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

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No. 1689/Hyd/2012
Assessment Year: 2009-10

M/s Country Club Hospitality & Holidays Ltd., (Formerly Known as Country Club India Ltd.,) Hyderabad.	vs.	*Asst. CIT, Circle-1(2), Hyderabad.*
PAN – AAACC8276B		
(Applicant)		(Respondent)

ITA No. 1735/Hyd/2012
Assessment Year: 2009-10

Asst. CIT, Circle-1(2), Hyderabad	M/s Country Club Hospitality & Holidays Ltd., (Formerly Known as Country Club India Ltd.,) Hyderabad.
	PAN-AAACC8276B
(Applicant)	(Respondent)

Assessee by : Shri P. Murali Mohan Rao
Revenue by : Dr. K. Srinivas Reddy

Date of hearing : 21-02-2018
Date of pronouncement : 22-05-2018

ORDER

PER P. MADHAVI DEVI, J.M.:

Both are cross appeals of the assessee as well as the revenue against the order of the Ld. CIT(A)-2, Hyderabad

dated 18.09.2012. In the assessee appeal, the assessee has raised the following grounds of appeal.

"1. That the Order of the learned m (A) is not only erroneous both on facts and in law but is perverse.

2. That the learned m (A) erred in upholding the addition of Rs. 1,42,84,760/disallowed under the Provisions of S. 40A(3) of the IT Act, 1961 which is not correct and not justified.

3. That the expenditure of Rs. 1,42,84,760/- has been incurred in cash for purchase of items such as vegetables, fruits, dairy, poultry, milk and other sundry expenses from the small vendors who do not have any bank account and hence could not be paid in cheques / through banking channel. Hence, disallowance u/s. 40A(3) is not called for.

4. That the assessee company is running hotel business and the company is having 40 branches all over India the above amount of expenditure Rs. 1,42,84,760/- could not be paid in cheques / through banking channel as the parties to whom the payments were made has objected for the payment of cheques as there is no banking facility nearby.

5. The Appellant prays that the amount has been paid during the course of the business purpose only. Hence, disallowance u/s. 40A(3) is not correct.

6. That S. 40A(3) has been introduced to curb the black money and bogus transaction only and not to trouble the honest tax payers. In the instant case, the disallowance u/s. 40A(3) is not correct and hence may please be deleted.

7. That learned CIT(A) has given a direction to the AO to verify the payments made for TDS not deducted cases. As nothing is outstanding as payable at the end of year, the amount cannot be disallowed u/s. 40(a)(ia) of Rs. 5,03,20,862/- in the light of the decision of the Special Bench of Hon'ble ITAT, Vizag in the case of M/s Merilyn Shipping & Transports Vs ACIT, ITA No 477/Viz/2008.

8. That the provisions of section 40(a)(ia) of the Act is applicable only to expenditure which is payable on 31" March of every year and cannot be invoked to disallow the amounts which are already been paid during the previous year.

9. That the learned CIT(A) has not given a speaking order and specific allowances not confirmed.

10. That the learned CIT(A) erred in upholding the disallowance u/s. 43B of Rs. 25,35,314/- which is not correct and not justified.

11. That the learned CIT(A) erred in upholding the disallowance towards FCCB expenditure of Rs. 7,30,66,667/- which is not correct and not justified.

12. That during the financial year 2006-07, the Appellant Company (Country Club (India) limited) has raised long term funds from international Market by issuing Foreign Currency Convertible Bonds worth USD 25 million, which is having the convertible option to equity shares or repayment of bonds after Five Years.

13. That during the financial year 2008-09 the company has incurred foreign exchange loss of as, 21,92,00,000/- on Foreign Currency Convertible Bonds due to fluctuation of exchange currency.

14. That the Appellant Company has restated the Bonds at the exchange rates prevailing at the year end and the difference out of such restatement is transferred to "Foreign Currency Monetary Item Translation Difference Account, to be written off over a period of 3 years."

15. That the learned C!T(A) failed to appreciate that the Appellant Company has transferred 1/3 of the difference amount to profit and Loss Account under the head Gain/Loss account during the Financial Year 2008-09 by following the notification issued by Ministry of Corporate affairs on 31" march 2009 Vide notification No. G.S.R. 225(E) regarding foreign exchange loss which is not correct and not justified.

16. That the notification No. G.S.R. 225(E) clarifies that companies can debit to profit and losses account, all foreign exchange losses which were incurred during the financial year 2008-2009 due to fluctuation of foreign currency and, companies can avail this benefit till 31st March 2011. Hence, disallowance In this regard is not correct.

17. In view of the above notification FCCS are not capital nature, it is revenue nature because it has not been converted in to equity share capital. Hence, foreign exchange loss which has been written off to profit and loss A/c over a period of three years shall be considered as revenue nature.

18. That the learned CIT(A) ought to have considered that in previous Financial Year, (i.e. 2007-08) the Appellant Company has offered an income of Rs. 7,08,20,000/- which came from foreign exchange fluctuation and would have allowed the loss on foreign exchange which is debited to profit and loss A/c in the financial year 2008-09 of Rs. 7,30,66,667/-.

19. That the Appellant craves leave to add, to alter, or amend any of the aforementioned Grounds of appeal".

1.1 Further, vide letter dated 18.09.2017, the assessee has raised the following additional grounds of appeal:

20. As per the ratio laid down by the Hon'ble Supreme Court of India in the case of National Thermal Power Co. Ltd vs. CIT (1998) 229 ITR 383 (SC) the ITAT has jurisdiction to examine the question of law though not arisen before the CIT (A) but h7isen before the IT AT for the first time.

21. The Ld. CIT (A) ought to have allowed the grounds of appeal in respect of addition made u/ s 40(a)(ia) of the Act without direction to the AO to verify, since the assessee has not been treated as an assessee in default u/ s 201(1) of the Act and no proceedings have been initiated in this regard.

22. The Ld AO ought to have appreciated that the provisions of section 1941 are not applicable to payments made of Rs. 10,34,375/- towards Rent a/ c.

23. The Ld AO ought to have appreciated that the provisions of section 1941 are not applicable to payments made of Rs. 25,45,575/- towards Furniture Hire charges.

24. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 31,92,307/- towards Advertisement-Hoardings.

25. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 75,48,367/- towards Advertisement-Newspaper & Periodicals.

26. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 12,55,745/- towards Advertisement-Sign Boards.

27. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 42,00,984/- towards Advertisement-TV.

28. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 13,45,954/- towards Advertisement-0thers.

29. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 18,74,353/- towards Business promotion expenses.

30. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 6,30,770/- towards Dry Cleaning Expenses.

31. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs.8,56,234/- towards Postage & courier charges.

32. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 4,55,600/- towards Recruitment expenses.

33. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 53,84,615/- towards House keeping maintenance.

34. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 13,81,000/- towards Generator maintenance.

35. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 87,99,923/- towards Club maintenance.

36. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 47,54,560/ - towards telephone charges.

37. The Ld AO ought to have appreciated that the provisions of section 194C are not applicable to payments made of Rs. 52,50,500/- towards printing & stationery .

38. The Ld AO erred in provoking the provisions of section 40(a) (ia) without appreciating the fact that payments made are not covered by provisions of chapter XVII-B of the Act.

39. The Ld. AO ought to have appreciated the fact that the receiver of the interest i,e. payee, who is resident has offered the same as income in its return of income for the respective financial year and therefore, the assessee cannot be treated as assessee in default.

40. The AO ought to have appreciated the fact that second proviso to section 40(a)(ia) is curative in nature and has retrospective effect from 01.04.2005 from the date in which sub-clause i.e.. 40(a) was inserted by Finance Act.

41. The appellant may add or alter or amend or modify or substitute or delete or rescind all or any of the grounds of appeal at any time before or at the time of hearing of the appeal.

2. Brief facts of the case are that the assessee was known as Country club India Ltd., and both the assessment order, as well as CIT(A) order were passed in the said name only. Subsequent to the order of the CIT(A), the assessee changed its name to Country Club Hospitality and Holidays Ltd., and the same was incorporated in ROC w.e.f 02.11.2014. The assessee has, thus filed revised Form No. 36 in the changed name and has raised the grounds of appeal. At the time of hearing, Ld. Counsel for the assessee submitted that the assessee does not wish to press the additional grounds of appeal Nos. 22 to 37 and therefore they are rejected as not pressed. Additional ground of appeal No. 20 is an argument in favour of admission of additional grounds while ground of appeal No. 21 is a legal ground and all the facts relating to this ground are on record. Therefore, this ground is admitted and we proceed to dispose the appeal of the assessee as under.

3. As regards grounds No. 2 to 6 relating to disallowance u/s 40A(3) of the IT Act, we find that similar issue had arisen in the assessee's own case for the A.Y 2008-09 and 'A' Bench of this Tribunal (to which both of us are signatories) has considered the issue at length at para 4 to 7 of its order has held as under, which is reproduced hereunder, for the sake of ready reference.

> *"4. Brief facts of the case relating to Ground No.2 are that the assessee company, which is in the business of running clubs and hospitality, filed its return of income for the A.Y 2008-09 on 26.09.2008 declaring income of Rs.89,61,93,030. The return was processed on 9.2.2010 raising a demand of Rs.7,24,50,170/-. Subsequently, the assessment was picked up for scrutiny u/s 143(3) of the Act and various details were called for from the assessee. The details were filed on 30.12.2010. AO u/s 133(6) of the Act, obtained the copies of bank A/c statements of the assessee, which revealed that the assessee has made payments through bearer cheques in excess of Rs.20,000/- in violation of section 40A(3) of the Act. He arrived at the total sum of Rs.1,33,68,613 as paid in violation of section 40A(3) of the Act and he accordingly disallowed the same. Aggrieved, the assessee preferred an appeal before the CIT (A) who confirmed the addition by holding that the assessee has not produced any evidence in support of its contention that the payment in question were below Rs.20,000 on different dates and that there was no violation of section 40A(3) of the Act. The assessee is in second appeal before us.*
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> *5. The learned Counsel for the assessee has raised further an alternative argument before us that out of the total payments made in cash/bearer cheques, main payments are made to the employees of the assessee and therefore, they are not covered by the provisions of section 40A(3) of the Act. He also drew our attention to the details of the payments at Pages 8 to 12 of the paper book filed by him and submitted that all these details were filed before the authorities below, but they have not looked into and have not verified them. Thus, he requested that the AO may be directed to verify and allow the same.*

6. The learned DR, on the other hand, supported the orders of the authorities below.

7. Having regard to the details of the payments made in cash, we find that some of the payments are to the employees of the assessee company. We find that any payment made by a company to its employees for incurring expenditure on its behalf for business of the company, cannot be disallowed u/s 40A(3) of the Act. Therefore, we deem it fit and proper to remit the issue to the file of the AO for verification of the above contention of the assessee and on verification if it is found that the payments are to the employees for meeting the expenditure of the assessee company, the AO shall not make any disallowance u/s 40A(3) to such an extent. Thus, Ground of appeal No.2 is treated as partly allowed for statistical purposes.

3.1 Respectfully following the same, we remand this issue also to the file of the A.O for verification and if it is found that payments are to the employees of the assessee company for meeting the expenditure of the assessee company, then the A.O shall not make any disallowance u/s 40A(3) of the IT Act to such an extent. The grounds of appeal No. 2 to 6 are accordingly treated as partly allowed for statistical purposes.

4. As regards grounds No. 7 to 9, we find that similar issue had arisen in the assessee's own case for the A.Y 2008-09 and that the ground of appeal raised by the revenue in its appeal for the A.Y 2009-10 is also similar to the grounds raised by the revenue for the A.Y 2008-09 which has been considered by the Tribunal and the

Tribunal dealt with the issue at paras 8 to 12 which are reproduced hereunder for ready reference:

> *"8. As regards Grounds of appeal Nos.3 to 6, brief facts are that on verification of the details filed by the assessee, the AO observed that the assessee has not made TDS from various payments totaling to Rs.5,21,75,632. He therefore, disallowed the same u/s 40(a)(ia) of the Act. On appeal, the CIT (A) has deleted the disallowance with a direction to the AO to verify whether the payment towards the expenditure, was actually paid or payable and to allow the same if it is found to have been actually paid, before 31st of March i.e. the end of the relevant accounting year. For giving such a direction, the CIT (A) followed the decision of the Special Bench of the ITAT, Visakhapatnam in the case of Merilyn Shipping & Tran sport vs. ACIT in ITA No.477/Viz/2008. The AO, while passing the consequential order, has verified the details and has allowed relief to the extent of Rs.5,01,61,399/-. In the grounds of appeal, the assessee's argument is that the CIT (A) ought to have deleted the disallowance by himself, instead of directing the AO to verify the claim of the assessee. Further, in the additional ground of appeal No.10, the assessee is claiming that if the assessee has not been treated as an "assessee in default" u/s 201(1), no disallowance u/s 40a(ia) can be made.*
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> *9. We find that the Hon'ble Supreme Court in the case of Palam Gas Service vs. CIT reported in (2017) 81 Taxmann.com 43 (S.C) has held that irrespective of the amount being paid, the same is disallowable u/s 40a(ia) if no TDS has been made. Therefore, the decision of the CIT (A) on this point has to be set aside. In such circumstances, the alternate plea of the assessee assumes importance.*
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> *10. The learned Counsel for the assessee has placed reliance upon the decision of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage (P) Ltd vs. CIT, reported in (163 Taxmann.355) wherein the Hon'ble Supreme Court was considering the case of the assessee who was considered as an assessee in default u/s 201(1) and interest u/s 201(1A) was also made. The Hon'ble Supreme Court has held that the assessee therein, cannot be treated as "as assessee in default" u/s 201(1), if the recipient has offered the income and has paid the taxes thereon. However, with regard to the interest u/s 201(1A), the Hon'ble Supreme Court has held that the same is payable till the date of payment of taxes by the deductee*

assessee. He submitted that in the case of the assessee before us, the recipients of the payment, have already offered the income in their hands and therefore, the assessee cannot be treated as "as assessee in default". Further, the learned Counsel for the assessee also argued that by virtue of the second proviso to section 40(a)(ia), where the assessee is not deemed to be "an assessee in default" under the provisions of sub-section 201 (1), then for the purpose of this sub-clause i.e. 40a(ia), it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing returned income by the recipient. By referring to the said proviso, he submitted that though this proviso has been inserted by the Finance Act of 2013, various Benches of the Tribunal have held this proviso to be clarificatory in nature and applicable retrospectively. He placed reliance upon the decision of the Hon'ble Delhi High Court in the case of CIT vs. Ansal Land Mark Township reported in 61 Taxman.com 45 (Del.) in support of this contention. He therefore, submitted that since the assessee has not been treated as an "Assessee in Default" u/s 201(1) of the Act, it is to be presumed that the recipients have offered the said income to tax and in such circumstances, no disallowance u/s 40a(ia) is to be made.

11. The learned DR however, supported the order of the authorities below.

12. Having regard to the rival contentions and the material on record, we find that the Hon'ble Delhi High Court in the case of CIT vs. Ansal Land Mark Township (Supra) has considered the applicability of the second proviso to section 40a(ia) and has held to be declaratory and curative and to have retrospective effect from 1.4.2005. The assessment order before us is the A.Y 2008-09. The relevant provision is reproduced hereunder for ready reference:

> *"[Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, [thirty per cent of] such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid :] [Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be*

deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.]"

In view of the above provision and since the assessee has not been treated as an "assessee in default" u/s 201(1) of the Act, we hold that no disallowance u/s 40a(ia) can be made. The assessee's additional ground of appeal No.10 is accordingly treated as allowed for statistical purposes".

4.1 Respectfully following the same, this ground of appeal of the assessee is also remitted to the file of the A.O with similar directions and the grounds are treated as allowed for statistical purposes and revenue's appeal is also treated as allowed for statistical purposes.

5. As regards Ground No. 10, we find that similar issue had arisen in the assessee's own case for the A.Y 2007-08 and the coordinate Bench of the Tribunal has considered the issue at paras 13 to 15 of its order. For the sake of ready of reference, the same is reproduced hereunder:

"13. As regards the grounds of appeal No.7 against the disallowance u/s 43B of the Act of the payments made towards APGST, VAT, ESI, Professional Tax Payable amounting to Rs.25,35,314 is concerned, brief facts are that the assessee had shown these amounts as outstanding at the end of the previous year and therefore, the AO made the disallowance. The CIT (A) also confirmed the said disallowance holding that the assessee has not substantiated the claim and has not brought out any evidence to prove that the payment, in question, were made within the time specified as per the provisions of section 43Bof the Act. The learned Counsel for the assessee submitted that the assessee has not debited these amounts to the P&L A/c and

has not claimed the same as expenditure and hence they cannot be disallowed u/s 43B of the Act. He has drawn our attention to the details of the outstanding liabilities at pages 6 to 7 of the Paper Book wherein these amounts are shown as payable and submitted that these details were also filed before the AO, who has not verified the same. He submitted that the opening balances from the earlier years are being added as income of the relevant A.Y and prayed for deletion of the addition.

14. The learned DR was also heard.

15. We find that at pages 6 & 7 of the paper book filed by the assessee are the copies of the trial balance as on 31.03.2008 showing the outstanding expenses and provisions. The amounts disallowed by the AO are the statutory provisions made by the assessee. The assessee's contention that these amounts have not been debited to the P&L A/c needs verification. Therefore, we deem it fit and proper to remit this issue to the file of the AO for verification of the assessee's claim and if the assessee has not debited the same to the P&L A/c, then no disallowance should be made u/s 43B of the Act. This ground of appeal is treated as allowed for statistical purposes.

5.1 Respectfully following the decision of the Coordinate Bench of the Tribunal, the issue is set aside to the file of the A.O for verification of the assessee's claim and if the assessee has not debited the same to profit and loss account, then the A.O shall not make any disallowance u/s 40(3)B of the Act. This ground of appeal is thus treated as allowed for statistical purposes.

6. As regards Grounds No. 11 to 18 are concerned, brief facts are that, during the F.Y 2006-07, the assessee company has raised term funds from international market by issuing Foreign Currency Convertible Bonds (FCCBs)

worth USD 25 Millions, which is having the convertible option to equity shares or repayment of bonds after 5 years. During the financial year relevant to the assessment year before us, the assessee stated that due to fluctuation of exchange currency, the company has incurred foreign exchange loss of Rs. 21,92,00,000/- on foreign currency convertible bonds (FCCB) and therefore the company has restated the bonds at the exchange rates prevailing at the year end and the difference is transferred to 'Foreign Currency Monitory Item Translation Difference Account' to be written off over a period of 3 years. The assessee also relied upon the notification dated 31.03.2009 of the Min of Corporate Affairs issued vide notification No. GSR 225(E) regarding foreign exchange loss, wherein it is provided that the company can debit to the profit and loss account, all foreign exchange losses which are incurred during the F.Y 2008-09 due to fluctuation of foreign currency and companies can avail this benefit till 31.03.2011 and therefore, in accordance with the said notification, the assessee company had transferred 1/3 of the difference amount to profit and loss account under the head gain/ loss account during the F.Y 2008-09. The A.O, however held that the CBDT instructions No. 3 of 2010,

dated 23.03.2010 had dealt the issue of "marked to market" i.e where the financial instruments are valued at market price so as to report the actual value on the reporting date which is required from the point of view of transparent accounting practices for the benefits to the shareholders of the company, but is notional loss as the asset continues to be owned by the company. She observed that the "marked to market" loss is given different accounting treatment by different assessees and a notional loss which should be contingent in nature cannot be allowed to be set off against the taxable income. Thus, she disallowed the claim of expenditure of Rs. 7,30,66,667/- claimed by the assessee as notional capital loss and brought it to tax. Aggrieved, the assessee preferred an appeal before the CIT(A), who confirmed the order of the A.O and the assessee is in second appeal before us.

6.1 The Ld. Counsel for the assessee while reiterating the submissions made before the authorities below has placed reliance upon the following decisions in support of his contentions:

(a) CIT Vs PACT Securities & Financial Services Ltd., reported in 61 taxmann. com 192 (AP & TS).

(b) Cooper Corporation Pvt Ltd., Vs DCIT, reported in ITA No. 866/PN/2014.

(c) CIT Vs Woodward Governor India Pvt Ltd., reported 179 taxman.com 326 (SC)

(d) Gati Limited Vs ITO, in ITA No. 1325/Hyd/2015.

(e) Crane Software International Ltd., Vs. DCIT in ITA No. 741/Ban/2010.

6.2 The Ld. DR, on the other hand, supported the orders of the authorities below and placed reliance upon the judgment of the Apex Court in the case of Sutlej Cotton Mills Ltd., reported in 116 ITR 1 (SC). Upon consideration of rival contentions and the material on record, we find that the A.O has disallowed the claim of the assessee on the ground that it is notional capital loss, while the Ld. CIT(A) confirmed the order of he A.O on the ground that it is to be allowed only at time of making payment and that the loss being capital in nature, cannot be allowed under any of the provisions of the Act. She also observed that the claim is not in accordance with the provisions of Sec. 43A of the Act. Thus, we find that both the A.O as well as the CIT(A) were of the opinion that it is a notional loss and therefore is not allowable in the first place. This issue was considered by the Hon'ble Apex Court in the case of Woodward Governor India Pvt Ltd., (supra) and it was held that the expression 'expenditure' used in section 37 of the IT Act may, in the circumstances of a particular case, cover

an amount which is really a 'loss', even though said amount has not gone out from the pocket of the assessee. The facts of the case and the findings of the Hon'ble Court are reproduced hereunder for the sake of convenience and ready reference:

> *"5. The assessee filed its Return of Income on 28.1.1998 for the assessment year 1998-99 on a total income of Rs. 1,10,28,190.00. That return was processed under Section 143(1)(a) on 23.3.1999. On 16.8.1999 a notice under Section 143(2) was issued to the assessee stating that in the course of assessment proceedings under Section 143 it was noticed by the Department that the assessee had debited to its Profit & Loss Account a sum of Rs. 41,06,746.00 out of which a sum of Rs.29,49,088.00 was the unrealized loss due to foreign exchange fluctuation on the last date of the accounting year. The AO held that the liability as on the last date of the previous year under consideration was a contingent liability, it was not an ascertained liability and consequently it had to be added back to the total income of the assessee. Accordingly, he added back Rs. 29,49,088.00 being the unrealized loss due to foreign exchange fluctuation. In other words, the debit to the P&L account was disallowed. This order of the AO was upheld by the CIT(A) vide decision dated 29.11.2001. Being aggrieved, the assessee went in appeal to the Tribunal. By judgment and order dated 1.4.2005 the Tribunal relying on its earlier decision in the case of M/s Woodward Governor India P. Ltd. for the assessment years 1995-96, 1996-97 and 1997-98 held that the claim of the assessee for deduction of unrealized loss due to foreign exchange fluctuation as on the last date of the previous year had to be allowed. This decision of the Tribunal has been upheld by the Delhi High Court vide the impugned judgment dated 30.4.2007, hence, this Civil Appeal is filed by the Department.*
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> *6. Shri Parag Tripathi, learned Additional Solicitor General, appearing on behalf of the Department submitted that, in this case, the assessee(s) claims deduction under Section 37, which is a residuary provision, as there is no specific provision dealing with adjustment based on foreign exchange fluctuations on the Revenue account (akin to Section 43A, which deals with such adjustments in the Capital account). According to the*

learned counsel, the essence of deductibility under Section 37 is that the increase in liability due to foreign exchange fluctuations must fulfill the twin requirements of "expenditure" and the factum of such expenditure having been "laid out or expended". According to the learned counsel, the expression "expenditure" is "what is paid out" and "something which is gone irretrievably". In this connection, learned counsel placed reliance on the judgment of this Court in the case of Indian Molasses Co. (Private) Ltd. v. CIT reported in 37 ITR 66. According to the learned counsel, the increase in liability at any point of time prior to payment cannot fall within the meaning of the word "expenditure" in Section 37(1). Therefore, according to the learned counsel, the requirement of expenditure is not met in this case. According to the learned counsel, similarly the requirement of money being "expended or laid out" is also not satisfied and thus additional liability arising on account of fluctuation in foreign exchange rate is not deductible under Section 37(1).

7. Shri C.S. Aggarwal, learned senior counsel appearing for M/s Woodward Governor India P. Ltd. (Civil Appeal arising out of S.L.P.(C) No. 593/08), submitted that the assessee had debited a sum of Rs. 41,06,748.00 to its P&L account of which a sum of Rs. 29,49,088.00 stood for the unrealized loss due to foreign exchange fluctuation. According to the learned counsel, the assessee has been following mercantile system of accounting. According to the learned counsel, under mercantile system of accounting, which is also known as accrual system of accounting, whenever the amount is credited to the account of the payee (creditor) liability stands incurred by the assessee even though the amount is actually not paid. In this connection, learned counsel placed reliance on the definition of the word "paid" in Section 43(2). According to the learned counsel, in the past in some years when the value of the rupee becomes stronger vis-`-vis US$, the Department had taxed the gains as income. Therefore, according to the learned counsel, when it comes to "income", the Department says that accrual is enough for taxability and "payment" is irrelevant but when it comes to "loss", the Department says that "payment" alone is relevant for taxability. According to the learned counsel, such double standards cannot be countenanced. Learned counsel further gave the following example in support of his contentions:

1. Where amount is borrowed and used in business:

2. The liability thus was, since by way of loan, the increased liability of Rs. 500/- was towards business increased by Rs.

500/- which resulted into business loss as a result of modification of existing liability. Likewise if on fluctuation, the dollar rate is reduced to Rs. 32/- per dollar, the liability will get reduced by Rs. 300/- and there would be a business gain of Rs. 300/-.

8. In the light of the above illustration, learned counsel urged that when the assessee(s) borrows 100 US$ on 1.4.1999 he incurs a crystallised liability, however, the value of that liability undergoes a change by 31.3.2000 on account of the fall in the rupee value. In other words, the rate of exchange fluctuated from Rs. 35 per dollar as on 1.4.1999 to Rs. 40 per dollar as on 31.3.2000, thus, increasing the liability of the assessee by Rs.500. According to the learned counsel, the assessee was entitled therefore to deduction under Section 37(1) for such enhanced liability. Similarly, if the dollar rate had reduced from Rs. 35 to Rs. 32 per dollar, then the assessee's liability would stand reduced by Rs. 300 and there would be a gain of Rs. 300 which would become taxable. From this hypothetical example, learned counsel urged that the liability stood incurred on the date on which the assessee borrows 100 $ which in the above example is 1.4.1999, however, on account of fluctuation in the dollar rate, the liability may enhance or may reduce by 31.3.2000. This has to be taken into account by the Department. The learned counsel submitted that whenever the dollar rate stood reduced, the Department has taxed in the past the business gains, therefore, as a corollary, the Department has to allow deduction in the year in which the assessee incurs business loss on account of the increase in the dollar rate. Therefore, according to the learned counsel, there is no warrant for interfering in the impugned judgment of the High Court.

10. As stated above, on facts in the case of M/s Woodward Governor India P. Ltd., the Department has disallowed the deduction/debit to the P&L account made by the assessee in the sum of Rs. 29,49,088.00 being unrealized loss due to foreign exchange fluctuation. At the very outset, it may be stated that there is no dispute that in the previous years whenever the dollar rate stood reduced, the Department had taxed the gains which accrued to the assessee on the basis of accrual and it is only in the year in question when the dollar rate stood increased, resulting in loss that the Department has disallowed the deduction/debit. This fact is important. It indicates the double standards adopted by the Department.

13. As stated above, one of the main arguments advanced by the learned Additional Solicitor General on behalf of the

Department before us was that the word "expenditure" in Section 37(1) connotes "what is paid out" and that which has gone irretrievably. In this connection, heavy reliance was placed on the judgment of this Court in the case of Indian Molasses Company (supra). Relying on the said judgment, it was sought to be argued that the increase in liability at any point of time prior to the date of payment cannot be said to have gone irretrievably as it can always come back. According to the learned counsel, in the case of increase in liability due to foreign exchange fluctuations, if there is a revaluation of the rupee vis-`-vis foreign exchange at or prior to the point of payment, then there would be no question of money having gone irretrievably and consequently, the requirement of "expenditure" is not met. Consequently, the additional liability arising on account of fluctuation in the rate of foreign exchange was merely a contingent/notional liability which does not crystallize till payment. In that case, the Supreme Court was considering the meaning of the expression "expenditure incurred" while dealing with the question as to whether there was a distinction between the actual liability in presenti and a liability de futuro. The word "expenditure" is not defined in the 1961 Act. The word "expenditure" is, therefore, required to be understood in the context in which it is used. Section 37enjoins that any expenditure not being expenditure of the nature described in Sections 30 to 36 laid out or expended wholly and exclusively for the purposes of the business should be allowed in computing the income chargeable under the head "profits and gains of business". In Sections 30 to 36, the expressions "expenses incurred" as well as "allowances and depreciation" has also been used. For example, depreciation and allowances are dealt with in Section 32. Therefore, Parliament has used the expression "any expenditure" in Section 37 to cover both. Therefore, the expression "expenditure" as used in Section 37 may, in the circumstances of a particular case, cover an amount which is really a "loss" even though the said amount has not gone out from the pocket of the assessee.

14. In the case of M.P. Financial Corporation v. CIT reported in 165 ITR 765 the Madhya Pradesh High Court has held that the expression "expenditure" as used in Section 37 may, in the circumstances of a particular case, cover an amount which is a "loss" even though the said amount has not gone out from the pocket of the assessee. This view of the Madhya Pradesh High Court has been approved by this Court in the case of Madras Industrial Investment Corporation Ltd. v. CIT reported in 225 ITR 802. According to the Law and Practice of Income Tax by Kanga and Palkhivala, Section 37(1) is a residuary section

extending the allowance to items of business expenditure not covered by Sections 30to 36. This Section, according to the learned Author, covers cases of business expenditure only, and not of business losses which are, however, deductible on ordinary principles of commercial accounting. (see page 617 of the eighth edition). It is this principle which attracts the provisions of Section 145. That section recognizes the rights of a trader to adopt either the cash system or the mercantile system of accounting. The quantum of allowances permitted to be deducted under diverse heads underSections 30 to 43C from the income, profits and gains of a business would differ according to the system adopted. This is made clear by defining the word "paid" in Section 43(2), which is used in several Sections 30 to 43C, as meaning actually paid or incurred according to the method of accounting upon the basis on which profits or gains are computed under Section 28/29. That is why in deciding the question as to whether the word "expenditure" in Section 37(1) includes the word "loss" one has to read Section 37(1) with Section 28, Section 29 and Section 145(1). One more principle needs to be kept in mind. Accounts regularly maintained in the course of business are to be taken as correct unless there are strong and sufficient reasons to indicate that they are unreliable. One more aspect needs to be highlighted. Under Section 28(i), one needs to decide the profits and gains of any business which is carried on by the assessee during the previous year. Therefore, one has to take into account stock-in-trade for determination of profits. The 1961 Act makes no provision with regard to valuation of stock. But the ordinary principle of commercial accounting requires that in the P&L account the value of the stock-in- trade at the beginning and at the end of the year should be entered at cost or market price, whichever is the lower. This is how business profits arising during the year needs to be computed. This is one more reason for reading Section 37(1) with Section 145. For valuing the closing stock at the end of a particular year, the value prevailing on the last date is relevant. This is because profits/loss is embedded in the closing stock. While anticipated loss is taken into account, anticipated profit in the shape of appreciated value of the closing stock is not brought into account, as no prudent trader would care to show increase profits before actual realization. This is the theory underlying the Rule that closing stock is to be valued at cost or market price, whichever is the lower. As profits for income-tax purposes are to be computed in accordance with ordinary principles of commercial accounting, unless, such principles stand superseded or modified by legislative enactments, unrealized profits in the shape of appreciated value of goods remaining

unsold at the end of the accounting year and carried over to the following years account in a continuing business are not brought to the charge as a matter of practice, though, as stated above, loss due to fall in the price below cost is allowed even though such loss has not been realized actually. At this stage, we need to emphasise once again that the above system of commercial accounting can be superseded or modified by legislative enactment. This is where Section 145(2) comes into play. Under that section, the Central Government is empowered to notify from time to time the Accounting Standards to be followed by any class of assessees or in respect of any class of income. Accordingly, under Section 209 of the Companies Act, mercantile system of accounting is made mandatory for companies. In other words, accounting standard which is continuously adopted by an assessee can be superseded or modified by Legislative intervention. However, but for such intervention or in cases falling under Section 145(3), the method of accounting undertaken by the assessee continuously is supreme. In the present batch of cases, there is no finding given by the AO on the correctness or completeness of the accounts of the assessee. Equally, there is no finding given by the AO stating that the assessee has not complied with the accounting standards.

15. For the reasons given hereinabove, we hold that, in the present case, the "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure under Section 37(1) of the 1961 Act.

16. In the light of what is stated hereinabove, it is clear that profits and gains of the previous year are required to be computed in accordance with the relevant accounting standard. It is important to bear in mind that the basis on which stock- in-trade is valued is part of the method of accounting. It is well established, that, on general principles of commercial accounting, in the P&L account, the values of the stock-in-trade at the beginning and at the end of the accounting year should be entered at cost or market value, whichever is lower - the market value being ascertained as on the last date of the accounting year and not as on any intermediate date between the commencement and the closing of the year, failing which it would not be possible to ascertain the true and correct state of affairs. No gain or profit can arise until a balance is struck between the cost of acquisition and the proceeds of sale. The word "profit" implies a comparison between the state of business at two specific dates, usually separated by an interval of twelve months. Stock-in-trade is an asset. It is a trading

asset. Therefore, the concept of profit and gains made by business during the year can only materialize when a comparison of the assets of the business at two different dates is taken into account. Section 145(1) enacts that for the purpose of Section 28 and Section 56 alone, income, profits and gains must be computed in accordance with the method of accounting regularly employed by the assessee. In this case, we are concerned with Section 28. Therefore, Section 145(1) is attracted to the facts of the present case. Under the mercantile system of accounting, what is due is brought into credit before it is actually received; it brings into debit an expenditure for which a legal liability has been incurred before it is actually disbursed. (see judgment of this Court in the case of United Commercial Bank v. CIT reported in 240 ITR 355). Therefore, the accounting method followed by an assessee continuously for a given period of time needs to be presumed to be correct till the AO comes to the conclusion for reasons to be given that the system does not reflect true and correct profits. As stated, there is no finding given by the AO on the correctness of the accounting standard followed by the assessee(s) in this batch of Civil Appeals.

17. Having come to the conclusion that valuation is a part of the accounting system and having come to the conclusion that business losses are deductible under Section 37(1) on the basis of ordinary principles of commercial accounting and having come to the conclusion that the Central Government has made Accounting Standard-11 mandatory, we are now required to examine the said Accounting Standard ("AS").

6.3 Thus, it is clear that the loss on account of fluctuation of foreign currency on the date of balance sheet is not a notional loss as held by the A.O and the CIT(A) and in allowable as expenditure if it is on revenue account.

6.4 The other ground on which the loss has not been allowed is on the ground that it is capital loss. The co-ordinate Bench of the Tribunal in the case of M/s Crane Software Ind Ltd., (supra) (to which, one of us, i.e JM is a

signatory), has considered the issue as to whether the FCCB issue expenses are in the nature of capital or Revenue and has held as under:

> *"34.1. Next is whether FCCB issue expenses are capital or revenue in nature. The assessee company had incurred expenses in connection with the issue of foreign currency convertible bonds. Assessee claimed the expenses as deductible as the expenses were incurred to raise loan finance. The assessing authority held that the bond holders had the option to convert the bonds to equity shares and therefore, the collection of funds through the issue of bonds needs to be treated as to increase the capital and therefore the connected expenses would be capital in nature and hence disallowed.*
>
> *34.2. We agree with the view of the Commissioner of Income-tax(A) that the expenses are not capital in nature. As on 31.03.2006, the previous year ending for the asst. year 2006-07, the funds collected by the assessee company through the issue of FCCB, were in the nature of liability. The assessee company was bound to discharge the bonds on due dates. The assessee was paying interest to bond-holders. It is clear that the bond finance was in the nature of loan finance.*
>
> *34.3. It becomes the capital of the company only when the bond holders exercise their option at the appropriate time in future. That conversion is only a future event, that mayor may not happen, depending on the option exercised by the bond-holders. Therefore, the possible equity character of the funds was contingent on the fact whether bonds would be converted or not in a future date. The nature of a present day loan fund cannot be held as equity fund on the basis of such contingency.*
>
> *34.4. As far as the nature of the funds for the asst. year 2006-07 is concerned, it was a liability in the nature of loan, that too interest bearing loan. If the funds are treated as equity capital for asst. year 2006-07, how the payment of bond interest would be justified in law, as law does not permit payment of interest on a company's equity capital.*
>
> *34.5. In the facts and circumstances of the case, the issue is decided in favour of the assessee".*

6.5 Thus, it is clear that till the bonds are converted into share capital, they remain as a loan fund and cannot be held as equity fund and thus capital in nature. From the financial statements for the F.Y 2008-09, and schedule 4 thereof, it is seen that unsecured loans include FCCBs worth Rs. 101,72,00,000/-. Therefore, the above decision is clearly applicable to the facts of the case before us. In the case of Gati Ltd. (cited supra), this bench was considered the nature of the expenses incurred for issuance of FCCBs and it was held as under:

> *"2. Brief facts of the case are that the assessee company, which is in the business of Cargo Transport and Trading, filed its return of income for the A.Y. 2007- 08 on 31.10.2007 declaring a total income of Rs.15,54,67,315 and book profit of Rs.2,62,85,309 under section 115JB of the Act. During the assessment proceedings under section 143(3) of the I.T. Act, the income of the assessee was determined at Rs.16,36,43,200. Subsequently, the CIT assumed jurisdiction under section 263 of the I.T. Act and directed the A.O. (i) to bring to tax the gain on account of foreign exchange fluctuation of Rs.15,46,428 as income from other sources; (ii) to disallow gratuity of Rs.1,32,95,577; and (iii) to disallow expenditure amounting to Rs.2,69,26,757 relatable to issue of foreign currency convertible bonds. Aggrieved by the order of the Ld. CIT under section 263 of the I.T. Act, the assessee preferred an appeal before the ITAT. The ITAT vide orders dated 04.01.2013 in ITA.No.749/Hyd/2012 upheld the initiation of proceedings under section 263 of the I.T. Act and as far as the disallowability of FCCB related expenses, the Tribunal directed the A.O. to examine the issue of allowability or otherwise of the expenses, keeping in view the ratio of various decisions relied upon by both the parties and as discussed by the Tribunal in its order. Against the order of the ITAT, the assessee preferred an appeal before the Hon'ble High Court but the Hon'ble High Court dismissed assessee's appeal holding that there was no*

substantial question of law involved in the matter. Therefore, the A.O., while giving effect to the order of ITAT, re-examined the allowability of expenditure incurred by the assessee on issue of FCCBs and held that FCCB bonds were issued with an option to the bond holders to convert them to ordinary shares or to redeem their claim of bonds on 06.12.2011 at 147.882% of the principal. He observed that since the said bonds are convertible and have the characteristic of equity shares, proportionate expenditure on the issue of bonds has to be treated as capital expenditure. He further observed that the main purpose of FCCBs was for expansion of their business, i.e., investment in wide ranging capital investment projects and the advantage that would accrue to the assessee from such capital investment would be of an enduring nature. He further observed that the bonds were not meant to be part of profit earning process or a part of the working capital but was meant for investment in the capital field such as off-shore acquisition, acquisition/ purchase of scrips, / investment in wholly owned subsidiaries etc., He therefore, treated the expenditure of Rs.2,64,26,757 incurred on issue of the bonds as capital expenditure and accordingly, brought it to tax. Aggrieved, assessee filed an appeal before the Ld. CIT(A) who confirmed the order of the A.O. and the assessee is in second appeal before us.

3. The Ld. Counsel for the assessee, Mr. Y. Ratnakar, while reiterating the submissions made by the assessee before the authorities below, and submitted that the assessee company has issued unsecured Foreign Currency Convertible Bonds ("FCCB") on 05.12.2006 for $ 20,000 million US dollars and the bond holders were given an option to convert FCCBs into original shares on or before 05.11.2011 and in the event the bond holder is not opting for such conversion, he is entitled to redemption on 06.12.2014 at 147.882% of the bond amount. He submitted that the bonds were issued for securing funds for business purposes including expansion of the business and the amount received is thus an unsecured loan in the hands of the company. He submitted that the expenditure of Rs.2,64,26,757 incurred by the assessee company for issuing these bonds is therefore revenue expenditure. He also submitted that during the F.Y. 2006-07 relevant to the A.Y. 2007-08, the funds collected by the assessee company continued to remain with the assessee only as a liability in the form of unsecured loans as none of the bond holders exercised any option for conversion of their bonds into shares during the relevant financial year. He, further submitted that in the F.Y. 2007-08, the bonds to the extent of 5 million US dollars were converted into share capital

as the bond holders exercised their option for conversion during the said F.Y. 2007-08 and this was also declared in the public accounts for the F.Y. 2007-08. He has submitted that the remaining outstanding amount in respect of the balance FCCBs has been fully repaid on 31.12.2011 with premium to the bond holders which fact has also been taken note of by the Commissioner in his order under section 263 of the I.T. Act. He has submitted that as the bonds were issued only for the purpose of securing loan finance, the assessee has not obtained any asset or advantage of any enduring nature and the expenditure made is for securing the use of money in business for certain period. He has submitted that it is irrelevant to consider the object for which the loan is obtained so long as it is for the business purposes of the assessee, to consider the same as revenue expenditure. According to him, the utilisation of FCCB proceeds has nothing to do with capital of the company and therefore, is allowable as revenue expenditure. Thus, according to him, the findings of the A.O. as well as the Ld. CIT(A) are erroneous. He placed reliance upon the following decisions in support of his contention.

1. India Cements Ltd., vs. CIT (1966) 60 ITR 52 (SC)

2. CIT vs. Tumus Electric Corpn. Ltd., (1990) 49 Taxman 249 (MP) (HC)

3. CIT vs. East India Hotels Ltd., (2001) 119 Taxman 235 (Cal.)

4. CIT vs. South India Corpn. (Agencies) Ltd., (2007) 164 Taxman 249 (Mad.)

5. CIT vs. First Leasing Co. of India Ltd., (2008) 304 ITR 67 (Mad.)

6. CIT vs. Secure Meters Ltd., 321 ITR 611

7. CIT vs. ITC Hotels Ltd., 334 ITR 109

8. M/s. Crane Software International Ltd. vs. DCIT, Bangalore Order dated 08.02.2011 in ITA.Nos. 741 & 742/Bang/2010.

9. CIT vs. Havells India Ltd., 352 ITR 376

10. DCIT vs. UAG Builders (P) Ltd., Delhi (2012) 25 taxmann.com 205 (Del.)

3.1. Further he has also relied upon the CBDT circular No.56 dated 19th March, 1971 on the provisions of section 35Dwherein it was clarified that the provisions of section 35D will not have the effect of bringing the expenditure covered by the decision of the Hon'ble Supreme Court in the case of India Cements Ltd., reported in (1966) 60 ITR 52 within the scope of the expenditure to be amortized against profits over ten year period under section 35D of the Act. Thus, according to him, the expenditure on the issue of FCCB is allowable as revenue expenditure.

4. The Ld. D.R., on the other hand, supported the orders of the A.O. and has placed reliance upon the findings of the A.O. and the CIT(A).

5. Having regard to the rival contentions and the material on record, we find that the only dispute is to the nature of expenditure incurred by the assessee on issue of FCCBs. The Hon'ble Supreme Court in the case of "India Cements" (cited supra) was considering the allowability of claim of expenditure of the assessee therein, incurred by it, on stamps, registration fees etc., for securing a loan, as business expenditure under section 37(1) of the Act, and held that loan obtained cannot be treated as an asset or advantage of an enduring nature for the benefit of the business of the assessee, as, a loan is a liability and has to be repaid and it is therefore, erroneous to consider the liability as an asset or an advantage. It was further held that the nature of the expenditure incurred in raising a loan would not depend upon the nature or purpose of the loan as the loan may be intended to be used for the purchase of raw material when it is negotiated but the company may, after raising the loan, change its mind and spend it on secured capital assets. Therefore, the purpose for which the loan was required was irrelevant to the consideration of the question, whether the expenditure for obtaining the loan was a revenue expenditure or capital expenditure and therefore, it was held that the expenditure incurred for availing loan is allowable undersection 37(1) of the Act. This decision of the Hon'ble Supreme Court has been followed by various High Courts in the cases cited by the Ld. Counsel for the assessee cited supra. The Hon'ble Madhya Pradesh High Court in the case of CIT vs. Tumus Electric Corpn. Ltd., (1990) 49 Taxman 249 (MP) (cited supra), after considering the above judgment of the Hon'ble Supreme Court has held that the expenditure incurred by the assessee therein in connection with the execution of a mortgage deed to secure a loan was revenue

expenditure as there was no regulation regarding the application of capital subsidy to any specific purpose.

6. In the case of CIT vs. East India Hotels Ltd., (cited supra), the Hon'ble High Court of Calcutta was considering the allowability of the expenditure on account of issue of debentures and the applicability of Section 35D to such expenses and it was held that Section 35D has been introduced w.e.f. 01.04.1971 to give benefit to the assessees in case of capital expenses but a deduction, which is otherwise allowable as revenue expenditure, cannot be denied after insertion of Section 35D. The Hon'ble High Court also took note of the CBDT Circular No.56 dated 19.03.1971 which clarified the provision of section 35D and the amortization allowable and the said provision has further been clarified that it is not intended to supersede any other provision of the I.T. Act, under which such expenditure is admissible as a deduction. In the case before the Hon'ble Calcutta High Court, 20% of the debentures was payable by the end of three years from the date of issue of debentures by way of issue of shares and the balance 20% at the end of 8th, 9th , 10th and 11th years from the date of allotment of debentures by payment in cheques. The Hon'ble High Court held the above facts of conversion of 20% of the debentures into shares by the end of 3 years to make the debentures more lucrative/attractive does not change the character of repayment of the loan within 11 years as it retains the character of a loan.

7. In the case of CIT vs. South India Corporation (Agencies) Ltd., (cited supra), the Hon'ble High Court of Madras was seized of the issue as to whether the expenditure incurred on issue of debentures was capital or revenue and after considering the decision of the Hon'ble Supreme Court in the case of India Cements (cited supra) as well as the Delhi High Court decision in the case of CIT vs. Thirani Chemicals Ltd., reported in 290 ITR 196, held that the expenditure incurred on the issue of debentures is permissible deduction under section 37 of the I.T. Act. Similar view was expressed by the Hon'ble High Court of Madras in the case of First Leasing Company & India Limited (cited supra).

8. The Hon'ble Karnataka High Court in the case of ITC Hotels Ltd., (cited supra) has also considered the judgment of the Rajasthan High Court in the case of Secure Metres Ltd., (cited supra), to hold that even if the debentures were to be converted into the shares at a later date, the expenditure incurred on such convertible debentures has to be treated as revenue

expenditure. We find that 'A' Bench of this Tribunal at Bangalore in the case of M/s. Crane Software International Ltd., Bangalore vs. DCIT, Circle-11(2) (cited supra), has considered whether FCCB issue expenses are in the nature of capital or revenue and has held the same to be revenue in nature. Similar view has been expressed by the Hon'ble Delhi High Court in the cases of CIT vs. Havells India Ltd., (cited supra) and also DCIT vs. UAG Builders (P.) Ltd., Delhi (cited supra). We, therefore, find that this issue is fairly covered by the above cited decisions. Hence, we hold that the expenditure incurred by the assessee on issue of FCCB is revenue expenditure allowable under section 37(1) of the I.T. Act.

6.6 Further the Hon'ble Supreme Court in the case of CIT Vs Woodward Governor India Pvt Ltd., (supra) has held that the expression 'expenditure' as used in Sec. 37 of the Act, covers the amount which is really a loss, even though the said amount has not gone out from the pocket of the assessee, and that the loss suffered by the assessee on account of foreign exchange difference as on date of balance sheet, is an item of expenditure allowable u/s 37(1) of the Act. The Hon'ble Supreme Court had also taken note of the fact that in the previous years, whenever the dollar rates would be reduced, the department had taxed the gains which accrued to the assessee therein on the basis of accrual and it was only in the relevant year when the dollar rates increased resulting in a loss, that the department disallowed the deduction / debit and that it indicated the double standards adopted by the department. Even in the case before us, the assessee has stated that

the disallowance is made only in A.Y 2009.10, whereas the balance of the expenditure which has been claimed in subsequent assessment years, has been allowed as a deduction in the assessment completed u/s 143(3) r.w.s 147 of the IT Act for the A.Y 2010-11. Respectfully following the above decisions (cited supra), we hold that the assessee, which is following a uniform and consistence method of accounting, and has claimed the expenditure in accordance with the notification of the Min of Corporate Affairs and the A.O has allowed the same in the subsequent assessment years, the revenue cannot take a contrary stand only for the A.Y 2009-10. In the result, the grounds of the appeal of the assessee on this issue are allowed.

7. In the result both the assessee's appeal as well as Revenue's appeal are partly allowed for statistical purposes.

Pronounced in the open court on 22nd May, 2018.

Sd/-	Sd/-
(S. RIFAUR RAHMAN)	**(P. MADHAVI DEVI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 22nd May, 2018

KRK

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2) ACIT, Circle-1(2), Hyderabad.
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4) The Departmental Representative, I.T.A.T., Hyderabad.
5) Guard File.