

**IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI
BEFORE SHRI G.S.PANNU, AM AND SHRI RAVISH SOOD, JM**

ITA No. 1025/Mum/2016

(निर्धारण वर्ष / Assessment Year:2011-12)

Clearwater Capital Partners (Cyprus) Limited C/o S.R.B.C & Associates LLP, 14 th Floor, The Ruby, 29 Senapati Bapat Marg, Dadar (West) Mumbai-400028	बनाम/ Vs.	Deputy Commissioner of Income Tax (International Taxation)-2(1)(1) Room No. 114, 1 st Floor, Scindia House, NM Marg, Ballard Pier, Mumbai-400 038
स्थायी लेखा सं./जीआइआर सं./PAN No. AACCC9756A		
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

ITA No. 843/Mum/2016

(निर्धारण वर्ष / Assessment Year:2011-12)

Deputy Commissioner of Income Tax (International Taxation)-2(1)(1) Room No. 114, 1 st Floor, Scindia House, NM Marg, Ballard Pier, Mumbai-400 038	बनाम/ Vs.	Clearwater Capital Partners (Cyprus) Limited C/o S.R.B.C & Associates LLP, 14 th Floor, The Ruby, 29 Senapati Bapat Marg, Dadar (West) Mumbai-400028
स्थायी लेखा सं./जीआइआर सं./PAN No. AACCC9756A		
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Applicant by	:	Shri Niraj Sheth, A.R
प्रत्यर्थी की ओर से / Respondent by	:	Shri. Samuel Darse, D.R

सुनवाई की तारीख / Date of Hearing	:	05.02.2018
घोषणा की तारीख / Date of Pronouncement	:	02.05.2018

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present set of cross appeals filed by the assessee and the revenue are directed against the assessment order passed by the Deputy Commissioner of Income tax (International Taxation)-2(1)(1), Mumbai under Sec. 144C(13) r.w. Sec. 143(3) of the Income tax, 1961 (for short 'Act'), dated 28.12.2015. That as inter connected issues are involved in the aforementioned appeals, therefore, the same are being taken up together and disposed off by way of a common order. We shall first take up the appeal filed by the assessee. The assessee assailing the order of the DCIT (International Taxation), Mumbai, had raised before us the following grounds of appeal:-

"Based on the facts and circumstances of the case, Clearwater Capital Partners (Cyprus) Limited [hereinafter referred to as the Appellant] respectfully craves leave to prefer an appeal under section 253 of the Income-tax Act, 1961 (Act) against the order dated 28 December 2015 passed by the Deputy Commissioner of Income-tax (International Taxation)-2(1)(1), Mumbai [hereinafter referred to as the learned AO], in pursuance of the directions issued by Hon'ble Dispute Resolution Panel - I, Mumbai (DRP).

1. Ground of Objection No. 1

1.1 *On facts and circumstances of the case and in law, the learned AO erred in not granting the credit for taxes deducted at source (TDS) in respect of interest income earned by the Appellant on Foreign Currency Convertible Bonds (FCCBs) merely because Appellant, on account of procedural difficulties could not furnish TDS certificates although the payment were received net of taxes.*

1.2 *Without prejudice to above, on facts and in circumstances of the case and in law, the learned A.O erred in raising a demand, in respect of taxes which are already deducted at source by the deductor appropriately, which is not in consonance with the provisions of section 205 of the Act.*

2. Ground of Objection No. 2

On facts and circumstances of the case and in law, the learned AO erred in taxing the total assessed income at the rate of 40% (plus applicable surcharge and cess) as against applicable rate of 10% as per India - Cyprus Double Taxation Avoidance Agreement (DTAA) in respect of interest income and fee from consultancy services as per article 11 and article 12 of India - Cyprus DTAA respectively and at the rate of 10% (plus applicable surcharge and cess) as per the provision of section 115A of the Act in respect of interest income from FCCBs.

3. Ground of Objection No. 3

The learned A.O erred in levying consequential interest under section 234B and section 234C of the Act.

Each of the ground of appeal is referred to separately, and may kindly be considered independent of each other.

The Appellant craves leave to add, amend, alter, vary, omit, substitute or amend the above grounds of appeal at any time before or at the time of hearing of the appeal so as to enable the Honorable Income-tax Appellant Tribunal to decide this appeal according to the law.”

2. Briefly stated, the facts of the case are that the assessee which is a foreign company had filed its return of income for A.Y. 2011-12 on 24.11.2011, declaring total income of Rs.19,19,82,378/-. The case of the assessee was selected for scrutiny assessment under Sec. 143(2). The assessee which is a company incorporated in Cyprus and a tax resident of the said country had made investment in India under the Foreign direct Investment Scheme (for short 'FDIS'). During the year under consideration, the assessee had earned interest income, capital gains, fee for technical services and dividend income. That as the assessee had international transactions exceeding Rs.15 crore, therefore, its case was referred to the Transfer Pricing Officer-2(3), Mumbai (for short 'TPO'). The TPO vide his order passed under Sec. 92CA(3) of the Act, dated 23.01.2015 did not propose any adjustments to the international transactions of the assessee. The draft order of assessment was passed by the A.O under Sec. 143(3) r.w. Sec. 144C(1) of the Act, vide order dated 25.03.2015 and the income of the assessee pursuant to an addition of Rs.7,52,18,925/- on account of interest income and incentive fees on Foreign currency convertible bonds (FCCBs) was determined at Rs.26,72,01,300/-

3. The assessee assailed the draft order of assessment, dated 25.03.2015

before the Dispute Resolution Panel-III, Mumbai (for short' DRP'). The DRP vide its order dated 09.12.2015 issued directions under Sec. 144C(5) of the Act. The A.O in compliance to the directions of the DRP passed the *impugned* order dated 28.12.2015 under Sec. 144C(13) r.w. Sec. 143(3) and determined the total income of the assessee at Rs.24,52,45,870/-.

4. Aggrieved, the assessee had assailed the order of assessment dated 28.12.2015 passed by the A.O under Sec. 144C(13) r.w. Sec. 143(3) for A.Y. 2011.12 in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee, at the very outset of the hearing of the appeal submitted that the authorities below had erred in not granting the credit of TDS on the interest income which was earned by the assessee on the investments made in FCCBs issued by certain Indian corporate. It was submitted by the Id. A.R that as per the issuance mechanism of FCCBs the non-residents subscribes to the FCCBs issued in foreign currency which are convertible into shares of the issuing companies. The company issuing the FCCBs delivers the bonds to a Domestic Custodian Bank who in turn instructs the Overseas Depository Bank to issue a certificate to the non-resident investors against the bonds held by the Domestic Custodian Bank. It was submitted by the Id. A.R that given the above mechanism, as the identity of the FCCBs holder is generally not known to the Domestic Custodian Bank, the issuing company withholds taxes at the rate of ten percent prior to remitting the interest payments and even though in fiduciary capacity, the Overseas Depository Bank's name is indicated as the deductee in the TDS certificate. The Id. A.R submitted that it is because of the aforesaid reasons that the credit of tax withheld by the issuing companies is not reflected in Form 26AS of the assessee company. The Id. A.R submitted that a similar issue as regards not allowing of credit of TDS on the interest income which was earned by the assessee on the investments made in FCCBs issued by certain Indian corporate, was also involved in the assessee's own case for the immediately preceding year i.e A.Y. 2010-11. It was submitted by the Id. A.R that the matter was carried in appeal by the assessee before the Tribunal, which had disposed off the said

appeal, viz. Clearwater Capital Partner (Cyprus) Ltd. Vs. Dy. Commissioner of Income Tax (International Taxation)-2(1)(1), Mumbai (ITA No. 1200/Mum/2015), vide its order dated 07.04.2017 (Copy placed on record). It was submitted by the ld. A.R that the Tribunal while disposing off the appeal of the assessee for A.Y 2010-11, had after deliberating at length on the issuance mechanism of FCCBs, restored the matter to the file of the A.O for making necessary verification as regards the entitlement of the assessee towards grant of credit for taxes deducted at source on interest received on FCCBs. It was submitted by the ld. A.R that on similar lines the matter may be restored to the file of the A.O to make necessary verifications as regards the claim of the assessee for grant of credit for taxes deducted at source on interest received on FCCBs. Per contra, the ld. Departmental Representative (for short 'D.R') did not object to the aforesaid contention of the ld. A.R.

5. We have heard the rival contentions of both the parties and perused the orders of the lower authorities and the material available on record. We find that the assessee company had during the year under consideration received interest of Rs.5,32,63,492/- (USD 11,91,577) on FCCBs from the following parties:-

Sr. No.	Name of the issuing company	Amount (in USD)	Amount (in INR)
1.	Sayaji Hotels Limited	37,500	16,76,250
2.	Kamat Hotels (India) Limited	6,32,971	2,82,93,804
3.	Dolphin Offshore Enterprises (India) Ltd.	4,468	1,99,719
4.	Videocon Industries Limited (4.5%)	3,36,881	1,50,58,581
5.	Videocon Industries Limited (5%)	1,79,757	80,35,138
	Total	11,91,577	5,32,63,492

(USD 1=INR 44.70)

We have given a thoughtful consideration to the issue before us and are persuaded to be in agreement with the contention of the ld. A.R that under the scheme of issuance of FCCBs, as the identity of the FCCB holder is generally not known to the Domestic Custodian Bank, therefore, the issuing company withholds taxes at the rate of ten percent prior to remitting the interest payments and even though in fiduciary

capacity, the Overseas Depository Bank's name is indicated as the deductee in the TDS certificate. Given the above mechanism of issuance of FCCBs, the credit of taxes would not be reflected in the Form 26AS of the assessee. We have perused the observations of the coordinate bench of the Tribunal in context of the issue under consideration in the assessee's own case for A.Y 2010-11. We are of the considered view that on a similar footing the matter requires to be restored to the file of the A.O, for making necessary verifications as regards the assessee's claim for grant of credit for taxes deducted at source on interest received on FCCB's during the year under consideration. We, therefore, restore the issue to the file of the A.O with a direction to verify the assessee's claim in respect of the grant of credit of TDS. The A.O is directed to satisfy himself that the amount of TDS had been deposited into government treasury and that the assessee is the lawful deductee in respect of the said amount. The A.O shall further satisfy himself on the aspect that the gross amount of interest had been considered as the income of the assessee and that no other person has or will claim credit of the said amount of taxes. We hold and direct accordingly. The **Ground of appeal No.1** is allowed for statistical purposes.

6. The ld. A.R further submitted that the A.O had erred in taxing the total assessed income of the assessee at the rate of 42.23% [i.e tax rate of 40% (plus) 2.5% surcharge and 3% education cess] as against the applicable rate of 10% as per India-Cyprus Double Taxation Avoidance Agreement (for short 'DTAA'). It was submitted by the ld. A.R that the 'Interest income' and 'Fees from consultancy services' as per Article 11 and Article 12 of the tax treaty, respectively, were liable to be brought to tax @ 10%. It was further submitted by the ld. A.R that the A.O had also erred in bringing to tax the interest income from FCCBs @ 40% (plus applicable surcharge and cess) as against the rate of 10% contemplated in Sec. 115AC of the Act. It was submitted by the ld. A.R that against the

interest on FCCB's the issuing corporate had already withheld tax at the rate of 10%. It was submitted by the ld. A.R that necessary directions may be issued to the A.O to tax the aforementioned respective incomes as per the correct rates contemplated in the India-Cyprus tax treaty and the aforementioned statutory provision in the Act. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders passed by the A.O.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record in context of the issues under consideration. The assessee, as emerges from the records, had received interest amounting to Rs. 156,982,378/- on fully convertible debentures issued by Clear Capital Partners India Private Limited, a company incorporated under the Indian Companies Act, 1956. We find that as per Article 11 of the India-Cyprus tax treaty, the interest arising in a contracting state and paid to a resident of the other contracting state may be taxed in that other state. However, such interest may also be taxed in the contracting state in which it arises according to the laws of that state, but if the beneficial owner of the interest is a resident of the other contracting state, the tax so charged shall not exceed 10% of the gross amount of the interest. We are of the considered view that as per Sec. 90(2) of the Act, where the government of India had entered into an agreement with the government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee. Since the provisions of Article 11 of the India-Cyprus tax treaty are more favorable to the assessee, therefore the interest received by the assessee is justifiably liable to be brought to tax at the rate of 10% of the gross amount of the interest. We thus direct the A.O to subject

the interest received by the assessee at the rate of 10% as provided in Article 11 of the India-Cyprus tax treaty.

7. We further find that Article 12 of the India-Cyprus Tax Treaty contemplates the rate of tax in respect of royalties and fees for technical services. The assessee during the year under consideration had received fees amounting to Rs. 35,000,000/- for providing consultancy services from National Cotton Products Private Limited (for short 'NCCPL'). We find that as per Article 12 - Para 3(b) the 'fees for technical services' includes within its sweep 'Consultancy services'. As per Article 12 royalties or fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. However, such royalties or fees for technical services may also be taxed in the Contracting State in which they arise according to the laws of that state, but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed 10% of the gross amount of the royalties or fees for technical services. We are persuaded to be in agreement with the contention advanced by the ld. A.R that in the backdrop of the India-Cyprus tax treaty, the provisions of the Act shall apply to the assessee who is a resident of Cyprus, to the extent they are more beneficial to it. Since the provisions of the India-Cyprus tax treaty are more favorable to the assessee, therefore, the consultancy fees received by the assessee are liable to be taxed at the rate of 10%. We thus are of the considered view that in terms of our aforesaid observations the consultancy receipts of the assessee, being in the nature of FTS would thus justifiably be brought to tax as per Article 12 of the India-Cyprus tax treaty at the rate of 10% of the gross amount of the consultancy receipts. We thus direct the A.O to subject the fee from consultancy services received by the assessee at the rate of 10% as provided in Article 12 of the India-Cyprus tax treaty.

8. We are further persuaded to be in agreement with the contention of the ld. A.R that the interest income from FCCBs held by the assessee are subject to deduction of tax at source @ 10% as per Sec. 115AC(1)(a) of the Income Tax Act, 1961. We thus in terms of our aforesaid observations direct the A.O to subject the interest income from FCCBs to tax @ 10% as per the provision of Sec. 115AC of the Act. Before parting, we may herein observe that the A.O while bringing the aforesaid amount to tax shall duly consider the claim of the assessee that amount of tax already had been deducted at source on the aforesaid interest income by the issuer company and deposited in the Government treasury. The **Ground of appeal No. 2** is allowed in terms of our aforesaid observations.

9. The ld. A.R had further assailed before us the levy of interest under Sec. 234B and 234C of the Act. The ld. A.R submitted that as the assessee is a non-resident company, therefore, as a duty was cast on the payer to pay the tax at source, on failure, no interest under the aforesaid statutory provisions could be imposed on the payee assessee. The ld. A.R in respect of his aforesaid contention had relied on the judgment of the Hon'ble High Court of Bombay in the case of DIT(International taxation) Vs. NGC Network Asia LLC (2009) 313 ITR 187. We find ourselves to be in agreement with the aforesaid contention of the ld. A.R and are of the considered view that as the assessee is a non-resident company, therefore, a duty stands cast upon the payer to pay the tax at source, and resultantly no obligation for payment of advance tax was cast upon the assessee. We thus being of the considered view that in the backdrop of the judgment of the Hon'ble High Court of Bombay in the case of NGC Network Asia LLC (supra), no interest under Sec. 234B and 234C could have validly been imposed on the assessee. We thus direct the deletion of the interest imposed on the assessee under the aforesaid statutory

provisions. The **Ground of appeal No. 3** raised by the assessee is allowed.

10. The appeal filed by the assessee is allowed in terms of our aforesaid observations.

ITA No. 843/Mum/2016
A.Y. 2011-12

11. We shall now advert to the appeal filed by the revenue assailing the order passed by the A.O, dated 28.12.2015. The revenue has challenged the order passed by the A.O by raising the following grounds of appeal:-

- “1. *Whether on the facts and in the circumstances of the case and in law, the Ld. DRP is right in directing the A.O to exclude the interest income of Rs.6,47,90,862/- received from FCCBs pertaining to Suzlon, an Indian Company.*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld. DRP is right in directing the A.O to exclude the incentive fee of Rs.1,04,28,063/- received from FCCBs pertaining to Suzlon, an Indian Company:-*
3. *Whether on the facts and in the circumstances of the case and in law, the ld. DRP is right in holding that the interest and incentive fee on the FCCBs do not accrue or arise in India*
4. *Whether on the facts and in the circumstances of the case and in law, the ld. DRP is right in holding that the interest income on FCCBs falls within the exclusion clause of section 9(1)(v)(b) of the Income-tax Act, 1961.*
5. *Whether on the facts and in the circumstances of the case and in law, the ld. DRP is right in holding that the incentive fee on FCCBs accrues or arises from source outside India in view of the provisions of section 9(1)(1) of the Income-tax Act, 1961.*
6. *The Appellant prays that the order of the ld. DRP on the above grounds be set aside and that of the Assessing Officer restored.*
7. *The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”*

12. Briefly stated, the issue involved in the appeal of the revenue lies in a narrow compass. The assessee had during the year under consideration received interest of Rs.1,15,27,370/- and incentive fee of Rs.1,04,28,063/- from Suzlon Energy Limited, an Indian company in India in the business of

wind power generation, carrying on business both in India and abroad. The entire proceeds of the funds borrowed by way of issuing the FCCB's, as mentioned in the Offering Circular, were utilized by Suzlon Energy limited in repayment of Acquisition facility through a credit agreement between ABN Amro Bank NV and Suzlon Energy Limited in order to assist with the financing of REpower Systems AG. Based on the above facts, it was claimed by the assessee that the interest on FCCB's received by the assessee from Suzlon Energy Limited was not chargeable to tax by virtue of the exception carved in Sec. 9(1)(v)(b) of the Act. Still further, it was submitted by the assessee that the incentive fee earned on the FCCB's was not chargeable to tax, as the monies were raised and utilized by Suzlon Energy Limited outside India, therefore, the income emanating from sources outside India would not accrue or arise in India. It was thus the claim of the assessee before the A.O that once the income falls within the exclusions carved out in Sec. 9(1)(v)(b) of Act, it would fall beyond the sweep of income that had accrued or arisen in India under Sec. 5(2) of the Act. However, the contentions of the assessee did not find favour with the A.O, who by his draft assessment order dated 25.03.2015, passed under Sec. 144(C)(1) r.w.s. 143(3) observed that explanation of the assessee could not be accepted for the following reasons:-

“The amount of FCCB is raised by an Indian company i.e Suzlon, hence it cannot be said that debt incurred or money raised is outside India.

- (i). The payment of interest accrues or arises in India.*
- (ii). Suzlon is an Indian company, and, it is carrying on business in India. Only some part of its business is carried outside India. This does not amount to business being carried outside India, in terms of provisions of section 9(1)(v)(b).*
- (iii). The proceeds of FCCB are fully used for the repayment of loan taken for acquiring a company named Repower. It is not the business of the assessee to acquire companies overseas, nor, it is the business of the assessee to repay loans of subsidiaries/affiliates. Thus, the loan is not utilized outside India for the purpose of business of assessee company in terms of provisions of section 9(1)(v)(b).*
- (iv). Suzlon is into business of Wind Power Generation, and use of FCCB amount for repayment of loan and that too which was used to acquire a*

company, cannot be said to be used for the purpose of earning any income from a source outside India in terms of provisions of section 9(1)(v)(b)."

13. The assessee objecting to the draft assessment order carried the matter before the Dispute Resolution Panel-1, Mumbai (for short 'DRP'). The DRP after deliberating on the contentions of the assessee observed that an identical issue as regards chargeability of income in respect of the same FCCB of Suzlon Energy Limited had come up for consideration before the DRP in the immediately preceding year, viz. A.Y 2010-11, wherein it was observed as under:-

"We have considered facts of the case, the written submissions and the oral arguments of the assessee as against the observations/findings of the AO in his draft order. It is noticed that the assessee has received interest income in respect of investment made in FCCBs issued by certain Indian corporate which inter alia included interest of Rs. 5,40,777/- (USD 12,010) on FCCBs issued by Suzlon. It was noticed that the entire proceeds of the funds borrowed by way of issuance of FCCN's were utilized by Suzlon in repayment of Acquisition facility which is understood to be a credit agreement between ABN Amro Bank NV and Suzlon in order to assist with the financing of Repower offer. Thus interest received was in respect of debt incurred or money borrowed and used by Suzlon for the purpose of making or earning an income from a source outside India. It cannot be said that interest income has accrued or arisen in India in all cases where the payer is an Indian resident because if that be so, then the provisions of section 9(1)(v)(b) would become redundant. In clause (b) of section 9(1)(v), an exception has been carved out in respect of interest payable by a person in respect of his debt incurred and money borrowed that was used for the purposes of a business carried on outside India. It may be noted that as per Offering Circular, the interest of Rs. 5,40,777/- on FCCB's received from Suzlon was in respect of debt incurred or moneys borrowed and used by Suzlon for making or earning an income from a source outside India. This is also substantiated with audited annual report of financial year 2007-08 and 2009-10 of Suzlon wherein it was evident that the entire proceeds of the funds borrowed by way of issuance of FCCB's were utilized by Suzlon in repayment of Acquisition Facility through a credit arrangement between ABN Amro Bank NV and Suzlon in order to assist with the financing of Repower offer. The assessee has also placed reliance in the case of ADIT(IT) vs. Adani Enterprises Limited (ITA 3072/Ahd/2009), wherein it was held that once income falls within the exclusion clause of section 9(1)(v)(b) of the Act, it cannot fall within the ambit of accrued or arise n in India under section 5(2) of the Act. Therefore, the case of the assessee has been fully covered by the decision. In the light of above facts, discussion and judicial precedents, the AO is directed to exclude the interest income received by the assessee from FCCB's investment pertaining to Suzlon, after due verification. The Objection is disposed off accordingly."

The DRP following its earlier order in context of the issue under consideration, directed the A.O to exclude the interest income received by the assessee from the FCCBs pertaining to Suzlon Energy Limited after making necessary verifications.

13. We have heard the rival contentions of both the parties, perused the orders of the lower authorities and the material available on record in context of the issue under consideration. We find that an identical issue in respect of chargeability of interest income received on FCCB's issued by Suzlon Energy Limited had been adjudicated upon by the DRP in the assessee's own case for A.Y. 2010-11. However, the order of the DRP was not further carried assailed by the revenue before the Tribunal, because no such right to appeal was vested with the revenue as per the law available on the statute at the relevant point of time. We however find that it is an admitted fact that the entire proceeds of the funds which were borrowed by way of issuing of FCCB's were utilized by Suzlon Energy Limited in repayment of acquisition facility being a credit agreement between ABN Amro Bank NV and Suzlon Energy Limited in order to assist with the financing of REpower offer. We further find that the contention of the assessee that the money borrowed by Suzlon Energy Limited was used by it for the purpose of making or earning of income from source outside India has neither been rebutted by the lower authorities, nor any such claim had been raised by the D.R before us during the course of the hearing of the appeal. We shall thus in the backdrop of the aforesaid factual position, adjudicate upon the chargeability of tax on the interest income of Rs.1,15,27,370/-on FCCB's issued by Suzlon Energy Limited. We find that as per Sec. 9(1)(v)(b) of the Act, where interest is payable by a resident person in respect of any debt incurred or moneys borrowed and used for the purpose of business or a profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India, the same shall not be deemed to be the income that had accrued or arisen to such person in India. We are of the considered view that as observed by the DRP, since the FCCB's were issued outside India and the

debt incurred or moneys borrowed were utilized by Suzlon Energy Limited outside India, therefore, the interest income on such FCCBs received by the assessee from Suzlon Energy Limited were not chargeable to tax in India by virtue of the exception carved in Sec. 9(1)(v)(b) of the Act. We may herein observe that the fact that the interest income on the FCCB's issued by Suzlon Energy Limited is exempt under Sec. 9(1)(v)(b) in the hands of the payee is fortified by the observations of a coordinate bench of the Tribunal, viz. ITAT Ahmedabad bench 'C', in the case of Suzlon Energy Ltd. Vs. ACIT, Circle-8, Ahmedabad (2016) 156 ITD 7 (Ahd) for A.Ys. 2005-06, 2007-08 and 2010-11 (Copy placed on record). The Tribunal while deliberating on the issue before them as to whether the assessee appellant had defaulted in deduction of tax at source on the interest payments on the FCCB's issued to non-residents, observed that as the interest income in the hands of the recipients fell within the sweep of the exclusions carved in Sec. 9(1)(v)(b) and hence was not covered by Sec. 5(2), therefore, there was no occasion on the part of the assessee appellant before them to have deducted tax at source on the said amount. We thus in terms of our aforesaid observations are of the considered view that no infirmity emerges from the order of the DRP, who had directed the A.O to exclude the interest income of Rs.1,15,27,370/- received by the assessee from the FCCB's issued by Suzlon Energy Limited, after making necessary verifications.

14. We further find that the DRP had concluded that the incentive fees of Rs. 1,04,28,063/- received by the assessee for revision in conversion price of the FCCB's of Suzlon Energy Limited was not liable to be brought to tax in India. The DRP while concluding as hereinabove, had observed that as the FCCB's were issued outside India and the monies were raised and utilized by Suzlon Energy Limited outside India, therefore, the income emanating from the source outside India cannot be deemed to accrue or arise in India in view of the provisions of Sec. 9(1)(i) of the Act. We have given a thoughtful consideration to the observations of the DRP and are persuaded to subscribe to the same. We find ourselves to be in agreement with the view taken by the DRP that as the monies were raised by Suzlon Energy Limited outside India,

therefore, as per Sec. 9(1)(i) of the Act, the income emanating on the FCCB's from the sources outside India is not to be deemed to accrue or arise in India. We thus finding no infirmity in the order of the DRP, therefore, uphold its order in context of the issue under consideration. The **Grounds of appeal Nos. 1 to 7** raised by the revenue before us are dismissed in terms of our aforesaid observations.

15. The appeal filed by the revenue is dismissed.

16. The appeal of the assessee in ITA No. 1025/Mum/2016 is partly allowed, while for the appeal of the revenue in ITA No. 843/Mum/2016 is dismissed, in terms of our aforesaid observations.

Order passed in the open court on 02/05/2018.

Sd/-
(G.S.PANNU)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 02.05.2018
Ps. Rohit

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT,
Mumbai