

आयकर अपीलीय अधिकरण, " बी" न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं श्री जी. पवनकुमार, न्यायिक सदस्य के समक्ष
BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER AND
SHRI. G. PAVAN KUMAR, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 371/Mds/2014

निर्धारण वर्ष / Assessment year : 2008-09

Deputy Commissioner of Income Tax,
Company Circle II(1),
Chennai – 600 034.

Vs. M/s. Emerald Resilient Tyre
Manufactures Pvt Ltd.,
No. 3, 9th Lane, Shastri Nagar,
Adayar,
Chennai – 600 020.

[PAN: AABCT 3770E]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से /Respondent by

: Shri. Supriyo Pal, JCIT
: Shri. Vikram
Vijayaraghavan,
Advocate

सुनवाई की तारीख/Date of Hearing

: 06.04.2017

घोषणा की तारीख /Date of Pronouncement

: 21.06.2017

आदेश/ O R D E R

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

The Revenue has filed an appeal against the order of the Commissioner of Income Tax (Appeals)-II, Chennai in ITA No. 533/2013-14 dated 28.10.2013 passed u/s. 147 and 250 of the Income Tax Act.

2. The Revenue raised the following grounds:

2. The Ld. CIT(A) erred in deleting the addition made towards expenditure incurred on currency swap transactions amounting to Rs. 1.82 crores.

2.1 The Ld. CIT(A) failed to appreciate the fact that the Board's Instruction No 3/2010 dated 23.03.2010 governing the treatment of loss arising out of forward contracts are binding on the department;

2.2 The Ld. CIT(A) failed to appreciate that provisions of section 43(5) does not include SWAP currency transactions as a non speculative transaction. In this case, the assessee had swapped the INR loan for a CHF loan and has suffered losses as a result of volatility of foreign exchange market during the year and the said loss cannot be allowed.

2.3 The Ld. CIT(A) ought to have appreciated the fact that in page 8 of his order, it was held that though SWAP currency transactions are aimed at protecting from the adverse movements of the foreign currency exchange rates, they cannot be termed as business transactions as such since the said loss had not arisen out of manufacturing or trading activity,' which means it is a speculative loss.

2.4 It is submitted that the decision relied upon by the CIT(A) in the case of Munjal Shawa Ltd Vs DCIT (94 TTJ 227) (Del) cannot be applied to the facts of this case since the above decisions were rendered in the context as to whether foreign currency is a commodity for the purpose of sec. 43(5) of the Act.

2.5 It is submitted that the decision in the case of Shree Capital Services Ltd., Vs ACIT (121 ITD 498)(Kol) is also rendered in the context as to whether derivatives would fall within the definition commodity in sec. 43(5) of the Act.

3. The Brief facts of the case are that the assessee is in the Business of manufacture of solid & industrial pneumatic tyres and filed, the Return of income on 23.09.2008 with total income of Rs. 1,20,98,800/- and the Return of income was processed u/s. 143(1) of the Act. Subsequently, notice u/s. 148 of the Act was issued. The Assessing Officer found that the assessee has debited amount of Rs. 1,82,66,657/- towards loss on currency swap transaction. The Ld. AR explained that the assessee entered into CHF (Swiss Franc) agreement with SBI to the extent of Rs. 9 crores and the Assessing Officer found that the company has agreed to deliver on the contract maturity/settlement and this swap contract give protection adverse movements in currency on USD/INR, due to volatility in the foreign currency marked to breach point. The assessee company in response to notice u/s. 148 of the Act filed letter to treat return filed earlier as compliance and the Reasons for re-opening were communicated to the assessee company and subsequently notice u/s. 143(2) dated 15.11.2010 was issued. The Ld. AR appeared from time to time and filed the details and the Ld. AO has verified the financial accounts. The assessee has filed the detailed information on the swap transactions and explained that the swap transactions are not in nature of speculative transaction and the Assessing Officer discussed in the Para 4 of the assessment order and concluded that loss incurred by the assessee is a speculative loss and disallowed the claim and passed order u/s. 143(3) and 147 of the Act dated 26.12.2011.

4. Aggrieved by the order, the assessee has filed an appeal with the CIT(A). In the appellate proceedings, the Ld. AR argued the grounds on the re-opening of assessment and Business loss of Rs. 1,82,66,657/- on currency swap transactions. The Ld. CIT(A) considered the statement of facts and grounds and confirmed the re-assessment proceedings as valid. On the second disputed issue of treatment of currency swap transaction, the Ld. CIT(A) found that the assessee has a currency swap transaction and claimed same as a business loss, whereas, the Assessing Officer has treated a speculative loss. The Ld. CIT(A) considered the findings of the Assessing Officer, submissions of the assessee and the provisions of section 43(5) of the Act and provisions of section 28 to 41 and also discussed on shares and stocks and commodities and relied on the judicial decisions referred at Page 9 of the order which read as under:

"In the present case, the transaction is a SWAP contract. The SWAP contract is in relation to the Foreign Currency. Therefore one has to see whether the 'contract of foreign currency' amounts a speculative transaction? Also one has to see whether foreign currency represents a commodity or a share and stock?"

Shares and stocks means the shares of the companies. Hence the foreign currency will not fall in to the category of 'shares and stocks'. Commodity means the ones which are eligible to be traded in the recognized commodity exchanges. The currency, whether foreign currency, or Indian currency, is not allowed to be traded in the commodity exchanges. Therefore the foreign currency cannot be treated as a commodity. The Delhi Bench of ITAT in the case of Munjal Shawa Ltd vs DCIT (94 TTJ 2 7) has held that the foreign currency is neither a commodity nor a share. The relevant portion of the decision is as under:

Munjal Shawa Ltd vs DCIT (94 TT J 227)(Del):

"Foreign currency or any currency is neither commodity nor shares. The sale of Goods Act specifically excludes cash from the definition of goods besides, no person other than authorized dealers and money changers are allowed in India to trade in foreign currency, much less speculate. 5.8 of the Foreign Exchange "Regulations Act, 1973, provides that except with prior general or special permission of the REI, no person other than an authorized dealer shall purchase, acquire, borrow or sell foreign currency. The presumption of any speculative transaction is, therefore, directly rebutted in view of the legal impossibility and in mew of the fact that foreign currency was neither commodity nor shares".

The special bench of ITAT Kolkata in the case of Shree Capital Services Ltd. v. ACIT (121 ITD 498)(Kol)(SB) has held that a currency cannot be termed as a commodity so as to attract the provisions of S.43(5). The relevant portion of the decision is as under:

Section 43(5) of the Income-tax Act, 1961 - Speculative transactions - Assessment year 2004-05 - Whether clause (d) of proviso to section 43(5) is

prospective in nature and will be effective from date on which Legislature made it effective, i.e., 1-4-2006 - Held, yes-

Whether term (derivatives' in which underlying asset is shares, would fall within meaning of (commodity' used in section 43(5) - Held, yes-

Whether, therefore, where assessee suffered a loss on account of futures and options, i.e., a form of derivatives, in which underlying asset was

shares, said loss was rightly disallowed by revenue authorities by invoking provisions of section 43(5) - Held, yes

Similarly, the Mumbai Bench of ITAT in the case of DCIT V. Intergold (I) Ltd., (124 TTJ 337)(Mum) has held that profits from cancellation of forward exchange contracts are business profits and not speculative profits. The relevant decision is as under:

Section 80HHC of the Income-tax Act, 1961 - Deductions - Exporters - Assessment year 1997-98 - Assessee-company was engaged in business of cutting and polishing of diamonds and manufacturing of studded gold and then exporting it - It had entered into forward exchange contract with certain parties - On cancellation of said contracts it included foreign exchange gain realized to its profit for purpose of deduction under section 80HHC - Assessing Officer excluded that amount on ground that same was a speculative business income not eligible for deduction under section 80HHC - Whether since during course of its business of export assessee entered into such contracts for sale of foreign exchange with banks, it was a regular business income and not speculation income - Held, yes-

Whether however, 90 per cent of foreign exchange gain on cancellation of forward exchange contract would be liable to be reduced from business income for computing 'profit of business' as per clause (baa) of Explanation to section 80HHC - Held, yes

The Calcutta High Court in the case of CIT v. Soorajmull, (129 ITR 169) has held that where in the normal course of business of import and export of jute, the assessee entered into foreign exchange contract to cover up the losses and differences in the exchange valuation, the transaction is not a speculative transaction. The relevant portion of the decision is as under:

Explanation 2 to section 24(1) of the Indian Income-tax Act, 1922 [Corresponding to section 43(5) of the income-tax act, 1961] - Speculative transactions - Assessee carrying on import and export business in jute entered into foreign exchange contract for 1 lakh pounds but could utilise the same for only 55,000 pounds - Paid Rs. 80,491 as damages representing exchange difference and interest -

Whether tribunal right in holding that impugned sum was not speculation loss and was incidental to carrying on assessee's business - Held, on facts, yes

In view of the above discussions and judicial pronouncements it is clear that Foreign Currency is neither a share / stock nor a commodity

'for the purpose of sec. 43(5) of the Act. Therefore: the transactions of 'foreign exchange contracts' cannot be viewed as speculative - transactions. Consequently, assessee's losses from the SWAP transaction is not a speculative losses for the purpose of sec.43(5). Therefore the Assessing Officer is not justified in treating the losses from the SWAP transaction as speculative losses. The Assessing Officer is directed to consider the loss from the SWAP Transactions as regular business losses and allow their set off against other business profits of the assessee. The assessee succeeds in this ground."

and the Ld. CIT(A) has partly allowed the appeal.

5. Aggrieved by the order, the Revenue has filed an appeal before the Tribunal. The Ld. DR argued that the Ld. CIT(A) has erred in deleting the addition on expenditure on SWAP transaction and overlooking the Board circular and cannot be treated as the business transaction and it covers the character of speculative loss and prayed for setting aside the order of the CIT(A) and allowed the Revenue appeal. Contra, the Ld. AR relied on the orders of the CIT(A) and explained that the transaction of obtaining of term loan from SBI is to reduce the interest of borrowing. The company has decided to enter into a SWAP transaction with SBI and the preferred currency being CHF (Swiss Franc) and applied the RBI guidelines and swap transactions and supported his arguments with the decisions of

- (i) Woodward Governor India Ltd (312 ITR 254),
- (ii) EID Parrys Limited Vs DCIT (174 ITR 11),
- (iii) ONGC Ltd. Vs CIT (230 CTR 0313),
- (iv) CIT Vs Badridas Gauridu Pvt Ltd (261 IT 256)

- (v) M/s. Ashok Leyland Limited, ITA Nos. 311/Mds/2013, 2915/Mds/2014 & 160/Mds/2013 and
- (vi) Cooper Corporation Pvt. Ltd., in ITA No. 866/PN/2014 and prayed for dismissing the appeal.

6. We heard the rival submissions, perused the material on record and judicial decisions. The assessee company has entered into SWAP transactions as submitted by the Ld. AR on outstanding liability of Rs. 9 crores and to reduce the interest cost of borrowing with CHF Swiss Franc and these transactions are permitted with an underlying loan liability transactions and the assessee transactions are recognised as Hedging transactions and not speculative and due to this swap transactions there is interest saving of Rs. 14.43 lakhs per annum. For the said assessment year the currency rate has been stable but due to unforeseen circumstances during the contract window period the USD/CHF rate fluctuated significantly. Since, the assessee has already closed the contract and had to pay pre-payment premium and the assessee has incurred loss of Rs. 182.65 lakhs.

6.1 We find the similar issue in respect of foreign exchange fluctuation of loan liabilities relating to the acquisition of assets was held in coordinate bench of this Tribunal in M/s. Grace Infrastructure Pvt. Ltd. In ITA No. 439/Mds/2017 dated 12.06.2017 where it was held as under:

"7. We have heard both the sides and perused the material on record. Admittedly, same issue came for consideration before this Tribunal in the case of TVS Motor company ltd., in I.T.A No.1153/Mds./2016 vide order

dated 30.11.2016 wherein the Tribunal placed reliance in the case of Cooper Corporation in ITA No.866/PN/2014 vide order dated 29.04.2016 for assessment year 2008-09 wherein held as follows:-

"10. We have carefully considered the rival submissions. Order of the authorities below and case laws cited. The Central issue involved in the present case is whether provisions for loss in the hands of assessee on account of restatement of outstanding foreign currency loans necessitated by fluctuation in foreign exchange would be allowable as business loss or a loss of capital nature in the facts narrated above. While as per the revenue, the increased liability due to exchange fluctuation correspond with carrying costs of the fixed assets and thus capital in nature, the assessee seeks to submit that the loss is revenue in nature.

10.1 On consideration of facts, it is noticed that certain loans were held in Indian currency in the earlier years. The Assessee entered into an agreement with the lenders to convert the loans in foreign currency equivalents to take advantage of the lower rate of interest rate applicable to later. The assessee has factually demonstrated that the conversion into foreign currency loans have actually benefited the Assessee in terms of saving of interest costs. We also notice that there is no dispute on the fact that the acquisition of capital assets / expansion of projects etc. from the term loans taken are already complete and the assets so acquired have been put to use. As a consequence, the loss occasioned from foreign currency loans so converted is a post facto event subsequent to capital assets having been put to use. We simultaneously notice that there is no adverse finding from the Revenue about the correctness or completeness of accounts of assessee on the touchstone of section 145 of the Act. In other words, the profits/gains from the business have been admittedly computed in accordance with generally accepted accounting practices and guidelines notified.

10.2 The assessee has inter alia applied AS-II dealing with effects of the changes in the exchange rate to record the losses incurred owing to fluctuation in the foreign exchange. AS-11 enjoins reporting of monetary items denominated foreign currency using the closing rate at the end of the

accounting year. It also requires that any difference, loss or gain, arising from such conversion of the liability at the closing rate should be recognized in the profit & loss account for the reporting period. In the same vein, CBDT notification S.O. 892(E) dated 31-03-2015 referred to also inter alia deals with recognition of exchange differences. The notification also sets out that the exchange differences arising on foreign currency transactions have to be recognized as income or business expense in the period in which they arise subject to exception as set out in Section 43A or Rule 115 of the Income Tax Rules, 1962 as the case may be.

10.3 The contention of the revenue that the loss is only contingent and notional and subsisting has been examined. As per section 209 of the Companies Act, 1956, the Assessee being a company is required to compulsorily follow mercantile system of accounting. S. 211 of the Companies Act, 1956 also, in terms, mandates that accounting standards as applicable is required to be followed while drawing statement of affairs. S. 145 of the Income Tax Act, 1961 similarly casts obligation to compute business income either by cash or mercantile system of accounting. Thus, in view of the various provisions of the Companies Act and Income Tax Act, it was mandatory to draw accounts as per AS II. Thus, in our considered view, the loss recognized on account of foreign exchange fluctuation as per notified accounting standard AS 11 is an accrued and subsisting liability and not merely a contingent or a I hypothetical liability. A legal liability also exists against the assessee due to fluctuation and loss arising therefrom. Actual payment of loss is an irrelevant consideration to ascertain the point of accrual of liability. As a corollary, the revenue has committed error in holding the liability as notional or contingent.

10.4 Copious reference has been made to S. 43A by Assessee as well as revenue. Thus, it would be pertinent to examine the issue on the touchstone of S. 43A of the Act. Section 43A, to the extent relevant in the context, reads as under:

"Notwithstanding anything contained in any other provision of this Act, where an assessee has acquired any asset in any previous year from a

country outside india for the purposes of his business or profession and, in consequence of a change in the rate of exchange during any previous year after the acquisition of such asset, there is an increase or reduction in the liability of the assessee as expressed in Indian currency (as compared to the liability existing at the time of acquisition of the asset) at the time of making payment—

(a) towards the whole or a part of the cost of the asset; or

(b) towards repayment of the whole or a part of the moneys borrowed by him from any person, direct or indirect, in any foreign currency specifically for the purpose of acquiring the asset along with interest, if any.

the amount by which the liability as aforesaid is so increased or reduced during such previous year and which is taken into account at the time of making the payment, irrespective of the method of accounting adopted by the assessee, shall be added to, or, as the case may be, deducted from—

(i) the actual cost of the asset as defined in clause (I) of section 43; or

(ii) the amount of expenditure of a capital nature referred to in clause (iv) of subsection (I) of section 35: or

(iii) the amount of expenditure of a capital nature referred to in section 35A; or

(iv) the amount of expenditure of a capital nature referred to in clause

(ix) of subsection (I) of section 36: or

(v) the cost of acquisition of a capital asset (not being a capital asset referred to in section 50) for the purposes of section 48,

and the amount arrived at after such addition or deduction shall be taken to be the actual cost of the asset or the amount of expenditure of a capital nature or, as the case may be, the cost of acquisition of the capital asset as aforesaid:

Provided that where an addition to or deduction from the actual cost or expenditure or cost of acquisition has been made under this section, as it stood immediately before its substitution by the Finance Act, 2002, on account of an increase or reduction in the liability as aforesaid, the amount to be added to or, as the case may be, deducted under this section from, the actual cost or expenditure or cost of acquisition at the time of making the payment shall be so adjusted that the total amount added to, or, as the case may be, deducted from, the actual cost or expenditure or cost of acquisition, is equal to the increase or reduction in the aforesaid liability taken into account at the time of making payment.

A bare reading of the aforesaid provision of Section 43A, which opens with a non-obstante and overriding clause, would show that it comes into play only when the assets are acquired from a country outside India and does not apply to acquisition of indigenous assets. Another notable feature is that S. 43A provides for making corresponding adjustments to the costs of assets only in relation to exchange gains/ losses arising at the time of making payment. It therefore deals with realised exchange gain/ loss. The treatment of unrealised exchange gain/ loss is not covered under the scope of S. 43A of the Act. It is thus apparent that special provision of S. 43A has no application to the facts of the case. Therefore, the issue whether, the loss is on revenue account or a capital one is required to be tested in the light of generally accepted accounting principles, pronouncements and guidelines etc.

10.5 Before We delineate on the allowability of loss based on generally accepted accountancy principles, it may be pertinent to examine whether the increased liability due to fluctuation loss can be added to the carrying costs of corresponding capital assets with reference to S. 43(1) of the Act. Section 43(1) defines the expression 'actual cost'. As per S. 43(1), actual cost means actual cost of the assets to the assessee, reduced by that portion of the costs as has been met directly or indirectly by any other person or authority. Several Explanations have been appended to S. 43(1). However, the section nowhere specifies that any gain or loss on foreign currency loan acquired for purchase of indigenous assets will have to be reduced or added to the costs of the assets. Thus, viewed from this perspective also, such increased liability

cannot be bracketed with cost of acquisition of capital assets save and except in terms of overruling provisions of S. 43A of the Act.

10.6 We also simultaneously note here that the Hon'ble Supreme Court in the & case of CIT vs. Tata Iron and Steel Co. Ltd. (1998) 22 ITR 285 held that cost of an asset and cost of raising money for purchase of asset are two different and independent transactions. Thus, events subsequent to acquisition of assets cannot change price paid for it. Therefore, fluctuations in foreign exchange rate while repaying installments of foreign loan raised to acquire asset cannot alter actual cost of assets. The relevant operative para is reproduced hereunder:-

"Coming to the question raised, we find it difficult to follow how the manner of repayment of loan can affect the cost of the assets acquired by the assessee. What is the actual cost must depend on the amount paid by the assessee to acquire the asset. The amount may have been borrowed by the assessee but even if the assessee did not repay the loan it will not alter the cost of the asset. If the borrower defaults in repayment of a part of the loan, the cost of the asset will not change. What has to be borne in mind is that the cost of an asset and the cost of raising money for purchase of the asset are two different and independent transactions. Even if an asset is purchased with non-repayable subsidy received from the Government, the cost of the asset will be the price paid by the assessee for acquiring the asset. In the instant case, the allegation is that at the time of repayment of loan, there was a fluctuation in the rate of foreign exchange as a result of which, the assessee had to repay a much lesser amount than he would have otherwise paid. In our judgment, this is not a factor which can alter the cost incurred by the assessee for purchase of the asset. The assessee may have raised the funds to purchase the asset by borrowing but what the assessee has paid for it, is the price of the asset. That price cannot change by any event subsequent to the acquisition of the asset. In our judgment, the manner or mode of repayment of the loan has

nothing to do with the cost of an asset acquired by the assessee for the purpose of his business. We hold that the questions were rightly answered by the High Court. The appeals are dismissed. There will be no order as to costs."

Thus, it is evident the variation in the loan amount has no bearing on the cost of the asset as the loan is a distinct and independent transaction as in comparison with acquisition of assets out of said loan amount borrowed. Actual cost of the corresponding fixed asset acquired earlier by utilizing the aforesaid loan will not undergo any change owing to such fluctuation.

10.7 The issue is also tested in the light of provision of S. 36(l)(iii) governing deduction of interest costs on borrowals. As stated earlier, manner of utilization of loan amount has nothing to do with allowability of any expenditure in connection with loan repayment. Both are independent and distinct transactions in nature. Similar analogy can be drawn from S. 36(l)(iii) of the Act which also reinforces that utilization of loan for capital account or revenue account purpose has nothing to do with allowability of corresponding interest expenditure. A proviso inserted thereto by Finance Act, 2003, also prohibits claim of interest expenditure in revenue account only upto the date on which capital asset is put to use. Once the capital asset is put to use, the interest expenditure on money borrowed for acquisition of capital asset is also treated as revenue expenditure. As also noted, S. 43A specifically and categorically calls for adjustments in cost of assets for loss or gain arising out of foreign currency fluctuations in respect of funds borrowed in foreign currency for acquisition of foreign assets. However, the same rationale of a deeming provision of S. 43A cannot be applied to loss or gain arising from foreign currency loss utilized for purchase of indigenous assets. Needless to say, impugned currency fluctuation loss has emanated from foreign currency loans. Besides AS-I 1, the claim of exchange fluctuation loss as revenue account is also founded on the argument that the aforesaid action was taken to save interest costs and consequently to augment the profitability or reduce revenue losses of the assessee. The impugned fluctuation loss therefore has a direct nexus to the saving in interest costs without bringing any new capital

asset into existence. Thus, the business exigencies are implicit as well explicit in the action of the Assessee. The argument that the act of conversion has served a hedging mechanism against revenue receipts from export also portrays commercial expediency. Thus, We are of the opinion that the plea of the assessee for claim of expenditure is attributable to revenue account has considerable merits.

10.8 Section 145 of the Income Tax Act deals with method of accounting and states that business income inter-alia has to be computed in accordance with cash or mercantile system of accounting. Sub-section (2) thereof authorizes the Central Government to notify accounting standards to be followed for determination of business income. Section 211 of the Companies Act also similarly casts a duty on a company to give a true and fair view of the profit and loss of the company for the financial year. It also requires the company to adhere, the accounting standards for preparation of profit in the Profit & Loss Account and the Balance Sheet. A conjoint reading of section 145 of the Act and section 211 of the Companies Act leaves no room for doubt that the Assessee is obliged to follow the accounting standards prescribed to determine business income under the head "business or profession". We notice that the Hon'ble Supreme Court in the case of Woodward Governor India (P) Ltd. (supra) has observed that AS-I I is mandatory in nature. In the light of observations made in Woodward Governor India (P) Ltd. (supra), we arc of the view that loss arising on foreign exchange fluctuation loss has been rightly accounted for as a revenue expense in the Profit & Loss account in accordance with accounting fiat of AS-11.

10.9 We find that the decision in the case of Sutej Cotton Mills Ltd. (supra) relied upon by the Ld. Departmental Representative is of no assistance to the Revenue. The Hon'ble Supreme Court therein stated the principle of law that where any profit or loss arises to an assessee on account of depreciation in foreign currency held by him on conversion from another currency, such profit and loss would ordinary be trading loss if the foreign currency held by the assessee on revenue account as trading asset or as a part of circulating capital embargo in business. However, if the foreign currency is held as a

capital asset, the loss should be capital in nature. The aforesaid principle of law is required to be applied to the facts of case to determine whether the foreign currency is held by the assessee on revenue account or as a part of circulating capital. In the present case, fluctuation loss inflicted upon the assessee bears no nexus or relation to the acquisition to the assets. The action of the assessee is tied up to its underlying objective i.e. saving in interest costs, hedging its revenue receipts etc. which are undoubtedly on revenue account. Thus, the loss generated in impugned action bears the character of revenue expenditure. Similarly, decision of the Apex Court in the case of Tata Iron and Steel co. (supra) also weighs in favour of the assessee. We also note that reliance placed by the CIT(A) on Elecon Engineering Co. Ltd. (supra) is misplaced. The decision concerns applicability of S. 43A in the facts of that case and thus clearly distinguishable.

11. For the aforesaid reasons, in the absence of applicability of section 43A of the Act to the facts of the case and in the absence of any other provision of the Income Tax Act dealing with the issue, claim of exchange fluctuation loss in revenue account by the Assessee in accordance with generally accepted accounting practices and mandatory accounting standards notified by the ICAI and also in conformity with CBDT notification cannot be faulted. No inconsistency with any provision of Act or with any accounting practices has been brought to our notice. Otherwise also, in the light of fact that the conversion in foreign currency loans which led to impugned loss, were dictated by revenue considerations towards saving interest costs etc. we have no hesitation in coming to the conclusion that loss being on revenue account is an allowable expenditure under S. 37(1) of the Act. The order of the CIT(A) sustaining the disallowance is not called for and is thus reversed. In the result, the Ground No.1 is allowed."

In view of the decision of Co-ordinate Bench of Pune Tribunal, this ground raised by the assessee is allowed."

7.1 However, before us Id. D.R brought to our knowledge, the judgement of Supreme Court in the case of ACIT vs. Elecon Engineering Co. Ltd. in [2010] 322 ITR 20 (SC) wherein held that:-

"reversing the decision of the High Court, proceeding on the basis that the purpose of the loan taken by the assessee was to finance the purchase of plant and machinery, and on the facts of this case, that it could not be said that the rollover charges had nothing to do with the fluctuation in the rate of foreign exchange. Since the court was concerned with capitalisation of foreign exchange difference in respect of acquisition of fixed assets from abroad, rollover charges relating thereto had to be debited/credited to the asset in respect of which liability was incurred. Rollover premium charges were not allowable under section 36(1)(iii) . Explanation 3 to section 43A , as it stood prior to its amendment in 2002, would apply to such roll over charges."

7.2 Further in the case of *C.I.TVs. Claimate Systems P Ltd. 90CCH 40(Del.)* wherein it was held as follows:-

"8. Decision of the Delhi High Court in Woodward Governor India Pvt. Ltd. (supra) has been affirmed by the Supreme Court in decision reported as Commissioner of Income Tax, Delhi Vs. Woodward Governor India Pvt. Ltd. [2009] 312 ITR 254. It has been, inter alia, held that the expression "expenditure" in Section 37(1) of the Act connotes "what is paid out" and what has gone irretrievably. But the word "expenditure" used in context of Section 37(1) would also cover „loss? even though the said amount had not gone out from the pocket of the assessee. The said provision was a residuary provision extending the allowance to items of business expenditure, not covered by Section 30 to 36 of the Act. Reference was made to Section 28 and 29 read with Section 145(1) of the Act, and it was observed that accounts maintained in the normal course of business should be taken as correct unless there were strong and sufficient reasons for their unreliability. Thus, the profits and gains? of the previous year were required to be computed with regard to the relevant Accounting Standards. The reference also made to Accounting Standard-11, which deals with the effects of foreign exchange fluctuations, and it was accordingly observed as under:

"21. In conclusion, we may state that in order to find out if an expenditure is deductible the following have to be taken into account (i) whether the system of accounting followed by the assessee is mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received; (ii) whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide; (iii) whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it; (iv) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains; (v) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards; (vi) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation".

Thereafter, reference was made to Section 43A of the Act, both as the provision stood prior to 01.04.2003 and thereafter. However, we need not to go further into the said issue as the Supreme Court in *Woodward Governor India Pvt. Ltd. (supra)* had dealt with the unamended Section 43A of the Act."

7.3 Further in the case of *Mettler Toledo India (P.) Ltd. Vs. ITO* reported in [2013] 56 SOT 498 (ITAT[Mum]) wherein it was held as follows:-

"13. We have perused the records and considered the rival contentions carefully. The dispute is regarding allowability of loss on account of foreign exchange fluctuation in respect of foreign currency loan taken by the assessee. The assessee had been restating foreign exchange loan liability on the balance-sheet date which resulted into loss which has been claimed as deduction. The loss/gain on account of foreign exchange fluctuation on restatement of the loan liability on the balance-sheet date is required to be taken into account in computation of income if the loan is on revenue account or is a working capital loan. Loss is allowable as deduction under section

37(1) as held by the hon'ble Supreme Court in the case of Woodward Governor India (P.) Ltd. (supra). The loan in this case had been taken as working capital loan as is clear from the loan agreement wherein the purpose of the loan is clearly mentioned to use it as a working capital to finance the activities of the company. As held by the hon'ble Supreme Court in the case of Sutej Cotton Mills Ltd. v. CIT [1979] 116 ITR 1, foreign currency fluctuation loss is allowable as deduction if the foreign currency is held on revenue account or as trading asset or as part of circulating capital employed in the business. As regards the year of allowability, the claim has to be allowed on the basis of restatement of the liability on the balance-sheet date as held by the hon'ble Supreme Court in the case of Woodward Governor India (P.) Ltd. (supra). Thus the claim of the assessee is allowable. In case there is gain in a year and the assessee has not offered it to tax, the Revenue is free to take action under law. In these years, admittedly there is loss which is allowable as deduction. We, therefore, set aside the order of the Commissioner of Income-tax (Appeals) and allow the claim of the assessee."

7.4 In view of the above judgement, we are not in a position to follow the earlier decision of the Chennai Tribunal in the case of M/s.TVS Motor company Ltd cited supra or decision of Co-ordinate Bench of Pune Tribunal in the case of Cooper Corporation cited supra. Further, it is to be noted that jurisdictional High Court in the case of Learned Commissioner of Income Tax Vs. M/s.Hi Tech Arai Ltd., reported in [2010] 321 ITR 477 (Mad) wherein held that:-

"it cannot be held that simply because a co-ordinate Bench of the Tribunal had earlier taken a different view, the Tribunal on this occasion also ought to have followed the same. When we find that the Tribunal has applied the law correctly in the impugned order, there is no gainsaying that there was an earlier order by the co-ordinate Bench and therefore, for that reason, this time also the Tribunal should have blindly followed its own earlier decision even if such earlier decision did not reflect the correct position of the law."

8. In view of the decision, we are of the opinion that foreign exchange fluctuation in respect of term loan liabilities relating to acquisition of assets are to be

capitalized in terms of the Explanation 3 to section 43A of the Act and it cannot be said that the Id. C.I.T(A) has enhanced assessment so as to issue notice for enhancement of assessment. Accordingly, all the grounds raised by the assessee are dismissed cumulatively."

we applying the provisions and Ratio of decision of co-ordinate bench find that the assessee has entered into a swap transaction in foreign currency being speculative loss and Accordingly we allow the ground of appeal of the Revenue.

7. In the result, the Revenue appeal is allowed.

Order pronounced on Wednesday, the 21st day of June, 2017 at Chennai.

Sd/-

(चंद्र पूजारी)

(CHANDRA POOJARI)

लेखासदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated: 21st June, 2017

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant 2.प्रत्यर्थी/Respondent

4.आयकर आयुक्त/CIT 5.विभागीय प्रतिनिधि/DR

Sd/-

(जी. पवन कुमार)

(G. PAVAN KUMAR)

न्यायिकसदस्य/JUDICIAL MEMBER

3.आयकर आयुक्त (अपील)/CIT(A)

6.गार्ड फाईल/GF