)	33,16,93,100

7. The facts relating to issue of FCCB:

Assessee has raised the fund by way of FCCB during F.Y. 2006-07 vide offering circular dated 12.10.2006 issued on 16.10.2006. RNRL has issued the bond to lead manager i.e. Barclays Bank PLC who agreed to subscribe and pay for the bond. Single Global Certificate (GC) for FCCB funds is issued and registered in the name of common depository Euroclear bank and Clearstream Luxemburg. The Barclays Bank PLC ("Barclays"), Lead Manager, as subscriber to aforementioned issue, signed the Subscription Agreement as per which Barclays agreed to subscribe to the FCCBs of USD 300 million proposed to be issued by RNRL. On 12.10.2006 RNRL issued Offer Document to Barclays (pg 155-337 of PB). On 16.10.2006 RNRL issued a single GC representing the aggregate principal of USD 300 million and delivered it to Deutsche Bank, Luxemburg ("the Registrar") of Euro Clear and Clear Stream ('the Exchanges") (pg 396-404 of PB). The Registrar registered the GC in the name of BT Globenet as the Nominee of Deutsche Bank, London, which was the Common Depository ("CD") of the Exchanges and released the authenticated GC to DB, London as the CD of the Exchange (pg 396-404 of PB). RNRL instructed the CD (DB London) to hold the GC on its behalf till Barclays instructed the CD to effect the payment to RNRL and thereafter to hold the GC for the account of the subscriber i.e. Barclays (pg 392 of PB). As per the Paying, Conversion and Transfer Agency Agreement dated 16.10.2006, RNRL agreed to deliver to the Registrar a duly executed GC (pg 355 of PB). RNRL instructed Barclays (i.e. the Subscriber) to make the net of fees payment of USD 290.40 million by way of subscription for the FCCBs Barclays

instructed the Deutsche Bank AG London (DB) to release the net proceeds of the FCCBs to the designated bank account of RNRL. The single GC for FCCB funds is issued and registered in the name of common depository for EuroClear Bank and Clearstream, Luxemburg. RNRL received the net sum of USD 290.40 million from Barclays through the DB and issued a receipt. On 15.10.2010 FCCBs of USD 300 million were transferred to Reliance Power Ltd. under the Demerger Scheme approved by the Hon'ble Bombay High Court. FCCBs of USD 100,000 were converted into shares. Reliance Power Ltd. has issued 43,860 shares to FCCB's holders during F.Y. 2010-11 (pg 485-486 of PB). On 14.10.2011, balance FCCB of USD 299.90 million was redeemed to the FCCB's Holders. (pg 485-486 of PB).

8. The assessee's case is that the FCCB fund is subscribed by Barclays bank and the assessee has received the fund from Barclays Bank. The assessee is not having detail of further subscribers of Barclays Bank at the time of issuance of FCCB or thereafter and assessee is not bound to keep such detail.

9. It is the case of AO that the report from Directorate of DIT (Intelligence), New Delhi was received on 19.11.2010 with regard to suspicious financial transactions carried out to overseas. The investigation carried out by SEBI wherein it was observed that FCCB proceeds had been used to invest in shares of Reliance Communication Ltd. (RCOM) through an investment vehicle, thereby circumventing the regulations of FEMA, SEBI and other regulatory norms.

10. The AO wanted to verify the source of FCCB funds is unaccounted/unexplained by following facts:

- i. FCCB funds of US \$ 300 million were raised by RNRL on 16.10.06.
- ii. Entire FCCB fund was held by one entity who was nominee of Euroclearbank, Luxembourg.

- iii. No details of the actual bondholders or ultimate beneficiaries have been provided by the assessee.

11. Therefore, assessee was given show cause notice and assessee has replied to show cause notice which is reproduced in para 23 of the re-assessment order passed u/s.143(3) r.w.s.147 of the Act which reads as under:

“23. In response to this issue, assessee company has given it reply vide letter dt.05.03.2014, which is reproduced as under:

A. SOURCE OF INVESTMENT IN FCCB – RS.1304.10 CRS.

1. During the year we had issued Foreign Currency Convertible Bonds (FCCB) Vide Offer Document dated 12.10.2006. The bonds were 4.928% convertible bonds due 2011 aggregating to USD 300 million. Copy of the Offer Document has been filed in course of original assessment proceedings vide letter dated 19.11.2009 and again in course of filing of objections to the reopening of assessment u/s.148 vide letter dated 18.12.22013 filed on 20.12.2013.

2. In the reasons recorded it has been stated that no inquiries were carried out with regard to the source of funds raised through FCCB. (para 3 of reasons recorded)

3. In this connection we once again state that we had submitted the Offer Document vide our letter dated 19.11.2009, copy of the said letter is enclosed as Annexure A. It can be seen that there was specific reply as regards FCCB issue pursuant to your query raised. We had also submitted letter dated 19.10.2006 of Brody, Kimberlee: LED London giving the details of proceeds realized, expenses incurred and balance amount transferred to the bank account of the company.

4. Attention is invited to page 122 of the Offer Document (Annexure I of letter dated 18.12.2013) in which the details of subscription and sale of the FCCB has been provided. It is stated that company has entered into a subscription agreement with the Manager i.e. Barclays Capital PLC pursuant to which the company agreed to sell to the Manager and the Manager agreed to subscribe for US 300 million aggregate principal amounts of the bonds. It is also stated that the Manager may for its own accounts, enter into asset swaps, credit derivatives or other derivative transactions relating to the Bonds and / or the shares at the same time as the offer and sale of the Bonds or in secondary market transactions. This document was already on record of the Assessing Officer provided by us in course of the assessment proceedings (letter dated 19. 11.2009 - Annexure A to this submission). Thus it is not correct on the part of the Assessing Officer to state that the names of the bondholders are not available. We had also submitted the copy of subscription agreement with Barclays Bank PLC as amended from time to time with our letter dated 18.22.2013 as Annexure 2 thereto.

We have also enclosed herewith following documents:-

- i. Letter from Barclays Bank PLC dated 16.10.2006 addressed to Deutsche Bank AG, London authorizing them to make payment to us against the delivery of Global Certificate.
- ii. Confirmation dated 16.10.2006 from Deutsche Bank London to us and to Barclays Bank PLC confirming the payment made by them to Barclays Bank.
- iii. Letter dated 16.10.2006 from Deutsche Bank AG, London as common depository acknowledging the receipt of Global Certificate.
- iv. Letter dated 16.10.2006 from Deutsche Bank Luxembourg SA as Registrar for receipt of Global Certificate representing USD 290.40 million.

Above documents are enclosed as Annexure B to E.

From the above documents it is clear that the bonds proceeds have been given to us by Barclays Bank PLC and the same has been sourced by them from Deutsche Bank London. Thus the source of the funds is fully explained.

5. We have to bring to your attention the decision of Income Tax Appellate Tribunal 'D' Bench in the case of Reliance Communications Ltd. (RCOM) in ITA No.2915 /Mum / 2012. In this case also the department had applied provisions of section 68 in respect of issue of FCCB by RCOM. Facts of RCOM and ours are identical and in support thereof we had submitted copy of the Offer Document of RCOM with our letter dated 18.12.2013 as Annexure 3 thereto.

In RCOM the matter of applicability of section 68 in respect of the FCCB proceeds received by them was a matter of revision proceedings u/s.263 of the Act. RCOM has issued similar FCCB during F.Y.2006-07 relevant to A.Y.200708. The issue of applicability of section 68 was considered by Commissioner of Income Tax who in the order u/s.263 had set aside the assessment to carry out investigation as regards the subscribers of FCCB.

The matter of order u/s.263 was challenged by RCOM before Income Tax Appellate Tribunal. Tribunal vide order dated 5.2.2013 in ITA No.2915 / Mum 12012 has held that the managers to the issue had subscribed to the FCCB and that it was the managers' sole discretion / obligations to find the customers if it wanted. It further held that the money was actually received from and on behalf of the manager to the issue. Tribunal noted that the global certificate was issued in the name of the manager. Reference is made to the para 5.5 and 5.6 of the said Tribunal order. Tribunal therefore held that the department was not justified in putting obligation on the assessee to prove the identity, capacity and credit worthiness of the subsequent subscribers, which was beyond the reach of the assessee. A copy of the said Tribunal order was enclosed with letter dated 18.12.2013 as Annexure 4 thereto.

Thus the matter of applicability of section 68 has already been considered by Tribunal in the same facts as ours and has held that based on the documents relevant to FCCB issue, the subscriber to the bonds is the Manager to the issue. In our case Manager to issue of FCCB was Barclays Capital PLC. As stated earlier this is evident from page 122 of the Offer Document. We therefore submit that the reasons recorded as regards non availability of the name of bond holders is not correct in as much as the name was available in the Offer Document and the same

was available at the time when the original assessment was framed and also available now. Further the payment by Barclays Bank and their source is also explained by evidence.

6. The reasons recorded further provides that the details of the ultimate beneficiaries have not been provided. We submit that what is important is the person making payment to us and not the subsequent transfer of the bonds by the original subscriber. As far as we are concerned the funds were given by Barclays Capital and if thereafter they have entered into further transactions for transfer of their beneficial interest in the bonds, the subsequent acquirers of the bonds are not material to the issue of applicability of section 68 in our case.

7. We therefore submit that all material / evidence necessary for the purpose of assessment are submitted. We had entered into a Subscription Agreement with the Manager i.e. Barclays Bank PLC in respect of subscription of the Bonds. As per amended and restated Subscription Agreement dated 10. 10.2006 (filed with letter dated 18. 12.2013 as Annexure 2) we had agreed to sell to the Manager and the Manager had agreed to subscribe for US\$300 million aggregate principal amount of the Bonds as set out in the Subscription Agreement (page 122 of the offer document - Annexure I of letter dated 18.12.2013). As per the said Subscription Agreement, issuer (i.e. the company) had agreed to issue the Bonds and Manager (i.e. Barclays Bank PLC) agreed with the Issuer to subscribe and pay for or to procure subscribers and pay for the Bonds. (para 1.1 of Subscription Agreement). In terms of the Subscription Agreement, the Manager i.e. Barclays Bank PLC paid to the issuer an amount of US\$ 290,400,400 after deducting their commission and expenses. It can be further seen from the page 122 of the Offer Document that Manager - Barclays Bank PLC may, for its own accounts enter into asset swaps, credit derivatives or other derivative transactions relating to the Bonds and / or the shares at the same time as the offer and sale of the Bonds or in secondary market transactions. As a result of such transactions, the Manager (or its affiliates) may hold long or short positions in such Bonds or derivatives or in the shares. These transactions may comprise a substantial portion of the offering and no disclosure will be made of such positions. The Manager (or its affiliates) may have purchased Bonds and been allocated Bonds for asset management and/or proprietary purposes and not with a view to distribution.

Relevant extract from the Subscription Agreement being Para 1.1 is reproduced hereunder:-

"Subject to and in accordance with the provisions of this Agreement and to agreement and execution of the Pricing Letter (as defined in Clause 1.8), the Issuer agrees to issue the Bonds and the Manager agrees with the Issuer to subscribe and pay for or to procure subscribers to subscribe and pay for the Bonds on the Closing Date at the issue price of 100 per cent, of the aggregate principal amount of the Bonds less the commission and concession referred to in Clause 5."

8. We therefore submit that the Offer Document, Subscription Agreement and the documents specified in para 4 above (Annexure A) clearly provide that the bonds were originally subscribed by Barclays Bank PLC and thereafter they may

have disposed off transfer, sold to various bond holders to which we are not privy to the details.

9. We understand that you had made reference to FT & TR section of Central Board of Direct Taxes for Exchange of information under India -UK Treaty. We are not aware as to whether you have received any information under the said Reference. We have to request you to provide the outcome of the said reference. We submit that the above facts will clearly come out in the said reference made to UK Tax Authorities.

10. In view of the above we submit that the nature and source of funds have been fully explained. We therefore submit that no addition should be made in respect of the proceeds of FCCB credited to our books as the said bonds were subscribed by Barclays Bank PLC whose identity and creditworthiness is already provided in the Offer Document at page 76 to 79.”

12. The AO was of a view that actual beneficiaries of FCCB funds is within the knowledge of assessee company since purpose of raising the fund was indirectly to invest in the shares of RCOM which is otherwise was not permissible. Thus, by withholding the detail of real subscribers, the assessee company has failed to explain the nature and source of FCCB fund of US\$ 300 million and failed to discharge the onus under section 68 of the Act. Accordingly, sum of Rs.1304.10 crores was added under section 68 of the Act and deemed to be income of the assessee.

13. The matter was carried to Ld. CIT(A) and the Ld. CIT(A) has deleted the additions by observing as under:

“8.4 I have considered the submission. Perusal of the assessment order shows that the Assessing Officer has considered the FCCB proceeds as unexplained cash credits on the ground that the source thereof is unexplained. Assessing Officer contends that the actual beneficiaries of FCCB funds are within the knowledge of the appellant as the funds were indirectly used for investment in shares of Reliance Communications Ltd. The main contention of the Assessing Officer are as under: -

- i) Details of actual bondholders or ultimate beneficiaries have not been provided by the appellant.
- ii) The appellant was bound to maintain a register wherein the name and address of the bondholder was to be specifically mention.
- iii) Payment of principal and accrued interest was to be made by transfer to the register account of the bondholder which means that the appellant was

in possession of the information regarding the ultimate investor in FCCB.

As against the Assessing Officer's contention the appellant submitted that they had submitted various documents to prove that the subscribers to the bonds were Barclays Capital PLC. The appellant points out that they have submitted copy of offer document, copy of subscription agreement with Barclays, copy of correspondence between Barclays Bank and Deutsche Bank regarding transfer of funds from Barclays Bank account with Deutsche Bank, issue of Global certificate in name of BT Globenet Nominees Ltd., receipt of the global certificate by Deutsche Bank Luxembourg SA. The appellant further submitted that the Assessing Officer had made reference through FT & TR for obtaining information about the subscribers of the bonds. The said information was not received till the date of passing of the order. The appellant made application under RTI to Assessing Officer and thereafter appealed to the Appellate Authority under RTI Act for obtaining the copy of information received from UK Tax Authority. Assessing Officer in his communication to the appellate authority under RTI confirmed the receipt of the said information. The appellant submitted that nothing adverse is found in the said communication against him. The appellant submitted that they made detailed submissions as to why the secondary source and the secondary beneficiaries are not relevant to the issue of section 68 under the facts of the case. It was also claimed that the scheme under which the FCCBs are issued also recognize the fact of non availability of the names of the subsequent bondholders when it provides that for the purpose of withholding tax the Tax Treaty of the country of the residence of the Depository will have to be reckoned. Thus the scheme when promulgated in 1993 also considered the fact that the names of the subsequent bondholders will not be available and what is relevant to the issuer company is the only depository. The appellant had also relied upon the decision of Tribunal in case of Reliance Communication Ltd. ITA No.2915 / Mum / 2012 in which on identical facts the applicability of section 68 was quashed. Hb' Tribunal has held that the subscribers to the bonds are the manager to the issue and the names of the subsequent subscribers are irrelevant for the purpose of section 68.

The appellant during the course of appellate proceedings has addressed the issues raised by the AO in the assessment order. The submission in this regard is reproduced above. The appellant has submitted the copy of offer document dated October 2006, subscription agreement, copy of paying, conversion and transfer agency agreement, letters from Barclays Bank PLC dated 16/10/2006 addressed to Deutsche Bank AG London authorizing them to make payment to assessee against delivery of global certificate, confirmation dated 16/10/2006 from Deutsche Bank to the assessee and to Barclays Bank PLC confirming the payment made by them to Barclays Bank, letter dated 16/10/2006 from Deutsche Bank AG London as common depository acknowledging the receipt of global certificate, letter dated 16/10/2006 from Deutsche Bank Luxembourg SA as registrar for receipt of global certificate representing 290.40 million US\$, copy of global certificate issued by Deutsche Bank Luxembourg SA in the name of B T Globenet nominees Ltd. of UK submitted vide letter dated 18/03/2014, copy of scheme i.e. issue of foreign currency convertible bonds and ordinary

shares through depository receipts mechanism since 1993.

As per page 122 of the offer document, the company has entered into a subscription agreement with the Manager i.e. Barclays Capital PLC pursuant to which the company agreed to sell to the manager and manager agreed to subscribe principle amount of the bonds amounting to 300 million US\$ in aggregate. It is also stated that the manager may on its own accounts enter into asset swap, credit derivatives or other derivatives transcription relating to the bonds/or shares at the same time offer and sell all the bonds in any secondary market transactions. The assessee stated that subsequent sale of the bonds by the manager is not relevant for the purpose of source of funds vis-à-vis the company as the funds have not been received from subsequent holders if any but from the Barclays. Original subscriber to the bonds are Barclays Capital PLC i.e Manager to the FCCB issue and this document was already available to the A.O and therefore it is not correct to say that the names of the bondholders is not available.

Para 2.1 of page 32 of the offer documents says that bond certificate will be issued to each bond holder in respect of its registered holding of the bonds. Further upon issue of bond, same will be represented by the global certificate deposited with common depository and registered in the name of nominee of the common depository. It is further provided that except in the limited circumstances described in the global certificate, owners of interest in bond represented by the global certificate will not be entitled to receive distinctive certificate in respect of their individual holding of bond.

The circumstances under which the bond holder is entitled to receive individual distinctive certificate is specified on page 101 of the offer document under the head exchange and registration of title. Same is reproduced as under:

"Owners of interests in the Bonds in respect of which the Global Certificate is issued will only be entitled to have title to the Bonds registered in their names and to receive individual definitive Certificates if either Euroclear or Clearstream (or any other clearing system as shall have been designated by the Company and approved by the Trustee on behalf of which the Bonds evidenced by this Global Certificate may be held) is closed for business for a continuous period of 14 days (other than by reason of holidays, statutory or otherwise) or announces an intention permanently to cease business or does in fact do so."

In such circumstances, the Company will cause sufficient individual definitive Certificates to be executed and delivered to the Registrar for completion, authentication and dispatch to the relevant Bondholders. A person with an interest in the Bonds in respect of which this Global Certificate is issued must provide the Registrar with a written order containing instructions and such other information as the Company and the Registrar may require to complete, execute and deliver such individual definitive Certificates."

The assessee therefore submits that the name of bond holders has been duly provided to the AO. The bonds are subscribed by Barclays Bank and represented by one global certificate. As per the international practice, interest in global certificate and the bond is transferred through the system of clearing. Euroclear maintains details of subsequent transfer of bonds from one person to another. The details of which are mentioned in para 102 of the offer document under the title transfers. The assessee states that "Transfer of interest in the bonds represented by the global certificate will be effected through the records of Euroclear and Clearstream Luxembourg and their respective participant with accordance with the rules and procedures of Euroclear and Clearstream Luxembourg and their respective direct and indirect participant. Thus the bonds are not transferred but what is transferred is interest in bonds. Therefore the bond continue to remain in name of one person though the interest in bonds may get divided between various individual buyers. Details of such beneficial interest is maintained through depository and not by the company. This system is similar to the shares of Indian company issued to depository accounts who have the sub-accounts of equity holders. Whenever transfer of shares happens between two shareholders the same is registered through the depository and do not come to the company. Only difference between the demat system in India and depository abroad is that the names of the subsequent holders are protected by the relevant laws of the country where the depository is situated."

Para 2.1 of the offer documents provided for maintenance of register of the bond holders. However, this register is maintained by the registrar and not the company. In this case, Deutsche Bank London SA is the registrar which maintains such register and the company does not maintain it. It is therefore submitted that the A.O has made a presumption that the company was bound to make the payment of principal and interest directly to each bondholder and therefore the company must be in possession of details regarding ultimate investor in FCCB. It is submitted that the contention of the A.O is not correct and that "payment of principal in respect of bond represented by the global certificate will be made to the order of principal agent or payee agent as notified to the bond holders. In this connection we invite your attention to the scheme under which the FCCB bonds are issued i.e. issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Mechanism) Scheme 1993 notified vide Notification No.G.S.R. 700(E) dated 12th November, 1993. The said scheme is annexed as **Annexure 6**. In para 10 of the said notification it is provided that the provisions of Double Taxation Avoidance Agreement between India and the country of residence of Overseas Depository bank is applicable in respect of matter of interest on FCCB. Thus it is very clear that the interest is payable to the depository who in turn makes the payment to various beneficial interest owners of the bonds. The bonds are registered in the name of Global Depository and only when the bondholders converts the bonds into shares, the information thereof is received us."

Therefore the appellant submits that they have entered into a subscription agreement with the manager i.e. Barclays Bank PLC in respect of subscription of the bonds. As per the subscription agreement dated 10/10/2006 the

assessee has agreed to sell to the manager and the manager has agreed to subscribe for 300 million US\$ aggregate principle amount of the bonds as per the subscription agreement (Page 122 of the offer document) and the company had agreed to issue the bonds and the manager i.e. Barclays Bank PLC agreed with the issuer to subscribe and pay for or to procure subscribers and pay for the bonds (para 1.1 of the subscription agreement). The Barclays Bank PLC paid 290,400,400 US\$ after deducting their commission and expenses. The Barclays Bank PLC may for its own account entered into asset swap credit derivatives or other derivatives transaction relating to the bonds or the shares at the same time as the offer and sale of the bonds in secondary market conditions. The manager may hold long or short decisions in such bonds or derivatives or in the shares and no discloser will be made of such decisions. The extract of para 1.1 of the subscription agreement is as under ""Subject to and in accordance with the provisions of this Agreement and to agreement and execution of the Pricing Letter (as defined in Clause 1.8), the Issuer agrees to issue the Bonds and the Manager agrees with the Issuer to subscribe and pay for or to procure subscribers to subscribe and pay for the Bonds on the Closing Date at the issue price of 100 per cent, of the aggregate principal amount of the Bonds less the commission and concession referred to in Clause 5."

The appellant has also referred to the order of Ld.CIT(A) against original assessment order passed in this case. A copy of order was enclosed along with the submissions. In the original assessment proceedings, the FCCB issue expenses were disallowed as the same were treated as capital expenditure. In the appellate order passed by the Ld CIT(A) in appeal No.CIT(A)-13/Addl CIT 7(2)/185/09-10 dated 26/10/2010, the Ld.CIT(A) held that FCCB was in the nature of debenture/ borrowed funds and not share capital and hence FCCB issue expenses were allowable as revenue expenditure. The Ld.CIT(A) also noted that it was not mandatory that shares has to be issued against FCCB borrowed. The extract from the appellate order is reproduced as under:

“(a) The amount has been received towards issue of bonds and not share capital as per para 6 of the terms and conditions of issue of bonds offering circular dated 12/10/2006, it has been provided that:

1 Bond holders have the right to convert the bonds into shares at any time during the conversion period.

2 The right of the bondholder to convert the bonds into shares is called the conversion right. Subject to any upon compliance with the provisions of this condition, the conversion right attaching to any bond may be exercised, at the option of the holder thereof, at any time (subject to the next paragraph) on and after 27 November 2006 upto the close of business (at the place where the certificate evidencing such bond is deposited for conversion) on 10 October 2011 (but except as provided in condition 6.1.4 and condition 10, in no event thereafter) or if such bond shall have been called for redemption by the issuer before the maturity date, then upto the close of business (at the place

aforesaid) on the seventh day (at the place aforesaid) prior to the date fixed for redemption thereof provided that in each case, if the final such date for exercise of the conversion right is not a business day at the place aforesaid, then the period for exercise of conversion right by bondholders shall end on the immediately preceding business day at the place aforesaid. (b) Thus it is clear that these bonds are not mandatorily convertible in shares. As such the nature of these FCCB5 Bonds is in the nature of debentures/ borrowed funds and not share capital. It is therefore noted that the Ld.CIT(A) in the previous year after going through the scheme has held that it is in the nature of borrowed funds and not share capital. The appellant also submitted that subsequently the bonds were transferred to Reliance Power Ltd under demerger scheme approved by Hb' Bombay High Court vide order dated 15th October 2010 and the borrowings were repaid on maturity as per details in the case of Reliance Power Ltd.

The appellant has also referred to the decision of Hon'ble ITAT in the case of Reliance Communication Ltd. in ITA No.2915/Mum/2012 AY.2007-08 dated 05/02/2013. The facts in this case are similar. In the case of Reliance Communication Ltd., the issue was that the assessee company claimed to have raised funds to the tune of Rs.6485 cores by way of foreign currency convertible bonds. Assessment was completed and thereafter the Ld.CIT passed an order u/s.263 of the Act contending that investigation was not carried out by the AO to establish the name, address, genuineness and credit worthiness of the actual subscriber FCCB in terms of section 68 of the Act. Hon'ble ITAT after elaborately discussing the case observed as under:

5. Foreign Currency Convertible Bonds

5.1. The factual matrix as regards this item is that the assessee raised funds through three issues of FCCBs during the previous year relevant to the assessment year under consideration. FCCB means a bond expressed in foreign currency, the principal and interest in respect of which is payable in foreign currency, issued by an Issuing company and subscribed to by a person who is resident outside India, in foreign currency and exchangeable into equity shares of the company after a specified period or to the redeemed. The assessee received proceeds of FCCB issues in Deutsche Bank, Singapore (DB) of US\$ 500 million; and JP Morgan New York and Hong Kong and Shanghai Banking Corporation of US\$ 1000 million. These FCCBs were subscribed to by the Lead Managers namely, Deutsche Bank Hong Kong (DB HK) for US\$ 500 million; JP Morgan Securities Ltd. U.K. and Hong Kong and Shanghai Banking Corporation for US\$] 000 million.

5.2. The AO enquired about this aspect of the matter and the assessee furnished its reply dated 17.4.2009, a copy of which has been placed at page 25 of the Paper Book (PB). By the said reply, the assessee submitted that it issued FCCBs in three tranches aggregating to US\$ 1500 million. The name and address of the subscribers to the three tranches of FCCBs and the corresponding amounts were duly

indicated by showing name and address of the subscribers such as DB HK for the FCCB US\$ 500 million. The details of the bank in which the proceeds of FCCBs were parked in the foreign countries and from where these were transferred to Indian Bank, were also furnished. Along with the said reply, the assessee submitted copies of Offer Memorandum of the FCCBs issued, Global Certificate along with the Registrars confirmation of entries of the Bondholder in Register, Foreign Inward Remittance Certificate and the details of FCCBs as per the Offer documents and Global Certificates.

5.3. Both the sides are in agreement that the facts and circumstances of the three FCCB issues are similar. For the sake of convenience and on representative basis, the parties chose to take up the FCCB issue of US\$ 500 million with DB HK as Lead Manager for making their respective submissions. The assessee entered into a Subscription Agreement with DB HK on 21.3.2006, as per which DB HK agreed to subscribe to the FCCB issue of US\$ 500 million. As per Clause-I of the Agreement, the assessee agreed to issue the Bonds and the Lead Manger agreed to subscribe and pay for or to procure subscribers to subscribe and pay for the Bonds on the closing date at the issue price of hundred per cent of the aggregate principal amount of the Bonds less the commission and concession referred to in Clause-5. As per Clause 1.2, the Issuer assessee undertook to prepare and deliver to the Lead Manager an Offering Circular not later than four business days prior to the closing date. The assessee issued Offering document dt.05.05.2006 to DB HK, clarifying that the Bonds would be represented by single Global Certificate (GC). Upon issuance, the Bonds were represented by a Global Certificate deposited with a Common Depository. The terms and conditions of the Bonds given as per Schedule-1 to the Agreement provide that the Bonds were to be issued in the registered form in the denomination of US\$ 1000 each. As per Clause 3.2, no individual certificates in respect of interest (share) in any Bonds were to be issued in exchange for the Global certificate except in the circumstances provided in Clause 3.3. According to clause 3.3, individual certificates were to be issued only in the prescribed circumstances, such as, the Common depository or any successor to the common depository notifying to the company in writing that it is at any time unwilling or unable to continue to act as a depository and a successor depository is not appointed by the Company within 90 days or Euroclear, Clearstream Luxembourg (Stock exchange) is closed for business for a continuous period of 14 days, etc. As per the Paying, Conversion and Transfer Agency Agreement dated 9.5.2006, a copy of which has been placed in the PB, the assessee Company agreed to deliver to the Registrar a duly executed GC. Such GC was issued on 09.05.2006, being the closing date of FCCB, and delivered to DB, Luxemburg (Registrar). A copy of the Global Certificate issued by the assessee in the name of BTGlobenet Nominees Limited for US\$ 500 million is available at pages 42 onwards of PB. It was registered in the name of BT Globenet as the nominee of DB

London, which was the Common Depository. The Registrar authenticated the Global Certificate upon the written order of the company and arranged for the delivery of the Global Certificate to the depository. The assessee instructed DB London to hold the GC on its behalf till DB HK instructs it to effect the payment and thereafter to hold it for the subscriber, that is, DB HK. Payment of US\$497.500 million (net after deduction of expenses and commission) was made by DB HK that is, the subscriber, on the instructions of the assessee. Copies of the letter authorizing payment and the cross receipt in respect of US\$ 497,500,000 are available at pages 61 and 62 of PB. The assessee received such payment on 09.05.2006 which was reflected in its books of account. The assessee duly informed the Reserve Bank of India (RBI) about such issues of FCCBs from time to time at the relevant stages. It can be noticed from letter dated 28.3.2005 issued by RBI authorizing the assessee to issue FCCBs under Automatic Approval Route.

5.4. The case of Id. CIT is that the AO should have examined the identity, capacity and credit worthiness of the actual subscribers' to the FCCB issue in terms of section 68. In his opinion, the acceptance by the AO of the assessee's contention that the amount was eventually received from DB HK, the subscriber, was not appropriate. Now the question arises as to whether the Id. CIT was justified in holding that the onus u/s 68 of the Act could have been discharged only on proving three prerequisites - identity, capacity and creditworthiness - in respect of actual subscribers and not DB HK, who undertook to subscribe to the FCCB and remitted the proceeds after partly finding some further subscribers and partly itself subscribing to the FCCB.

5.5. Section 68 of the Act clearly provides that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. A bare perusal of this provision divulges that there is an obligation on the assessee to prove the identity, capacity and credit worthiness of the person from whom the money is actually received. At the cost of repetition, we summarize the entire proceedings in respect of FCCB of US\$ 500 million which was undertaken to be subscribed to by DB HK. A GC for the whole issue was issued in favour of the nominee of DB HK who could have either subscribed to all the Bonds itself or solicited customers. It was the sole discretion/ obligation of the DB HK to find such customers, if it wanted. Admittedly, DB HK subscribed to/collected the sum in respect of US\$ 500 million and after deduction of their commission, remitted the balance USD 497,500,000 to the assessee.

5.6. It is palpable from the above narration of facts that the assessee was concerned with and did actually receive US\$ 497.500 million from and on behalf of DB HK, which was duly recorded in its name. It is not understandable, in the facts and circumstances of the extant case, that how the assessee could have entered the names and addresses of the

actual subscribers in its books of account, when the subscriber, as far as the assessee is concerned, was DB HK. The Global Certificate was issued by the assessee in the name of DB HK. It was for DB HK to subscribe to the entire FCCB or find customers for a part or total of such issue. The decision on inviting other customers from outside India to subscribe to the FCCB and to what extent was the sole responsibility of DB HK, without any instructions or involvement of the assessee in India. In so far as the assessee is concerned, it was only supposed to get the amount against FCCB from DB HK, which it, in fact, received. The fact that Global Certificate was issued in the name of nominee of DBHK amply proves that it was the obligation of DB HK to pay towards FCCB issue of US\$ 500 million. The Id. CIT has not referred to any material which indicates that the assessee had details of the actual subscribers at the time of issuance of FCCB or it was obliged to keep such details. No material has been brought to our notice even by the Id. DR to show that at that stage the assessee had any direct contact with the actual subscribers to the FCCB, different from DB HK. It can be observed from the details of the shares issued, on conversion of FCCB at a much later stage, that DB HK itself opted to subscribe for a certain part of the FCCB and issued a portion thereof to other customers who also happen to be international financial institutions only. At the stage of issuance of Bonds, there was privity of contract between the assessee and DB HK on one hand and between DB HK and actual subscribers on the other. It was the duty of DB HK to eventually get the shares allotted or refund granted to itself and other international financial institutions at the relevant point of time. It was only at the stage of issuance of shares or the granting of refund, that the assessee was to do the needful upon intimation by DB HK about the persons who had purchased separate interest (shares) in the GC. It is a matter of record that the assessee issued shares on conversion to certain parties, such as, JP Morgan Securities Ltd., The Hong Kong and Shanghai Banking Corporation Limited and DB HK itself in next year on various dates from 18.10.2007 to 31.1.2008. Only on the issuance of shares, these international financial institutions could be said to have come into direct contact with the assessee company. At the stage of issuance of Bonds in the previous year relevant to the assessment year under consideration, such customers of DB HK were not entitled to directly approach the assessee company in respect of any matter concerning the issuance of Bonds. When such is the situation, we fail to appreciate as to how the assessee could record the names of actual subscribers other than DB HK in its books of account and further prove their identity, capacity and credit worthiness. On a specific query from the bench, the learned Departmental Representative could not bring to our notice any statutory requirement or guideline issued by the RBI or any other Government authority fastening obligation on the assessee to maintain a record of the actual subscribers at that stage and record in their names instead of DB HK, who actually signed subscription agreement with the assessee. During the currency of the GC, only DB HK remained the subscriber to the FCCB issue of the assessee. The assessee was only

required to prove the identity, capacity and creditworthiness of DB HK who subscribed to its full issue of FCCB (some part directly and some part through its own customers), which is not in doubt. The fact that the assessee received the amount of subscription of Bonds from DB HK has not been denied by Id CIT. The further fact that Global certificate in respect of Bonds was issued in favour of DB HK and upon conversion of such Bonds, some of the shares were issued in favour of DB HK and remaining in favour of other international financial institutions has also not been disputed by the Id. CIT. In our considered opinion, the assessee adequately discharged the onus cast upon it in terms of section 68. The probe suggested by the Id. CIT could have been possible in the assessment of DB HK, who eventually partly subscribed to the Bonds itself and partly issued these to the international financial institutions. In view of these facts, we are of the considered opinion that Id. CIT was not justified in putting obligation on the assessee to prove the identity, capacity and creditworthiness of the actual subscribers, which fact was beyond its reach at the relevant time. We, therefore, do not approve the stand taken by Id. CIT on this issue."

The AO however did not consider the order contending that this was related matter u/s.263. However, the fact remains that the issue is identical in both the cases where the issue is regarding the subscription of the foreign currency convertible bonds in context of section 68 of the Act. Diversion of the proceed for non-business purpose does not taint the source of fund. Hon'ble Tribunal, in this case has already held that by furnishing the details of the original subscriber the assessee has duly discharged its onus.

The appellant has further submitted

- i) Letter from Barclays Bank PLC dated 16/10/2006 addressed to Deutsch Bank AG London authorizing them to make payment to them against the said of global certificate.
- ii) Confirmation dated 16/10/2006 from Deutsch Bank Luxemburg SA as registrar in receipt of global certificate representing 290.40 million US\$. The appellant therefore submitted that the bond proceeds have been given to them by Barclays Bank PLC and in view of the decision of the jurisdictional ITAT in the case referred above, it is established that the assessee has duly discharged its onus.

The appellant has given point wise reply to all the allegations of the A.O as reproduced above which are self explanatory.

In view of the submission made by the appellant, the case was discussed with the AO also. It is noted that the information received so far on this issue, as also discussed with the A.O is not so as to draw any adverse inference on the issue of further beneficial owners of the FCCB and in the context of section 68 of the IT Act. Further A.O or concerned authority have also not found any information or document in this context more than or otherwise than the material / information existing at the time of assessment which could give rise to any actionable cause and anticipatory propositions are

not liable to be considered in existing facts and circumstances of the case. Looking into the overall facts of the case it is therefore noted that the appellant has duly discharged its onus by filing the details of the subscriber. No adverse inference against this submission has been noted by the AO. Hb' Jurisdictionaltribunal has already held in exactly similar case of RCOM that under such circumstances, section 68 of the Act can not be invoked under the facts and circumstances of the case. The appellant is not privy to the subsequent holders of the bond if any and further as held by Hb' Tribunal in such matter only the original subscriber is relevant. LdCIT(A) also in the appellate order against the original assessment order has held that the transaction is in the nature of borrowing and therefore issue expenses can not be held as capital in nature. There is no instance of payment made by the company to any other person. The A.O has also talked about the deployment of fund. As per SEBI report the money raised by FCCB has not been used for the purpose of business of the assessee but was used to invest in the shares of group company. However this aspect is irrelevant to the issue which is section 68 of the I T Act 1961. The issue is directly covered by the decision of Hb' Jurisdictional ITAT (Supra) and is binding in nature. Since the facts of the case is identical to that of Reliance Communication Ltd. therefore, respectfully following the decision of Hb' Jurisdictional ITAT (supra) the addition made by the A.O is hereby deleted for the reasons as discussed above and as per law applicable in this behalf as held by Hb' ITAT in the case of Reliance Communication Ltd. This ground of appeal is therefore allowed.”

14. The Ld. D.R. argued that assessee has not provided details of actual bondholders to whom the lead manager is Barclays Bank has ultimately transferred the bonds. As per the Ld. D.R. identity, creditworthiness and genuineness has to be looked into vis-à-vis the subsequent bondholders collectively represented by global certificate. Ld. D.R. emphasized that the lead managers are not the subscribers or at least the ultimate subscribers. He further submitted that assessee was required to cause the register of the bondholders to be maintained by the Registrar. As per the Ld. D.R., the failure of the assessee to produce the names of the subsequent bondholders and failure to give their creditworthiness justifies the invocation of section 68 of the Act. Ld. D.R. submitted that the Ld. CIT(A) has deleted the addition on the ground that section 68 is not applicable in the case of RCOM which Ld. CIT(A) has relied upon, wherein the order is under section 263 of the Act and it is pertaining to revision of the order, therefore, Ld. CIT(A) should have not followed the order of Tribunal in RCOM. The Ld. D.R. further submitted

that if the provisions of section 68 are applied to the FCCB proceeds, the interest expenses and FCCB expenses were also to be disallowed as non genuine.

15. On the other hand, the Ld. A.R. has submitted before us that assessee was not given copy of the SEBI report and report of DIT (Intelligence) New Delhi. The assessee submitted that non giving the report of SEBI and DIT (Intelligence) which is extensively used in reassessment proceeding has rendered the assessment bad in law. The Ld. A.R. submitted that the AO has made the addition on the ground that the source of the above fund has not been fully and correctly explained and the same was treated as unexplained cash credit. The assessee in his balance sheet has shown as unsecured loan to the tune of Rs.1304.10 crores. Assessee has debited FCCB interest and FCCB issue expenditure in profit and loss account. The Ld. A.R. submitted that FCCB fund of US\$ 300 millions were raised by RNRL on 16.10.2006 and entire FCCB fund was held by one entity who was nominee of Euroclear Bank. No detail of actual bond holder or ultimate beneficiaries has been provided to the assessee. The assessee company maintained the register wherein the name and address of the bondholder is mentioned. All along assessee's stand is that it is a global practice that a single global certificate of FCCB fund is issued and registered in the name of common depository for Euroclear and Clearstream and held for the account of bondholder in international central security depository Euroclear and Clearstream Luxemburg. The assessee stated that as per the certificate, the global certificate representing the bonds was issued to M/s. BT Globenet Nominee Ltd., London. Assessee is having a single global certificate on behalf of bondholder and FCCB issuer does not have any access to information about bondholders. The assessee has submitted the copy of letter from Barclays Bank addressed to Deutsche Bank, AG London authorized against global certificate and the confirmation dated 16.10.2006 from Deutsche Bank, London to Barclays Bank PLC confirming the payment made by them to

Barclays Bank. The letter dated 16.10.2006 from the Deutsche Bank, London has common depository acknowledging the receipt of global certificate. The Deutsche Bank SA is a registrar for receipt of global certificate representing USD 300 millions. From this, it is clear that the bond proceeds have been given to assessee by Barclays Bank PLC and same has the source from their account with Deutsche Bank, London. Thus the source of fund is fully explained.

16. The Ld. A.R. lastly submitted that a bond certificate is issued in respect of register holding of the bond, the bond was represented by the global certificate deposited with common depository and registered in the name of nominee of common depository. The owner of interest in the bond in respect of which the global certificate issued will be entitled to have a title on the bond registered in the name and to receive the individual certificate if either Euroclear and Clearstream is closed for business for continuous period of 14 days. The AO insisted for the register but the register is maintained by the holder of the global certificate and global certificate issued in the name of Euroclear and Clearstream, Luxembourg and it is the Euroclear who maintains the details of subsequent transfer of bonds from one person to another. The bonds are not transferred but the transfer is of interest in the bond. Therefore, bond remains in the name of one person through the interest in bond may be divided between various individual buyers. The assessee is not bound to keep the register of ultimate interest in the bond holders.

17. The Ld. A.R. further submitted that similar issue had come up before Income Tax Appellate Tribunal in case of Reliance Communication in ITA No.2915/M/2012 wherein similar FCCB was issued by Reliance Communication Ltd. The facts of the Reliance Communication Ltd. and assessee are identical. In Reliance Communication Ltd. the matter of applicability of section 68 in respect of FCCB proceeds received by them was

the matter of revision under section 263 of the Act. The issue of applicability of section 68 was considered and matter was set aside by Commissioner as to make investigation as regards subscriber of FCCB. The matter was decided by the Tribunal and Tribunal has held that the subscriber of FCCB was the lead manager to the issue whose identity and creditworthiness was well known. Therefore, section 68 was held not applicable. It was further pointed out that the Department has filed the appeal in Hon'ble Bombay High Court and Hon'ble Bombay High Court has dismissed the department's appeal. Thereafter, the matter went to Hon'ble Supreme Court and Hon'ble Supreme Court has also dismissed the appeal of the Department. The Ld. A.R. therefore submitted that in this case the issue is covered by the decision of Hon'ble Supreme Court, therefore, the department's appeal may be dismissed.

18. The Ld. A.R. submitted that the issue in the appeal is covered by the decision of Tribunal in case of Reliance Communication Ltd. therefore, CIT(A) is justified in his action and appeal may be dismissed. The Ld. A.R. has submitted chart giving facts in case of RCOM and the facts in assessee's case. For understanding the facts, we reproduce the same as under:

Description of Events	Issue of FCCB of USD 300 Million	
	Reliance Natural Resources Limited ("RNRL")	Reliance Communications Limited ("RCOM")
	Particulars	Particulars
	10.10.2006	21.03.2006
Lead Manager	Barclays Bank PLC ("Barclays"), Lead Manager, as subscriber to aforementioned issue, signed the Subscription Agreement as per which Barclays agreed to subscribe to the FCCBs of USD 300 million proposed to be issued by RNRL (pg 338-352 of PB)	Deutsche Bank Hong Kong ("DB HK"), Lead Manager, as subscriber to aforementioned issue, signed the Subscription Agreement as per which DB HK agreed to subscribe to the FCCBs of USD 500 million proposed to be issued by RCOM (Para 5.3, Pg 5)
	12.10.2006	05.05.2006
Offer Document	RNRL issued Offer Document to Barclays (pg 155-337 of PB)	RCOM issued Offer Document to DB HK (Para 5.3, Page 5 & 6)
	16.10.2006	09.05.2006
Global Certificate	RNRL issued a single Global Certificate ("GC") representing the aggregate principal of USD 300 million and delivered it to DB, Luxemburg ("the Registrar") of	RCOM issued a single GC representing the aggregate principal of USD 500 million and delivered it to DB, Luxemburg ("the Registrar") of Euro Clear and Clear

	Euro Clear and Clear Stream ("the Exchanges") (pg 396-404 of PB)	Stream ("the Exchanges") (Para 5.3, Page 5 & 6)
Common Depository	The Registrar registered the GC in the name of BT Globenet as the Nominee of DB, London, which was the Common Depository ("CD") of the Exchanges and released the authenticated GC to DB, London as the CD of the Exchange. (pg 396-404 of PB)	The Registrar registered the GO in the name of BT Globenet as the Nominee of DB, London, which was the Common Depository ("CD") of the Exchanges and released the authenticated GO to DB, London as the CD of the Exchange (Para 5.3, Page 6)
Instructions to hold Global Certificate	RNRL instructed the CD (DB London) to hold the GC on its behalf till Barclays instructed the CD to effect the payment to RNRL and thereafter to hold the GC for the account of the subscriber i.e. Barclays (pg 392 of PB)	ROOM instructed the CD (DB London) to hold the GO on its behalf till DB HK instructed the CD to effect the payment to ROOM and thereafter to hold the GO for the account of the subscriber i.e. DB HK (Para 5.3, Page 7)
Instruction to deliver Global Certificate	As per the Paying, Conversion and Transfer Agency Agreement dated 16.10.2006, RNRL agreed to deliver to the Registrar a duly executed GC. (pg 355 of PB)	As per the Paying, Conversion and Transfer Agency Agreement dated 9.5.2006, RCOM agreed to deliver to the Registrar a duly executed GO. (Para 5.3, Page 6)
Instruction for payment from Subscriber to Issuer of FCCB	RNRL instructed Barclays (i.e. the Subscriber) to make the net of fees payment of USD 290.40 million by way of subscription for the FCCBs	RCOM instructed DB HK (i.e. the Subscriber) to make the net of fees payment of USD 497.5 million by way of subscription for the FCCBs (Para 5.3, Page 7)
Instructions for releasing of funds from Lead Manager	Barclays instructed the CD to release the net proceeds of the FCCBs to the designated bank account of RNRL	DB HK instructed the CD to release the net proceeds of the FCCBs to the designated bank account of RCOM (Para 5.3, Page 7)
Fund received	RNRL received the net sum of USD 290.40 million from Barclays through the CD and issued a receipt	ROOM received the net sum of USD 497.5 million from DB HK through the CD and issued a receipt for the same (Para 5.3, Page 7)
	15.10.2010	
Demerger Scheme	FCCBs of USD 300 million were transferred to Reliance Power Ltd. under the Demerger Scheme approved by the Hon'ble Bombay High Court	- - -
	14.10.2011	From 18.10.2007 to 31 .01 .2008
Conversion of FCCB into shares	FCCBs of USD 100,000 were converted into shares Reliance Power Ltd. has issued 43,860 shares to FCCB's holders during F.Y. 2010-11. (pg 485-486 of PB)	ROOM issued equity shares on conversion of bonds to various bond holders (Para 5.6, Page 11)
	14.10.2011	09.05.2011
Redemption of FCCBs	Balance FCCB of USD 299.90 million was redeemed to the FCCB's Holders. (pg 485-486 of PB)	RCOM repaid the FCCB to of Deutsche Bank AG, London, Principal Agent as per the Paying, Conversion and Transfer Agency Agreement dated 09.05.2006 b

19. The Ld. AR submitted that in the above facts of RCOM's case, Tribunal has held that the provisions of section 68 are not applicable. The Ld. A.R. further pointed out that the order of Tribunal in RCOM case was not merely on applicability of section 263 but the Tribunal went to the facts of the issuance of FCCB and considered the applicability of provisions of section 68 in the said facts and came to conclusion that the subscribers to the Bonds were lead manager and the source thereof is fully explained. The Ld. A.R. has also submitted a chart summarizing the decision of Tribunal in RCOM's case and how the facts of RCOM are similar to the facts of the assessee. The same are given hereunder:-

Sr. No.	RCOM		RNRL	
	Particulars	ITAT Order	Particulars	Paper Book
1.	RCOM raised funds by way of FCCB during F.Y. 2006-07 from DB HK, JP Morgan USA and DB Hong Kong of USD 500 million each.	Pg 4 Para 5.1)	RNRL raised funds by way of FCCB during F.Y. 2006-07 vide offering circular dt.12.10.2006, issued on 16.10.2006	155-337
2.	RCOM issued FCCB and leadmanager agreed to subscribe and pay for thebonds issued by ROOM.	Pg 5 (Para 5.3)	RNRL issued bonds and leadmanager i.e. BarclaysBank agreed to subscribeand pay for the bonds	338-352
3.	RCOM issueddocumentdt. 05.05.2006 to DB HK (lead manager) clarifying that Bonds will berepresented by single GlobalCertificate (GO) depositedwith a Common Depository.	Pg 5 & 6 (Para 5.3)	Single GC for FOOB fundsis issued and registered in the name of Common Depository for EuroclearBank andClearstream, Luxemburg.	396-404
4	As per Clause 3.2, noindividual certificatesrespect of interest (share) inany Bonds were to be issuedin exchange for the Globalcertificate except in thecircumstances provided inClause 3.3. According toclause 3.3, individualcertificates were to be issuedonly in the prescribed circumstances, such as, the Common depository or any successor to the common depository notifying to the company in writing that it is at any time unwilling or unable to continue to act as a depository and a successor depository is not appointed by the Company within 90 days orEuroclear, Clearstream Luxembourg (Stock exchange) is closed for business for a continuous period of 14 days, etc.	Pg 6 in (Para 5.3)	3.2.1. Definitive Certificatesin respect of interests in anyBonds will not be issued inexchange for interest in theBonds evidenced by theGlobal Certificates except inthe circumstances providedin clause 3.2.2.	355-356

5	As per the Paying, Conversion and Transfer Agency Agreement dated 9.52006, ROOM agreed to deliver to DB Luxemburg (the Registrar) a duly executed GC.	Pg 6 (Para 5.3)	As per the Paying, Conversion and Transfer Agency Agreement dated 16.10.2006, RNRL agreed to deliver to DB Luxemburg (the Registrar) a duly executed GC.	353-391
6	GC was issued in the name of BT Globenet Nominees Limited, nominee of Deutsche Bank London which was common depository.	Pg 6 (Para 5.3)	GC was issued in the name of BT Globenet Nominees Limited, London nominee of DB London which was common depository.	396-404
7	RCOM instructed the CD (Deutsche Bank London) to hold the GC on its behalf till DB HK instructed the CD to effect the payment to ROOM and thereafter to hold the GC for the account of the subscriber i.e. DB HK	Pg 7 (Para 5.3)	RNRL instructed the Common Depository (DB London) to hold the Global Certificate on its behalf till Barclays instructed the CD to effect the payment to RNRL and thereafter to hold the GO for the account of the subscriber i.e. Barclays	392
8	<p>It is not understandable, in the facts and circumstances of the case, that how ROOM could have entered the names and addresses of the actual subscribers in its books of account, when the subscriber, as far as the ROOM is concerned, was DB HK.</p> <p>The GO was issued by the RCOM in the name of DB HK. It was for DB HK to subscribe to the entire FCCB or find customers for a part or total of such issue.</p> <p>The decision on inviting other customers from outside India to subscribe to the FCCB and to what extent was the sole responsibility of DB HK, without any instructions or involvement of the assessee in India. In so far as the assessee is concerned, it was only supposed to get the amount against FCCB from DB HK, which it, in fact, received.</p> <p>The Id. CIT has not referred to any material which indicates that the assessee had details of the 'actual subscribers' at the time of issuance of FCCB or it was obliged to keep such details. No material has been brought to our notice even by the Id. DR to show that at that stage the assessee had any direct contact with the actual subscribers to the FCCB, different from DB HK.</p>	Pg 8 & 9 (Para 5.6)	<p>In RNRL case, the only subscriber is Barclays.</p> <p>GC was issued in the name of BT Globenet Nominees Limited (nominee)</p> <p>In the present case also, RNRL has received funds from subscribers Barclays.</p> <p>In RNRL case also the actual subscriber is Barclays and details of further subscribers by Barclays at the time of issuance of FCCB is not available and RNRL is not obliged to keep such details.</p>	
9	It was only at the stage of issuance of shares or the granting of refund, that the assessee was to do the needful upon intimation by DB HK about the persons who had purchased separate interest (shares) in the GC.	Pg 10 (Para 5.6)	FCCBs of USD 100,000 were converted into shares and Reliance Power Ltd. has issued 43,860 shares to FCCB's holders during F.Y.2010-11.	485-486

	<p>It is a matter of record that the assessee issued shares on conversion to certain parties, such as, JP Morgan Securities Ltd., The Hong Kong and Shanghai Banking Corporation Limited and DB HK itself in next year on various dates from 18.10.2007 to 31.1.2008. Only on the issuance of shares, these international financial institutions could be said to have come into direct contact with the assessee company. At the stage of issuance of Bonds in the previous year relevant to the <i>assessment</i> consideration, such customers of DB HK were not entitled to directly approach the assessee company in respect of any matter concerning the issuance of Bonds. When such is the situation, we fail to appreciate as to how the assessee could record the names of actual subscribers other than DB HK in its books of account and further prove their identity, capacity and credit worthiness.</p>		<p>Balance FCCB of USD 299.90 million was redeemed to the FCCB's Holders in F.Y. 2011-12.</p>	
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20. We have heard the rival contentions of both the parties. The assessee has raised funds by issue of FCCBs during the previous year relevant to assessment year under consideration. The assessee has received proceeds of FCCB issue of US\$ 300 millions from Barclays Bank as lead manager. Assessee has entered into a subscription agreement with Barclays Bank on 10.10.2006. As per the subscription agreement assessee agreed to issue the bond and lead manager agreed to subscribe and subscriber agreed to pay for bond on closing date of issue of price of 100% of aggregate principal amount of bond less commission and concession referred in Clause 1.2. The issuer assessee undertook to prepare and deliver to the lead manager and offering circular not later than four business days prior to the closing date. The assessee issued the offering document to Barclays Bank dated 12.10.2006 clarifying that the bond will be represented by single global certificate. Upon assurance, the bonds were represented by global certificate deposited with a common depository. The terms and conditions of bond given as per schedule to the agreement provide that bonds were to be issued in registered form in denomination of US\$ of 100 each. As per clause 3.2, no individual certificate in respect of interest in any bond was to be issued in exchange for the global

certificate except in circumstances provided in the clause. The individual certificates were issued only in prescribed circumstances such as common depository or any successor to the common depository notified to the assessee company in writing that in any time unwilling or unable to continue to act as a depository and successor depository is not embedded by the assessee company within 90 days or Euroclear and Clearstream, Luxemburg (Stock Exchange) is closed for a business for a continued period of 14 days. As per payee, conversion and transfer agency agreement dated 16.10.2006 being the closing date of FCCB and delivered to DB Luxemburg registrar, a copy of certificate issued by assessee in the name of BT Globenet Nominee Ltd of DB London is the common depository. The registrar authenticated the global certificate upon which the written order of the company and arranged for the delivery of global certificate to depository. The assessee instructed DB London to hold the GC on his behalf till Barclays Bank instructed it to effect the payment and thereafter hold it for subscriber i.e. Barclays Bank. The payment of US\$ 290.40 millions was made by way of subscription for FCCB. The assessee has received US\$ 290.40 million from Barclays Bank through Deutsche Bank and issued a receipt on 15.10.2010. FCCB of US\$ 300 million were transferred to Reliance Power under demerger scheme approved by Hon'ble Bombay High Court on 15.10.2011. The FCCB of US\$ 1 lakh were converted into shares in Reliance Power Ltd. and issued 43862 shares to FCCB holders during F.Y. 2010-11. Balance FCCB of US\$ 299.90 millions were redeemed to FCCB holder.

21. The AO in the original assessment order has accepted that assessee has received this amount of US\$ 300 millions from Barclays Bank. The assessment was completed under section 143(3) of the Act on 07.12.2009. The AO has examined the same and accepted that assessee has received US\$ 300 million from Barclays Bank. After reopening the assessment the AO has considered the report of SEBI and report of DIT(Intelligence). The copy of the

report of SEBI and DIT (Intelligence) was not supplied to the assessee. In the assessment order the AO has not provided any documentary evidence to show that there was any adverse evidence against the assessee company. The AO wanted to verify the detail of actual holder and ultimate beneficiary which was not provided by the assessee. The assessee did not maintain register wherein the name and address of the bondholder was specifically mentioned and payment of principal and accrued interest was to be made to registered account holder which means the assessee was not in possession of information regarding ultimate investor of FCCB. Against this, the assessee has submitted various documents to prove that Barclays Bank PLC is the subscriber. The assessee has submitted copy of offered document, copy of subscription agreement with Barclays, copy of correspondence between Barclays Bank and Deutsche Bank regarding transfer of funds of Barclays Bank account with Deutsche Bank, issue of global certificate in the name of BT Globenet Nominee Ltd. and receipt of global certificate by Deutsche Bank, Luxemburg. We find that assessee has submitted the information regarding the source of the fund and assessee has submitted all the evidences before AO and assessee has proved the source of FCCB funds. The AO has applied section 68 on the ground that assessee has failed to explain the nature and source of the fund. We find that assessee has explained the nature and source of the fund and it cannot be added under section 68. We find that the AO has treated Rs.1304.10 crores as deemed income of the assessee on the ground that assessee has not supplied the information about detail of actual bond holder and ultimate beneficiary, therefore it was added under section 68 of the Act. We find that similar issue had come up before the Tribunal in the case of Reliance Communication Ltd. in ITA No.2915/M/2012 for AY 2007-08 dated 05.02.2013. The facts of this case are similar to the facts of the assessee's case. In the Reliance Communication case assessee has raised the fund of Rs.6485 crores by way of FCCB and the AO wanted to verify the source of FCCB fund, name and address, genuineness of creditworthiness and actual

subscriber. The Tribunal in its order has held that assessee has adequately discharged the onus cast upon it. In terms of section 68 the probe suggested by CIT could have been possible in the assessment of DB HK who eventually partly subscribed to the bond itself and partly issued this to international financial institution. The Tribunal has further held that Ld. CIT (A) was not justified in putting the obligation on the assessee to prove the identity, capacity and creditworthiness of actual subscriber which the fact was beyond the reach at the relevant time.

In the instant case, the facts are similar in the assessee's case. In the assessee's case, the facts are that the assessee has received net of US\$ 290.40 million from Barclay Bank from Deutsche Bank AG London. Subscription agreement dated 10.10.2006 provides that issuer i.e. the assessee agrees to issue the bonds and the manger i.e. Barclay Bank PLC agrees with the issuer to subscribe and to pay for or to procure subscribers to subscribe and to pay for bonds at the issue price 100% of the aggregate principal amount of the bonds less the commission. In the offering circular dated 12.10.2006 in the chapter "Subscription and Sale" at page 122 of the Offering Circular, it is provided that the assessee has entered into subscription agreement with Barclay Bank PLC as per which the assessee has agreed to sell to the manager i.e. Barclay Bank PLC and Barclay Bank PLC has agreed to subscribe for US\$ 300 million aggregate principal amount of the bonds. It further provides that the Manager i.e. Barclay Bank PLC or its affiliates may, for its own accounts, enter into asset swaps, credit derivatives or other derivative transactions relating to the bonds and / or the shares at the same time as the offer and sale of the bonds or in secondary market transactions. As a result of such transactions, the Manager or its affiliates hold long or short positions in such bonds or derivatives or in the shares. These transactions comprise a substantial portion of the offering and no disclosure made of such positions. The manager or its affiliates have purchased bonds and been allocated bonds for asset

management and / or proprietary purposes and not with a view to distribution. A bond certificate issued to each bondholder in respect of its register holding of bonds. Each bond and its certificate numbered serially with an identifying number which is recorded on the relevant certificate and in the register of bondholder which the issuer kept by the Registrar. The issuer kept the specified office of the Registrar a register on which entered the names and addresses of the holders of the bonds and the particulars of the bonds held by them and of all transfers of the bonds. From the facts and the documents submitted by the assessee with regard to transfer of funds by Barclays Bank we hold that assessee has received the amount from Barclays Bank and discharged the burden by providing all the information / documents. Thus, assessee was only required to prove the identity and creditworthiness of Barclays Bank who subscribed to issue of FCCB which is not in doubt. Therefore, in our opinion, assessee has adequately discharged onus cast upon it under section 68. Section 68 of the Act clearly provides that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of previous year. A bare perusal of this provision divulges that there is an obligation on the assessee to prove the identity, capacity and credit worthiness of the person from whom the money is actually received but not source's source. We find that similar issue is decided by the co-ordinate bench in case of RCOM wherein the Tribunal has clearly held that section 68 does not apply to the facts of this case by observing as under:

“5.1. The factual matrix as regards this item is that the assessee raised funds through three issues of FCCBs during the previous year relevant to the assessment year under consideration. FCCB means a bond expressed in foreign currency, the principal and interest in respect of which is payable in foreign currency, issued by an Issuing company and subscribed to by a person who is resident outside India, in foreign currency and exchangeable into equity shares of the company after a specified period or to the redeemed. The assessee

received proceeds of FCCB issues in Deutsche Bank, Singapore (DB) of US\$ 500 million; and JP Morgan New York and Hong Kong and Shanghai Banking Corporation of US\$ 1000 million. These FCCBs were subscribed to by the Lead Managers namely, Deutsche Bank Hong Kong (DB HK) for US\$ 500 million; JP Morgan Securities Ltd. U.K. and Hong Kong and Shanghai Banking Corporation for US\$] 000 million.

5.2. The AO enquired about this aspect of the matter and the assessee furnished its reply dated 17.4.2009, a copy of which has been placed at page 25 of the Paper Book (PB). By the said reply, the assessee submitted that it issued FCCBs in three tranches aggregating to US\$ 1500 million. The name and address of the subscribers to the three tranches of FCCBs and the corresponding amounts were duly indicated by showing name and address of the subscribers such as DB HK for the FCCB US\$ 500 million. The details of the bank in which the proceeds of FCCBs were parked in the foreign countries and from where these were transferred to Indian Bank, were also furnished. Along with the said reply, the assessee submitted copies of Offer Memorandum of the FCCBs issued, Global Certificate along with the Registrars confirmation of entries of the Bondholder in Register, Foreign Inward Remittance Certificate and the details of FCCBs as per the Offer documents and Global Certificates.

5.3. Both the sides are in agreement that the facts and circumstances of the three FCCB issues are similar. For the sake of convenience and on representative basis, the parties chose to take up the FCCB issue of US\$ 500 million with DB HK as Lead Manager for making their respective submissions. The assessee entered into a Subscription Agreement with DB HK on 21.3.2006, as per which DB HK agreed to subscribe to the FCCB issue of US\$ 500 million. As per Clause-I of the Agreement, the assessee agreed to issue the Bonds and the Lead Manager agreed to subscribe and pay for or to procure subscribers to subscribe and pay for the Bonds on the closing date at the issue price of hundred per cent of the aggregate principal amount of the Bonds less the commission and concession referred to in Clause-5. As per Clause 1.2, the Issuer assessee undertook to prepare and deliver to the Lead Manager an Offering Circular not later than four business days prior to the closing date. The assessee issued Offering document dt.05.05.2006 to DB HK, clarifying that the Bonds would be represented by single Global Certificate (GC). Upon issuance, the Bonds were represented by a Global Certificate deposited with a Common Depository. The terms and conditions of the Bonds given as per Schedule-1 to the Agreement provide that the Bonds were to be issued in the registered form in the denomination of US\$ 1000 each. As per Clause 3.2, no individual certificates in respect of interest (share) in any Bonds were to be issued in exchange for the Global certificate except in the circumstances provided in Clause 3.3. According to clause 3.3, individual certificates were to be issued only in the prescribed circumstances, such as, the Common depository or any successor to the common depository notifying to the company in writing that it is at any time unwilling or unable to continue to act as a depository and a successor depository is not appointed by the Company within 90 days or Euroclear, Clearstream Luxembourg (Stock exchange) is closed for business for a continuous period of 14 days, etc. As per the Paying, Conversion and Transfer Agency Agreement dated 9.5.2006, a copy of which

has been placed in the PB, the assessee Company agreed to deliver to the Registrar a duly executed GC. Such GC was issued on 09.05.2006, being the closing date of FCCB, and delivered to DB, Luxemburg (Registrar). A copy of the Global Certificate issued by the assessee in the name of BT Globenet Nominees Limited for US\$ 500 million is available at pages 42 onwards of PB. It was registered in the name of BT Globenet as the nominee of DB London, which was the Common Depository. The Registrar authenticated the Global Certificate upon the written order of the company and arranged for the delivery of the Global Certificate to the depository. The assessee instructed DB London to hold the GC on its behalf till DB HK instructs it to effect the payment and thereafter to hold it for the subscriber, that is, DB HK. Payment of US\$497.500 million (net after deduction of expenses and commission) was made by DB HK that is, the subscriber, on the instructions of the assessee. Copies of the letter authorizing payment and the cross receipt in respect of US\$ 497,500,000 are available at pages 61 and 62 of PB. The assessee received such payment on 09.05.2006 which was reflected in its books of account. The assessee duly informed the Reserve Bank of India (RBI) about such issues of FCCBs from time to time at the relevant stages. It can be noticed from letter dated 28.3.2005 issued by RBI authorizing the assessee to issue FCCBs under Automatic Approval Route.

5.4 The case of Id. CIT is that the AO should have examined the identity, capacity and credit worthiness of the 'actual subscribers' to the FCCB issue in terms of section 68. In his opinion, the acceptance by the AO of the assessee's contention that the amount was eventually received from DB HK, the subscriber, was not appropriate. Now the question arises as to whether the Id. CIT was justified in holding that the onus u/s 68 of the Act could have been discharged only on proving three pre-requisites - identity, capacity and creditworthiness - in respect of actual subscribers and not DB HK, who undertook to subscribe to the FCCB and remitted the proceeds after partly finding some further subscribers and partly itself subscribing to the FCCB.

5.5. Section 68 of the Act clearly provides that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. A bare perusal of this provision divulges that there is an obligation on the assessee to prove the identity, capacity and credit worthiness of the person from whom the money is actually received. At the cost of repetition, we summarize the entire proceedings in respect of FCCB of US\$ 500 million which was undertaken to be subscribed to by DB HK. A GC for the whole issue was issued in favour of the nominee of DB HK, who could have either subscribed to all the Bonds itself or solicited customers. It was the sole discretion/obligation of the DB HK to find such customers, if it wanted. Admittedly, DB HK subscribed to/collected the sum in respect of US\$ 500 million and after deduction of their commission, remitted the balance USD 497,500,000 to the assessee.

5.6. It is palpable from the above narration of facts that the assessee was concerned with and did actually receive US\$ 497.500 million from and on behalf of DB HK, which was duly recorded in its name. It is not understandable, in the facts and circumstances of the extant case, that how the assessee could have entered the names and addresses of the actual subscribers in its books of account, when the subscriber, as far as the assessee is concerned, was DB HK. The Global Certificate was issued by the assessee in the name of DB HK. It was for DB HK to subscribe to the entire FCCB or find customers for a part or total of such issue. The decision on inviting other customers from outside India to subscribe to the FCCB and to what extent was the sole responsibility of DB HK, without any instructions or involvement of the assessee in India. In so far as the assessee is concerned, it was only supposed to get the amount against FCCB from DB HK, which it, in fact, received. The fact that Global Certificate was issued in the name of nominee of DB HK amply proves that it was the obligation of DB HK to pay towards FCCB issue of US\$ 500 million. The Id. CIT has not referred to any material which indicates that the assessee had details of the 'actual subscribers' at the time of issuance of FCCB or it was obliged to keep such details. No material has been brought to our notice even by the Id. DR to show that at that stage the assessee had any direct contact with the actual subscribers to the FCCB, different from DB HK. It can be observed from the details of the shares issued, on conversion of FCCB at a much later stage, that DB HK itself opted to subscribe for a certain part of the FCCB and issued a portion thereof to other customers who also happen to be international financial institutions only. At the stage of issuance of Bonds, there was privity of contract between the assessee and DB HK on one hand and between DB HK and actual subscribers on the other. It was the duty of DB HK to eventually get the shares allotted or refund granted to itself and other international financial institutions at the relevant point of time. It was only at the stage of issuance of shares or the granting of refund, that the assessee was to do the needful upon intimation by DB HK about the persons who had purchased separate interest (shares) in the GC. It is a matter of record that the assessee issued shares on conversion to certain parties, such as, JP Morgan Securities Ltd., The Hong Kong and Shanghai Banking Corporation Limited and DB HK itself in next year on various dates from 18.10.2007 to 31.1.2008. Only on the issuance of shares, these international financial institutions could be said to have come into direct contact with the assessee company. At the stage of issuance of Bonds in the previous year relevant to the assessment year under consideration, such customers of DB HK were not entitled to directly approach the assessee company in respect of any matter concerning the issuance of Bonds. When such is the situation, we fail to appreciate as to how the assessee could record the names of actual subscribers other than DB HK in its books of account and further prove their identity, capacity and credit worthiness. On a specific query from the bench, the learned Departmental Representative could not bring to our notice any statutory requirement or guideline issued by the RBI or any other Government authority fastening obligation on the assessee to maintain a record of the actual subscribers at that stage and recording their names instead of DB HK, who actually signed subscription agreement with the assessee. During the currency of the GC, only DB HK remained the subscriber to the FCCB issue of the assessee. The assessee was only required to prove the identity, capacity and creditworthiness of DB HK who subscribed to its full issue of FCCB (some part directly and some part through its own customers), which is not in doubt. The fact that the assessee received the amount of subscription of Bonds from DB HK has

not been denied by Id CIT. The further fact that Global certificate in respect of Bonds was issued in favour of DB HK and upon conversion of such Bonds, some of the shares were issued in favour of DB HK and remaining in favour of other international financial institutions has also not been disputed by the Id. CIT. In our considered opinion, the assessee adequately discharged the onus cast upon it in terms of section 68. The probe suggested by the Id. CIT could have been possible in the assessment of DB HK, who eventually partly subscribed to the Bonds itself and partly issued these to the international financial institutions. In view of these facts, we are of the considered opinion that Id. CIT was not justified in putting obligation on the assessee to prove the identity, capacity and creditworthiness of the actual subscribers, which fact was beyond its reach at the relevant time. We, therefore, do not approve the stand taken by Id. CIT on this issue.”

22. We are of the view that assessee has received US\$ 290.40 million after deduction of their commission from Barclay Bank which was duly recorded in the books of the assessee. The assessee has given documentary evidence before us to show that Barclay Bank has accepted the offered document of the assessee company. We find that CIT(A) held that the facts of the Reliance Communication’s case and assessee’s case are similar to which we subscribe. Therefore, we are of the view that CIT(A) is justified in deleting the addition u/s.68.

23. We find that the Tribunal’s decision was challenged before Hon’ble Bombay High Court. In appeal memo under section 260A, the Department has raised the issue of actual subscribers’ identity, capacity and genuineness as can be seen from the substantial question of law as well as the grounds of appeal raised in the appeal memo which reads as under:

- “A) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified cancelling order u/s 263 on the issue of FCCB even though the actual subscriber's identity, capacity and genuineness of transactions were not collected and established by the AO?
- B)
- C)

Department in SLP filed against the order of Bombay High Court has taken the following specific questions of law:-

“(vi) Whether on the facts and in the circumstances of the case, the Hon’ble High Court has not erred in upholding the order of the Ld. Tribunal on the ground that there was no error of law in its order on the issue of Foreign Currency Convertible Bonds (FCCBs) without appreciating that the assessee / respondent herein had not discharged its onus of furnishing the actual subscriber’s identity, capacity and genuineness of the transaction, which is prerequisite under section 68 of the Income Tax Act, 1961?”

(vii).....

“(viii) whether the Hon’ble High Court has not erred in not appreciating that under section 68 of the Income Tax Act, 1961, it is not sufficient for an assessee to disclose that credits in their Books had been received through Banking channels; the identity as well as the creditworthiness of the actual subscribers must nevertheless be proved?”

The Hon’ble Supreme Court of India in its judgment for Special Leave to appeal (C) CC No(s). 21779/2016 (Arising out of impugned final judgment and order dated 28/03/2016 in ITA No.1816/2013 passed by the High Court of Bombay) in the case of Commissioner of Income Tax -10, Mumbai vs. M/s. Reliance Communication Ltd. passed the order which reads as under:

“ORDER

Delay condoned.

We find no reason to entertain this special leave petition, which is, accordingly, dismissed.

Pending application(s), if any, shall stand disposed of.”

Thus the order of Tribunal in case of RCOM has attained finality. Since the facts in case of RCOM are similar to the facts of the assessee’s case, following the said decision of Tribunal which is finally approved by the

Hon'ble Supreme Court, the revenue's appeal as regards addition u/s.68 is dismissed.

24. The revenue has also raised the ground challenging the finding of the CIT(A) that subscribers to bonds are lead manager and beneficial bond holders are irrelevant for the purpose of section 68. While deciding the main ground relating to applicability of section 68, we have held that in the facts and considering the evidences produced by the assessee, the subscribers to bonds were Barclays Bank and source of source i.e. beneficial bond holders if any who may have given funds to Barclays Bank is irrelevant. The Ld. A.R. has relied upon various decisions of Supreme Court, Bombay High Court and other Courts holding that source of source is not the criteria to be considered in applicability of section 68. As held by Tribunal in case of RCOM that the source of source issue is to be addressed in the assessment of DB (in RCOM case), in the assessee's case the same has to be considered in the assessment of Barclays Bank and not in the assessee's case.

25. The next grounds of appeal of the Revenue is against the deletion of FCCB issue expenses and FCCB interest. The AO had disallowed the FCCB issue expenses of Rs.285828246 and FCCB interest of Rs.331693100. The AO has disallowed the above expenses relating to FCCB on the premise that the FCCB funds are non genuine as held by him while making the addition of FCCB proceeds u/s.68.

Since we have held that the nature and source of funds of FCCB is fully explained and that the addition u/s.68 was rightly deleted by CIT(A), the addition of FCCB expenses and FCCB interest are also rightly deleted by CIT(A). CIT(A) has partially upheld the disallowance of FCCB interest and FCCB expenses on the reason of deployment of the funds in various securities. The said addition is a subject matter of assessee's appeal and is separately

decided in subsequent paras. Thus, the addition of FCCB interest and FCCB expenses deleted by CIT(A) is correct as addition u/s.68 relating to FCCB funds is deleted.

26. In the result, all grounds raised in Department's appeal are dismissed.

27. Now assessee's appeal i.e. ITA No.1000/M/2016 is being disposed of as under:

ITA No.1000/M/2016 (Assessee's appeal)

28. In Ground No.1, the assessee has challenged the reopening of the assessment. In Ground No.2, the assessee has challenged the re-assessment order is bad-in-law as the AO has violated the principle of natural justice. In ground No.5, the assessee has challenged the reopening of assessment in respect of disallowance of part of FCCB interest by claiming that under Third Proviso to section 147 the assessment could not have been reopened. In ground No.9, the assessee has challenged the reopening of assessment in respect of disallowance of part of FCCB expenses by claiming that under Third Proviso to section 147 the assessment could not have been reopened.

29. Since the view taken by Ld. CIT(A) on merits has been upheld and since we have separately deleted the addition confirmed by CIT(A) in respect of part of FCCB interest and part of FCCB expenses, we are of the view that the issue contested by the assessee relating to the validity of reopening of assessment does not require adjudication as the same would result in an academic exercise.

30. The assessee in Ground No.3, 4 and 6 has challenged the addition confirmed by CIT(A) out of FCCB interest paid.

31. The AO in his reasons recorded has laid great emphasis on application of funds. The AO in this regard has relied upon the report of SEBI and report

of DIT (Intelligence), New Delhi. As per AO, the funds raised by issue of FCCB were used for investment purposes outside India and the same were used in various Yield Management Certificates (YMCs). The AO in course of re-assessment proceedings referred to various investments for different period the chart of which appears on the page 18 of the re-assessment order. The reasoning of the AO is that the FCCB funds were reused in business and the same has been diverted for non business purposes by investing the funds in YMCs. AO had disallowed the entire FCCB interest on the ground that the FCCB funds were found to be non genuine and addition was made u/s.68. Thus the claim of the AO was that the entire FCCB interest is disallowable as non genuine expenditure following the addition u/s.68 of the FCCB funds.

32. The Ld. A.R. submitted that CIT(A) has already held that provisions of section 68 are not applicable to FCCB funds and therefore CIT(A) has rightly deleted the disallowance of interest. He further pointed out that CIT(A) has directed to restrict the disallowance for the period of utilization of FCCB funds for non business purpose i.e. investment in YMCs. As per Ld. A.R. the funds raised by issue of FCCB were invested in various investment vehicles which was resulting in income and was offered to tax. The assessee has offered to tax the income for the period for which the investments were made in YMCs. The claim of the assessee regarding interest is justified u/s.36 as the interest income is offered to tax as business income and the AO has accepted the same both in original assessment as well as re-assessment order. The Ld. A.R. further pointed out that even if the investment income is to be taxed under the head income from other sources, the proportionate interest is allowable u/s.57(iii). The Ld. AR therefore submitted that the order of CIT(A) has to be reversed.

33. The Ld. DR relied upon the order of CIT(A). He further submitted that the claim cannot be admitted both u/s.36 as well as u/s.57(iii).

34. We have heard the rival contentions of both the parties. We find that the assessee has offered to tax the investment income which is not disputed by the A.O. The AO has also taxed the investments income as business income both in original assessment and re-assessment. After taxing the income from application of funds, the AO cannot turn his back and claim that the expenditure on borrowing is not allowable as business expense. The assessee has been requesting the AO to provide the copy of report of SEBI and report of Director of DIT (Intelligence) which is the basis for reopening the assessment as well as making the addition. The same has not been supplied to the assessee. No adverse evidence has been confronted to the assessee. The perusal of the assessment order also does not reveal any adverse evidence. The finding of the AO in this regard is unsupported by any evidence. Considering the above and the fact that income from investments has been offered to tax and the same has been taxed as business income, there is no justification for disallowance of so-called proportionate interest. We therefore hold that the order of CIT(A) upholding the disallowance of proportionate interest is to be reversed. We hold accordingly.

35. The assessee in Ground No.7 and 8 has challenged the addition confirmed by CIT(A) out of FCCB expenses.

36. CIT(A) has confirmed the disallowance out of FCCB expenses in the ratio of FCCB interest disallowed to total interest claimed. As per CIT(A), the facts and circumstances as discussed in context of FCCB interest expense is equally applicable to FCCB expenses. He accordingly disallowed the FCCB expenses in the ratio of FCCB interest expenses disallowed to total FCCB interest expenses claimed. As stated in respect of FCCB interest the AO has disallowed entire FCCB expenses on the ground that FCCB funds have been considered to be non genuine and provisions of section 68 were applied. CIT(A) has treated the FCCB funds as properly explained and has deleted the

FCCB expenses except a part thereof which was disallowed as the funds were used for investments purpose outside India which as per him was non business purpose.

37. The Ld. AR submitted that the said proportionate disallowance of expenses is incorrect and stated that submission as regards FCCB interest equally applies to FCCB expenses.

38. We have heard the rival contentions of both the parties. We find that CIT(A) has disallowed the proportionate amount based on the FCCB interest disallowed. In earlier para we have held that FCCB interest is not disallowable and therefore we have reversed the order of CIT(A) on the disallowance of FCCB interest. Based on same reasoning, proportionate FCCB expenses is also not disallowable and therefore the order of CIT(A) in this regard is also reversed.

39. Ground No.10 is regarding charging of interest u/s.234B. The AO has not discussed the levy of interest in the re-assessment order. However, the AO charged the interest u/s.234B amounting to Rs.381,79,84,083. The AO passed order u/s.154 whereby he reduced the interest charged u/s.234B to Rs.226,75,11,014. The ground of the assessee is that interest was charged for the first time in the order u/s.147 as there was no charge of interest in the order u/s.143(3) in respect of original assessment.

40. The Ld. CIT(A) relied upon the decision of South Indian Bank Ltd. 191 Taxman 301 (Ker).CIT(A) had rejected the submission of the assessee that the interest cannot be levied for the first time in the order u/s.147. CIT(A) therefore directed the AO to take the action in accordance with law.

41. The Ld. AR submitted that in the original assessment, the interest u/s.234B was not chargeable as the advance tax paid was more than the assessed tax. In the re-assessment u/s.147, additions were made and therefore the assessed tax was in excess of the advance tax paid. As per the Ld. AR, section 234B(3) refers to increase of interest and does not permit charging of interest for the first time. As per the Ld. AR, Explanation 2 to section 234B is applicable only when there is only assessment order u/s.147 without there being an order u/s.143(3) or intimation u/s.143(1). In the assessee's case though the re-assessment u/s.147 was for the first time, it was preceded by an order u/s.143(3) and therefore the Explanation 2 to section 234B cannot come into play.

42. The Ld. DR relied upon the order of CIT(A) and the decision in case of South Indian Bank Ltd.

43. We have heard the rival contention of both the parties. Considering our decision on grounds raised by department and by the assessee, the additions made in the re-assessment order are not sustained with the result the income computation reverts back to the original assessment where the interest was not levied. Considering the above position, we are of the view that the issue becomes academic and accordingly the order of the CIT(A) in this issue is set aside.

44. In Ground No.11 the assessee has challenged the charge of interest u/s.234D. The AO has not separately discussed the charge of interest u/s.234D in the re-assessment order. CIT(A) directed the AO to take action as per law as in his opinion charging of interest being consequential in nature.

45. The Ld. AR submitted that the Ld. CIT(A) has not considered the provisions of section 234D(1)(b). As per the said provisions, interest is

chargeable when the amount refunded u/s.143(1) exceeds the amount refundable on regular assessment. The assessee pointed out that in their case refund granted u/s.143(1) was Rs.83,60,109 and interest u/s.234D thereon was charged at Rs.1,67,202 in the original assessment order. Subsequently, there were further refunds but the same were not granted u/s.143(1). It was therefore submitted that charge of interest u/s.234D should be restricted to Rs.1,67,202 being the interest on refund granted in intimation u/s.143(1) and found to be excessive.

46. The Ld. DR relied upon the order of CIT(A).

47. We have heard the rival contention of both the parties. This issue requires verification of facts as to how much refund was granted u/s.143(1) which was subsequently recovered in regular assessment. Accordingly the AO is directed to verify the facts and restrict the charge of interest on refunds granted in intimation u/s.143(1) which has been recovered in regular assessment.

48. In the result, appeal of the assessee is partly allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 12.05.2017.

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Sd/-
(D.T. Garasia)
JUDICIAL MEMBER

Mumbai, Dated: 12.05.2017.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai

The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt.Registrar, ITAT, Mumbai.