IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No.356/Coch/2017
Assessment Year : 2008-09

The Income Tax Officer, Ward-1(1), Kochi.	**Vs.**	M/s. JRG Securities Ltd., (Presently Inditrade Capital Limited) JRG House, Ashoka Road, Kaloor, Kochi-682 017. [PAN:AAACH 7327G]
(Revenue-Appellant)		**(Assessee-Respondent)**

C.O. No.03/Coch/2018 (Arsg. out of I.T.A. No.356/Coch/2017)
Assessment Year : 2008-09

M/s. JRG Securities Ltd., (Presently Inditrade Capital Limited) JRG House, Ashoka Road, Kaloor, Kochi-682 017. [PAN: AAACH 7327G]	**Vs.**	The Income Tax Officer, Ward-1(1), Kochi.
(Assessee- Appellant)		**(Revenue-Respondent)**

I.T.A. No.357/Coch/2017
Assessment Year : 2008-09

M/s. JRG Securities Ltd., (Presently Inditrade Capital Limited) JRG House, Ashoka Road, Kaloor, Kochi-682 017. [PAN: AAACH 7327G]	**Vs.**	The Income Tax Officer, Ward-1(1), Kochi.
(Assessee-Appellant)		**(Revenue-Respondent)**

Revenue by	Smt. A.S. Bindhu, Sr. DR
Assessee by	Shri Balakrishnan K., CA

Date of hearing	18/02/2019
Date of pronouncement	01/03/2019

O R D E R

Per CHANDRA POOJARI, AM:

These appeals filed by the assessee as well as by the Revenue are directed against the order of the CIT(A)-1, Kochi and pertain to the assessment year 2008-09. The assessee has also filed Cross Objection in C.O. No.03/Coch/2018 against Revenue's appeal in ITA No. 356/Coch/2017 for the assessment year 2008-09.

ITA No. 356/Coch/2017 : Revenue's appeal : AY 2008-09

2. The first ground, Ground No. 2 raised by the revenue is with regard to deletion of addition of Rs.6,74,707/- made u/s. 36(1)(va) r.w.s. 2(24)(x) in respect of employees' contribution to PF/ESI.

3. After hearing both the parties, we find that this issue is squarely covered against the assessee by the judgment of Jurisdictional High Court in the case of CIT vs. Merchem Ltd. (378 ITR 443) wherein it was held that due date in the respective ESI/PF Act is the date to be considered for allowing deduction u/s. 36(1)(va).

3.1 In view of the above judgment of the Jurisdictional High Court, we are inclined to reverse the order of the CIT(A) and restore that of the Assessing Officer. Hence, employees' contribution to PF/ESI after due date under the relevant PF/ESI Act is

not eligible for deduction u/s. 36(1)(va) of the Act r.w.s 2(24)(x) of the Act. This ground of appeal of the Revenue is allowed.

4. The next ground, Ground No. 3 raised by the Revenue is with regard to allowance of purported non-IPO expenses to the tune of Rs.1,17,77,496/- in AY 2008-09. The CIT(A) erred in allowing the aforesaid expenditure u/s. 37(1) in AY 2008-09 which was incurred in earlier F.Y. 2006-07 and liability discharged in that year itself..

4.1 The facts of the case are that the assessee had incurred an amount of Rs.1,47,85,680/- in relation to the IPO undertaken by the assessee during the F.Y. 2006-07. The Company had claimed a deduction of one fifth of the total expenditure incurred being an amount of Rs.29,57,136/- (1/5th of Rs.1,47,85,680/-). The detailed split of Rs.1,47,85,680/- is as follows:

A. Expenses directly related to the Initial Public Offer

Nature of Expense	Amount (Rs.)
IPO Commission	19,61,064
DD issued in favour of ROC for IPO	4,87,500
Amount paid to share transfer agents	4,09,620
Other fees paid to ROC in relation to the IPO	1,50,000
Total Amount	30,08,184

B. Other Expenses

Nature of Expense	Amount (Rs.)	Amount (Rs.)
Advertisement Expenses		51,20,821
Other Charges		

Postage & Courier	10,76,110	
Printing & Stationery	15,62,080	
Maintenance charges, staff travelling expenses, food expenses, petrol expenses	7,74,625	
Draft Financial charges paid to Chartered Accountant	1,00,000	
Market research charges paid to Lead Managers	31,43,860	66,56,675
Total		1,17,77,496

The Assessing Officer, while computing the taxable income, had disallowed an amount of Rs.29,57,136/- being the amount of expenditure incurred towards the public issue of shares which primarily relates to advertisement expenses, postage and courier, printing and stationery, travelling expenses etc. The Assessing Officer had disallowed the said amount on the contention that the expenditure was capital in nature and was incurred in earlier assessment year and was considered as deferred/prior period capital expenditure.

4.2 On appeal, the CIT(A) deleted the disallowance made of Rs.23,55,449 (out of the total disallowance made by the Assessing Officer of Rs.29,57,136) and confirmed the balance disallowance of Rs.6,01,636/-. The CIT(A) held that the expenses incurred towards advertising, travelling, postage etc. were purely in the revenue field and operational in nature and intended for the furtherance of the assessee's business. It was held that expenses would have been incurred irrespective of whether the IPO had taken place or not.

4.3 Against this, the Revenue is in appeal before us.

4.4 The Ld. DR submitted that the CIT(A) erred in allowing the above expenditure as revenue expenditure u/s. 37(1) of the Act in assessment year 2008-09 which was incurred in earlier F.Y. 2006-07 and liability discharged in that year itself.

4.5 The Ld. AR submitted that section 35D(2)(c)(iv) of the Act provides for amortization of expenditure in connection with the issue, for public subscription of shares in or debentures of the assessee-Company, being underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus over a period of 5 years.

4.6 The Ld. AR relied on the judgment of the Madras High Court in the case of Commissioner of Income-tax v Ashok Leyland Ltd [2012] 23 taxmann.com 50 9) while evaluating the meaning the phrase, 'being' used in Section 35D(2)(c)(iv) held that, "we have no hesitation in holding that the expenditure that qualified for consideration under Section 35D is restricted by reason of use of the phrase "being". Thus expenditure incurred in connection with the issue of shares and debentures of the company to public subscription, which qualify for consideration under Section 35D are underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus and nothing more." Thus, according to the Ld. AR, section 35D(2)(c)(iv) of the Act defines the expenses which are directly relatable to issue of shares. As per section 35D(2)(c)(iv) of the Act, only the following expenses are directly relatable to issue of shares which can be treated as capital in nature:

Underwriting commission;

Brokerage;

Charges for drafting, typing, printing and advertisement of the prospectus

4.7 Thus, it was submitted that the provisions of section 35D of the Act should be applied in its strict sense as it provides only for expenses like underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus being directly related to the IPO which has to be amortized over a period of 5 years. The Ld. AR submitted that out of the total amount of INR 1,47,85,680/- incurred in relation to IPO undertaken by the Company in the Financial Year 2006-07, an amount of Rs.29,57,136/- being one fifth of the total amount as mentioned above was claimed as expenditure for the Financial Year 2007-08.

4.8 However, it was submitted that out of the amount of Rs. 1,47,85,680/-, the Company agreed for disallowance in relation to the following expenses considering that the same were directly relatable to the Initial Public Offer:

Nature of Expense	Amount (Rs)
IPO Commission	19,61,064
DD issued in favour of ROC	4,87,500
Amount paid to share transfer agents	4,09,620
Fees paid to ROC	1,50,000
Total Amount	30,08,184

Accordingly, it was submitted that considering the fact that the assessee had claimed a deduction during the Financial Year 2007-08 of Rs.6.01,636 (being 1/5th of the total amount of Rs.30,08,184/- directly relatable to the public issue of shares), the assessee was agreeable to the disallowance to the extent of the said amount. However, it was submitted that the remaining expenditure of Rs.23,55,499 (being 1/5th of the total amount of Rs. 1,17,77,496/-) claimed as deduction during the Financial Year 2007-08 included expenses which were purely revenue in nature such as advertising, travelling, postage market research etc. the benefit of which was purely in the revenue field.

4.9 The Ld. AR relied on the judgment of the High Court of Madras in the case of Commissioner of Income tax v Kreon Financial Services Ltd [2013] 38 taxmann.com 46 wherein it was held that certain expenditure, even though incurred at the time of issue of shares like dispatch and out of pocket expenses, registration fees, listing fees, stationery expenses, travelling expenses, meeting expenses, bank charges, commission and professional certification charges were revenue in nature as these

expenses are incurred to meet out the day to today transactions of the business of the assessee and accordingly allowable as revenue expenditure. Thus, emphasis was placed on the nature and purpose for which the expenses were incurred to classify the same as revenue expenditure. The Ld. DR relied on the judgment of the Karnataka High Court in the case of Commissioner of Income-tax vs. Indo Nissin Foods Ltd [2013] 35 taxmann.com 637 wherein in the context of analyzing whether expenditure incurred for television advertisement film production was in the nature of a revenue expenditure or not held that, "The expenditure incurred is dominantly for advertisement to promote the sales. If the contention of the Revenue is upheld, any expenditure incurred for marketing and promoting sales should have to be held as 'capital expenditure' and in no case, the deduction can be allowed. Such a contention is illogical and untenable."

5. We have heard the rival submissions and perused the record. We find that this issue came up for consideration in assessee's own case in ITA No. 339/Coch/2012 dated 07/03/2014 wherein it was held as under:

> *"6. On the contrary, in our view, the decision rendered by Hon'ble Supreme Court in the case of Brooke Bond (India) Ltd. vs. CIT (225 ITR 798 (SC) is squarely applicable to the facts of the instant case. We have already noticed that the Ld CIT(A) has rendered his decision by following the same. For the sake of convenience, we extract below the relevant observations made by ld CIT(A):-*
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> > *"15. In Ground No. 4, the appellant challenges the disallowance of Rs. 29,57,136/- claimed as revenue expenditure stated to have been incurred by it in connection with Initial Public Offer of shares. It is the argument of the appellant that while computing the taxable income,*

the Assessing officer has disallowed an amount of Rs. 29,57,136/- as capital expenditure in spite of the claim of the appellant that the AO is wrong in arriving at the conclusion that the amount of Rs. 29,57,136/- incurred by the appellant as capital expenditure and taxing the same. It was argued at the time of hearing that the expenses incurred on Initial Public Offers include expenses which are purely revenue in nature such as advertising, traveling, postage etc. and thus the inference drawn-up by the Assessing officer is not correct. The appellant submits that the claim of the appellant that the expenses are purely operational in nature and was solely spent for the furtherance of appellant's business consideration by widening its competitive landscape in the given market scenario may be accepted.

15.1 The further contention raised by the appellant in this regard is that expenses incurred and claimed towards issue of public offerings does not result in securing a tangible or intangible asset or any corporate right, so as to bringing forth enduring benefits to the appellant company.

15.2 I have given thoughtful consideration to the arguments given by the appellant as well as facts mentioned in the assessment order. The Assessing officer in the assessment order disallowed the entire claim of expenses on IPO (Initial Public Offer) treating the same as capital expenditure. The Assessing officer placed reliance on the judgment of the Hon'ble Supreme Court in the case of Brooke Bond (India) Ltd. v. CIT reported 225 ITR 798 (SC). On the other hand it was argued on behalf of the appellant that only direct expenses such as payment to Registrar of Companies, etc. are to be treated as capital expenditure. It has been further stated that expenses such as advertisement for public issue, traveling expenses for the purpose of IPO and other related expenses such as market research and postage expenses cannot be held to be capital in nature. The appellant also place reliance on a number of judicial pronouncements, which ahs been cited supra.

15.3 I Have gone through the judgment of the Hon'ble Supreme Court in the case of M/s. Brooke Bond India Ltd. The Hon'ble Apex Court in the said judgment has held as under:

> *"It is no doubt true that before the AAC as well as before the Tribunal it was submitted on behalf of the assessee that increase in the capital was to meet the need for working funds for the assessee company. But the statement of case sent by the Tribunal does not indicate that a finding was recorded to the effect that the expansion of the capital was undertaken by*

the assessee for the purpose of meeting the need for working funds for the assessee to carry on its business. Though the increase in the capital results in expansion of the capital base of the company and incidentally that would help in the business of the company and may also help in the profit-making, the expenses incurred in that connection still retain the character of a capital expenditure since the expenditure is directly related to the expansion of the capital base of the company. On the facts and in the circumstances of the case, the Tribunal was right in sustaining the disallowance of Rs. 13,99,305 being expenses incurred in connection with the issue of fresh lot of shares."

15.4 On a perusal of the above judgment of the Hon'ble Court, it can be said that nowhere the Hon'ble court has made any distinction between direct and indirect expenses with regard to pubic issue of shares. The Hon'ble court has only said that expenses which are relatable to public issue of shares are to be treated as capital in nature. The argument of the appellant that expenditure on advertisement for IPO, market research expenses related to IPO, traveling expenses and postal expenses etc. are indirect expenses and therefore the same is to be treated revenue in nature is not acceptable. Advertisement has to be carried on for the purpose of drawing interest of the general public for the subscription to the shares. Similarly market research expenses, as well as postal expenses for dispatch of various documents related to IPO are also directly linked to the public issue of shares. Similarly, journeys undertaken by the promoters and employees for the purpose of IPO are also related to IPO. Thus all the activities are directly and intricately linked with the initial public offer of shares, and, therefore, they are part and parcel of expenses pertaining to public issue of shares. The reliance place by the appellant on various case laws are distinguishable on fact as because none of the cases cited by the appellant deal with public issue of shares. I, accordingly hold that the Assessing officer was justified in treating the entire expenditure of Rs.29,57,136/- as capital expenditure. The decision of Hon'ble Supreme Court in the case of Brooke Bond India Ltd. cited supra fully applies to the facts of the appellant's case. This ground of appeal raised by the appellant in this regard is therefore dismissed."

We notice that the Ld CIT(A) has examined the various expenses incurred by the assessee in terms of the decision rendered by Hon'ble Supreme Court in the case of Brooke Bond (India) Ltd (supra). Accordingly, we agree with the view expressed by Ld CIT(A).

7. The Ld A.R alternatively contended that the Initial Public Offer expenses are considered as "Preliminary expenses" under sec. 35D of the Act. He further submitted that the provisions of sec. 35D was extended to the service sector also by the Finance Act, 2008 by omitting the word "industrial" from sec. 35D of the Act. The Ld Counsel submitted that the expenses incurred in connection with issue, for public subscription, of shares of the Company, being underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of prospectus are covered under sec. 35D(2) of the Act. He further submitted that the preliminary expenses are allowed as deduction in five annual instalments u/s 35D of the Act. Accordingly he submitted that the deduction claimed by the assessee is in terms of sec. 35D of the Act.

8. However, we notice that the alternative contention of the assessee for deduction u/s 35D of the Act was not examined by the AO. Accordingly, in our view, the same requires to be considered at the end of the assessing officer. Accordingly, we restore this alternative contention to the file of the AO with the direction to examine the same and take appropriate decision in accordance with the law, after affording necessary opportunity of being heard to the assessee."

5.1 In view of the above decision of the Tribunal, we are inclined to allow this ground of appeal of Revenue as discussed in para (6) of the Tribunal order. This ground of appeal of the Revenue is allowed.

6. The next ground, Ground No. 4 relates to the allowance of Prior Period Expenses amounting to Rs.1,78,48,292/- already offered to tax in AY 2009-10.

6.1 The facts of the case are that the assessee had disallowed an amount of Rs. 1,78,46,292/- in AY 2009-10 towards prior period expenses pertaining to AY 2008-09 and had claimed the same as an allowable expenditure by filing the revised computation of income for AY 2008-09. The same was also duly certified by the

auditor in Form 3CD pertaining to the AY 2009-10. The split up of Rs. 1,78,46,292/- is as follows:

Turnover fees paid to Stock Exchange : Rs.78,86,87/-

Stamps used: Rs.32,08,342/-

Business Incentive paid: Rs.67,51,276

The same was duly certified by the auditor in the Form 3CD pertaining to AY 2009-10 wherein the amount of prior period expenses was disclosed separately. The said expenses were treated as prior period expenses considering that the auditor had identified the same only in AY 2009-10. Accordingly, the assessee had claimed the expenses in relation to AY 2008-09 by filing a revised return of income which the assessee had omitted to claim in the original return of income complying with the provisions of section 139(5) of the Act. While computing the taxable income, the Assessing Officer had disallowed an amount of Rs.1,78,46,292 representing expenditure incurred on turnover fees, stamps used and business incentive which were claimed separately by the assessee in the revised computation of income.

6.2. On appeal, the CIT(A) deleted the disallowance by holding that undoubtedly, if the amounts as above totalling Rs.1,78,46,292/- had been offered to tax in the latter Assessment year, there is no reason to tax the assessee for the same amount in the impugned AY 2008-09, since that would result in double taxation which is impermissible under the statute and untenable in law. The CIT(A) observed that the accounts of the assessee had been audited under the Companies Act as well as

the Income tax Act for both Assessment years 2008-09 and 2009-10, which were not rejected by the Assessing Officer. Therefore, by relying on the ratio laid down by the Supreme Court in the case of Kedarnath Jute Manufacturing Co. Ltd. v. CIT (82 ITR 363) as well as the principle that the consistent system followed by the assessee should not be disturbed without legally valid and plausible reasons and the fact that the assessee had filed a revised return of income, the CIT(A) deleted the enhancement and the assessment made by the AO of Rs. 1,78,46,292/-.

6.3 Against this, the Revenue is in appeal before us. The Ld. DR relied on the order of the Assessing Officer. The Ld. DR also relied on the decision of the ITAT Mumbai Bench in the case of ITO vs. Suresh Chand Jain (100 ITD 435) wherein it was held that SEBI turnover fee being a statutory liability was allowable u/s. 43B of the Act.

6.4 On the other hand, the Ld. AR submitted that as per section 139(5) of the Act, if any person, having furnished a return under sub-section (1), or in pursuance of a notice issued under sub-section (1) of 142, discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. Accordingly, it was submitted that the assessee had claimed the expenses in relation to AY 2008-09 by filing a revised return of income which the assessee had omitted to claim in the original

return of income. Considering the fact that the said amount had already been subject to tax for the AY 2009-10, it was submitted that it would be against law to impose a tax liability on the same amount twice.

6.5 The amount disallowed in the computation of total income of AY 2009-10 was Rs. 1,43,06,107/- as per Enclosure 5 of the Tax Audit Report for AY 2009-10. In this regard, the Ld. AR recreated the table as follows –

Particulars	Amount (Rs.)
Income	
Fees for the Private equity placement not recharged to group	(1,10,00,000)
Expenditure	
Turnover fee for stock exchange not accounted in earlier years	78,86,674
Stamps used	32,08,342
Short provision of depreciation in respect of earlier years	48,69,935
Provision for advances doubtful of recovery not recorded in earlier years	25,89,880
Business Incentives not recorded in earlier years	67,51,276
Total	1,43,06,107

6.6 Thus, it was submitted that the amount disallowed in the computation of total income for AY 2009-10 was after neting off income and expenses, wherein the amount of Rs.1,78,48,292/- (Rs. 7,886,674 + Rs. 3,208,342 + Rs. 6,751,276) being

the total of Turnover fees, Stamps used and Business Incentives were also disallowed in the computation of total income for AY 2009-10 and it was the net amount of Rs.1,43,06,107/- which was shown in the computation of total income for AY 2009-10. Thus, it was submitted that the entire amount of Rs. 1,78,46,292/- was offered to tax in the relevant assessment year.

7. We have heard the rival submissions and perused the record. In the present case, the expenditure was incurred in connection with the following expenses:

Turnover fee for stock exchange not accounted in earlier years	78,86,674/-
Stamp paper balances written off	3,208/-
Business incentives not recorded in earlier years	67,51,276/-

These expenses were not debited to the P&L account in the assessment year under consideration in 2008-09.. However, it was charged to the P&L account of the subsequent assessment year 2009-10. The same was disallowed suo moto for the assessment year 2009-10 on the reason that it was relating to the assessment year 2008-09. In our opinion, the incurring of expenses was not at all examined by the CIT(A) and he has also not examined whether provisions of section 43B would be applicable or not. In our opinion, the Assessing Officer has to examine the applicability of section 43B towards any fee payable to SEBI and also he is required to examine the nature of the expenditure whether capital or revenue. In view of this, we are inclined to remit the entire issue to the file of the Assessing Officer to

re-examine and decide afresh. This ground of appeal of the Revenue is partly allowed for statistical purposes.

8. The Cross Objection filed by the assessee in C.O. No. 03/Coch/2018 is in support of the CIT(A) order. In view of our findings in Revenue's appeal, the Cross Objection has become infructuous and is dismissed as infructuous

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9. The only ground raised in the assessee's appeal reads as follows:

> On the facts and circumstances of the case, the CIT(A) has erred in treating the amount incurred towards professional and consultancy charges as capital expenditure without considering the fact that the consultancy charges paid by the Company does not result into any long term enduring benefit to the Company as the expenses were purely operational in nature and intended for the furtherance of the Company's business and were incurred in the revenue field to identify suitable investors.

9.1 The facts of the case are that during the assessment year, the assessee-Company had incurred an expenditure of Rs.1,85,70,000/- for consultancy charges for private equity to identify suitable investor for the said assessee-Company and the expenditure was claimed as revenue expenditure paid to one M/s. Veda Corporate Advisors Pvt. Ltd. The investor M/s. Duckworth Limited invested in the said company as equity of Rs.49.83 crores in share capital and convertible warrants of Rs.6.4 crores approx. and as such the capital funds of the said assessee-company was enhanced from Rs.24 crores to Rs.80.5 crores. It was noticed that the consultancy fee expended for this purpose was having long term enduring benefits

for the company and cannot be considered as revenue expenditure. Therefore, the said consultancy fees was treated as non-depreciable capital expenses to provide long term capital base to the assessee-Company by providing enduring benefits in terms of capital to the said assessee-Company on long duration basis. Hence, such expense was disallowed. However, it was noticed that in the revised computation of income, the assessee company had already disallowed Rs.1,10,00,000/- and as such balance amount of Rs.75,70,000/- was disallowed and added to the income.

9.2 On appeal, the CIT(A) confirmed the disallowance of Rs.75,70,000/- being capital in nature by observing as follows:

> (a) The assessee had extracted from the agreement entered into with Veda and listed the various services provided by Veda towards which the payments totalling Rs. 75,70,000/- were made. These included: a) Preparation of Executive Summary/presentation for initial circulation among interested investors and coordination amongst investors; b) Preparation of Investor Presentation and Information Memorandum; c) Handling negotiations with investors; d) Advising on Business Valuation; e) Co-ordination of and assistance in negotiations with the investors to reach an initial Memorandum of Understanding; f) Coordinating due diligence with audit firms; f) Signing of the final definitive shareholder agreements. It is clear from the nature of these that the incurrence of these expenses follow or flow alongside the long-term and strategic decision taken to invite investment, and although the expenses

themselves do not form part of the capital introduced, these were expended as part of the financial build up that culminated in the investments. The facts of the case do not show that the impugned expenses were to meet the day-to-day transactions of the business of the assessee. These expenses therefore need to be examined to determine whether or not they have any role to play in generating any long-term benefit.

(b) Any investment is based on capital budgeting exercises undertaken by the investor using financial models [such as Net Present Value (NPV), Discounted Cash Flow (DCF), Internal Rate of Return (IRRJ, etc.]. Increasing the professional and/or consulting charges may not necessarily trigger or increase the quantum of investment made, but undoubtedly add to and participate in the successful culmination of the investment-seeking and sourcing exercise. The charges themselves have been paid to the consultant (M/s Veda in the instant case) - and not to the investor - to facilitate the negotiations, assist in preparing documents and smoothen the route to finalizing the investments. Such facilitation, assistance, smoothening and other services provided by M/s Veda, although exercises that are carried out at the time of the sourcing of the investment, generate value to the Appellant that cannot automatically be held as yoked and fettered to one single financial year being that of the incurrence of the corresponding expenses but which play out and impact the fortunes of the Appellant in the long term over several future financial years. The value generated is through the modified and enhanced capital structure of the

Appellant, Therefore, the argument of the Appellant that the impugned expenses paid towards professional and consultancy charges are purely revenue in nature cannot be accepted at face value.

(c) Professional and consultancy fees may be incurred for a variety of reasons. In deciding whether it is permissible to deduct such fees in computing taxable profits it is necessary to establish not only whether the fees were incurred wholly and exclusively for the purposes of the business, but also whether the items to which they relate are capital or revenue in nature. The extent to which a professional/consultancy fee is capital or revenue depends on the nature of services provided. Fees that relate to capital items are usually held to be capital in nature and are not deductible in computing taxable profits. For example, fees in relation to the following would be disallowed in computing profits on the grounds that they represent capital rather than revenue expenditure: (i) fees in connection with raising long-term finance; (ii) fees in connection with changing the structure of a business (for example, incorporating a business or forming or dissolving a partnership). In contrast, fees that relate to revenue items are deductible.

(d) The Courts have held that whenever the capital structure (through increases in long term share capital or loans) or the asset base of the assessee (through investment in and commencement of new projects) is impacted by the expenditure, the related expenses would be capital in nature. For instance, the

expenditure incurred towards preparing a project report for setting up a new unit is capital in nature [Ref: The ombay High Court in the case of CIT vs. J.*K. Chemicals Limited* (1994) 207 ITR 985 (Bom.), while consultation charges paid by in connection with the expansion of an existing project were held to be allowable as revenue expenditure [Ref: The Hon'ble Gujarat High Court in the case *of Jyotilal vs. CIT* (2009) 24 DTR 177 (Guj.)]. Likewise, travelling and incidental expenditure in finalization of project for existing business was allowable as revenue expenditure [Ref: the decision of the ITAT, Mumbai Bench in the case of Jt. *CIT vs. Rallis India Lid.* 3 ITR 1 (Mum.) (Trib.). The key difference in the two kinds of decisions appears to be the creation of a new asset and therefore the expansion of the asset base of the assessee along with such new dimension. The Delhi High Court held in the case of CIT vs. DLF Commercial Developers Limited [2010] 323 ITR 321 (Del.) that when no new asset was created, then the expenses would be revenue expenditure.

(e) Any expenditure incurred by a company in connection with the issue of shares with a view towards increase its share capital is directly related to the expansion of the capital base of the company, and is capital expenditure, even though it may incidentally help in the business of the company and in profit making. This position has been upheld by the Supreme Court in the cases of *Brook Bond India Limited vs. CIT* [1997] 225 ITR 798 (SC) and *CIT vs. Kodak India Limited* [2002] 253 ITR 445 (SC).

(f) In the case of *Brooke Bond India Ltd.* v. *CIT* [1983] 140 ITR 272 (Cal.), the Calcutta High Court held that where the object of incurring an expenditure is to affect (the capital structure as a result of which certain incidental advantage flows, the expenditure will be of capital nature. Therefore, it was held that by acquiring capital, the assessee was increasing earning of income or earning of the profit, which was held to be the physical test. The Court held that it would be the resultant advantage obtained by incurring the expenditure along with the purpose and object of incurring the expenditure that should be the guide to determine the question as to whether expenditure is capital or revenue.

(g) In the case of *Punjab State Industrial Development Corporation vs CIT* [1997] 225 ITR 792 (SC), the Supreme Court held that they do not consider it necessary to examine all the decisions *in extenso* because of the opinion that *the fee paid to the Registrar for expansion of the capital base of the company was directly related to the capital expenditure incurred by the company and although incidentally that would certainly help in the business of the company and may also help in profit-making, it still retains the character of a capital expenditure since the expenditure was directly related to the expansion of the capital base of the company.* This decision took cognizance of and held against the contrary decision of the Madras High Court in the case of *CIT vs. Kisenchand Chellaram (India) P. Ltd.* [1981] 130 ITR 385 (Mad.), which had held that the fees paid (to the Registrar of Companies) for raising the capital of

the company would be revenue in nature since the without capital a company could not carry on its business and hence the expenses incurred for increasing the capital were bound up with the functioning and financing of the business.

(h) In the case of *Groz-Beckert Saboo Ltd. vs. CIT* [1986] 160 ITR 743 (P & H), the Hon'ble Punjab and Haryana High Court took the view that the fee paid under the Companies Act for increasing the share capital was an expenditure of capital nature. Similarly, in the case of *Mohan Meakin Breweries Ltd vs. CIT (No. 2)* [1979] 117 ITR 505 (HP), the Hon'ble Himachal Pradesh High Court took the same view that increase of share capital and fees paid to Registrar of Companies for increasing authorized capital will result in an advantage of enduring nature and is, therefore, capital expenditure and is not allowable as revenue expenditure. Therefore, the majority of the High Courts have taken the view that whenever there is an increase of the capital by increasing of the shares and it adds advantage to the capital asset of the company then such expenditure shall be treated to be capital expenditure and not revenue expenditure and not allowable under Section 37 of the Act.

(i) However, in the case of *Warner Hindustan Ltd. vs. CIT* [1988] 171 ITR 224 (AP) - which has been cited by the assessee, the Andhra Pradesh dissented from the views above and agreed with the view of the Madras High Court in the case of *CIT vs. Kisenchand Chellram (India) P. Ltd* (supra) and held that an increase in the authorised capital does not by itself result in expending the

capital base or the fixed capital company. This expenditure is more in the nature of expenditure laid out for facilitating the assessee's operations and to enable it to carry on its business more efficiently and profitably. This was done with a view to facilitate a better conduct of the assessee's business. Per the Court, merely obtaining an authorization for increasing the authorised capital, the fixed capital of the company was not enhanced or enlarged. Similarly, in the case of *Hindustan Machine Tools Ltd (No. 3) v. CIT* [1989] 175 ITR 220 (Kar), the filing fees paid to the Registrar of Companies towards enhancement of the authorized share capital was held deductible as revenue expenditure.

(j) From all the above, it is clear that the matter on hand is not fully settled and that there are arguments that can be made in favour of both sides. However, on the instant facts of the case, the expenses are determined to follow or flow alongside the long-term and strategic decision taken by the Appellant to invite investment from M/s Duckworth Limited, and therefore inextricably integrated into such decision. Therefore, these were expended as part of the financial build up that culminated in the investments and are captured within the financial envelope of the investments. There is pre-decided specificity to the purpose for which M/s Veda was hired by the assessee, the purpose being to facilitate the investment flow from M/s Duckworth. Therefore, there exists unity of intent, purpose and action and an unambiguous bond between the between the impugned expenses (as the machinery) and the investment (the product) to the extent that the machinery and the product

cannot be artificially separated. The facts of the case also do not show that the impugned expenses were to meet the day-to-day transactions of the business of the assessee. The decision of the Supreme Court in the case *of Punjab State Industrial Development Corporation vs CIT* (supra) overriding the decision of the Madras High Court (and in corollary, of all other contrary decisions too) also need to be factored in, the weight of judicial opinion appears to be not in favour of the assessee.

(k) The decision of the ITAT, Mumbai Bench in the case of *Agrani Telecom Ltd vs ACIT* [2013] 39 taxmann.com 155 cited by the assessee is not directly jurisdictionally binding on this office.

(l) The expenditure incurred in the form of consultancy charges is seen to be generating enduring benefit to the assessee. The concept of enduring benefit is a paramount factor in settling the Revenue versus Capital debate as upheld by the Supreme Court. As already stated earlier, there appears to be nothing on record to show that the impugned expenditure was incurred for the running of the business or for *"necessitating the business operations for enabling the assessee to do business for earning some profit without having impact on fixed capital"* [as extracted from the Order of the ITAT, Mumbai Bench in the case of *Agrani Telecom Ltd vs ACIT* (supra)]. The facts of that case are clearly distinguished. The impugned expenses being professional and consultancy fees/charges are held to be directly related to expansion of the capital base of

the assessee and hence to be treated as capital expenditure. Other than rhetoric flourished by the assessee [viz. *"purely operational in nature and intended for the furtherance of the company's business and were incurred in the revenue field to identify suitable investors"* (sic) and *"do not result in securing a tangible or intangible property, corporeal or incorporeal rights, so that they could be of a lasting or enduring benefit to the enterprise"*[1] (sic)], the facts of the instant case do not show that the impugned expenditure incurred was related to the carrying on or the conduct of the business and formed an integral part of the profit earning process. The profit earning apparatus has been augmented through the change in the capital structure of the instant assessee, of which the impugned expenses form an integral and organic part.

(m) In sum, the arguments of the assessee are rejected and the impugned expenses totalling Rs. 75,70,000/- are directed to be retained as disallowed and assessed being capital in nature.

9.3 Against this, the assessee is in appeal before us. The Ld. AR relied on the judgment of the Supreme Court in the case of Kedarnath Jute Manufacturing Co. Ltd. v. CIT (82 ITR 363) wherein it was held that, *"We are wholly unable to appreciate the suggestion that if an assesses under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income-tax Officer, the assesses will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assesses is entitled to a particular deduction or not will depend on the provision of*

law relating thereto and not on the view which the assessee might taken of its right nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter." In view of the judgment of the Supreme Court in case of Kedarnath Jute Manufacturing Co. Ltd. (supra), consistent system of accounts followed by the assessee and return of income revised in accordance with the provisions of provisions of the Act, the Ld. AR submitted that the disallowance of prior period expenses amounting to Rs. 1,78,46,292/- may be allowed.

9.4 The ld. AR relied on the decision of the ITAT, Chennai Bench in the case of ACIT vs. R.R. Industries Limited in ITA No. 1256/Mds/2011 dated 17/02/2012 wherein it was held as under:

> *"21. We find that in the case of EID Parry (India) Ltd. (supra), it was observed by the Hon'ble Madras High Court that the expenditure for which deduction was claimed by the assessee was, in fact incurred in earlier years and treated as capital expenditure in those years only because of the abandonment of the project for which expenditures were incurred in earlier years were claimed as deduction in the year in question. On the above facts, the Hon'ble High Court has held that such expenditure was not allowable in the year in question. Thus, we find that the facts of the above case are clearly distinguishable from the facts of the instant case. In the instant case, it is not in dispute that the expenditure was incurred during the previous year relevant to the assessment year under appeal and no material has been brought on record to show that the expenditure was for a different new project.*
>
> *22. Similarly, the decision of J.K. Chemicals Ltd. (supra), we find it to be distinguishable on facts. In that case, the assessee was engaged in the manufacturing of fertilizers and the assessee incurred expenditure to obtain project report and market survey to set up new fertilizer unit for manufacturing more refined fertilizers, whereas, in the instant case, the Ld. AR made a statement at bar that the expenditures, in question was not for any new project. In the case of Commonwealth Trust Ltd. (supra), the*

Hon'ble Kerala High Court in respect of expenditure incurred for valuation of business assets held that "........ We agree with the Tribunal that the claim falls under s. 37(1) of the Act, and that the amount can well be regarded as having been laid out or expended wholly and exclusively for the purposes of the business. We think that the Tribunal was right in regarding the amount as having been expended on considerations of commercial expediency and sound business principles. It was in accordance with sound commercial practice to see that the buildings and machinery of the assessee were kept and maintained in a good state of efficiency for their work and functioning and valuation of these, done by the assessee, in the circumstances, must be regarded as expenses incurred wholly and exclusively for the purpose of the business. We uphold the Tribunal's order allowing this head of claim for deduction."

23. Further, the Mumbai Bench of ITAT in the case of Nimbus Communications Ltd. (supra) held as under:

> *"11. On a careful consideration of the facts and circumstances of the case, as incurring of the expenditure in question was for the purpose of rising capital by way of public issue and as the public issue got aborted, we are of the humble opinion that the expenditure is in the revenue field. For an expenditure to be considered for amortisation under section 350, it should be in the capital field. An expenditure which is incurred in the revenue field is allowable under section 37 of the Act. The Assessing Officer at para 6 of the assessment order has not come to a conclusion that the expenditure in question has not been incurred. After collecting the details from the assessee, he concluded that there being no change in the subscribed share capital and as the expenditure was not incurred prior to incorporation and as it could not be substantiated that the issue is in connection with the extension of business or setting up of new industrial undertaking, the assessee is not eligible for claim under section 35D. The nature of expenses are listed out at para 6 of the assessment order. As there is no controversy on the issue whether the assessee has incurred this expenditure or not and as the nature of expenditure reflect that they are revenue in nature and as the assessee has not got any enduring benefit, we uphold the contention of the assessee and hold that the expenditure is allowable under section 37-"*

24. In view of the above, we find no good reason to interfere with the order of the Ld. CIT(A). It is confirmed and the ground of appeal of the Revenue is dismissed."

9.5 The Ld. AR also relied on the decision of the ITAT, Mumbai Bench in the case of Trigyn Technologies Ltd. vs. ACIT in ITA No. 1986/Mum/2012 dated 20/04/2016 wherein it was held as under:

> *8. We have carefully considered the rival submissions. Insofar as the fact-situation is concerned, the invoice raised by Quartet Financial Services Pvt. Ltd., a copy of which is placed at pg. of the Paper Book, reveals that fee of Rs.50,50,800/- was paid for services in connection with advice on the restructuring of bank debts, identification of investor, raising equity capital in the company and structuring of such transactions. At pages 14 to 17 of the Paper Book is placed a copy of the mandate letter of the said consultant, which reveals the scope and methodology of the sen-ices provided to the assessee. The aforesaid material brings out that the fee has been paid to the said consultant primarily for rendering advice to reduce the interest burden of the assessee-company by, inter alia, exploring the possibility of identifying a strategic investor/lender. It is a settled proposition that payments made to consultants for obtaining professional services in connection with debt restructuring with banks, etc. is a revenue expenditure within the meaning of Sec. 37(1) of the Act and such proposition is supported by the judgment of the Hon'ble Gujarat High court in the case of CIT vs. Gujarat State Fertilizers & Chemicals Ltd.,358 ITR 323 (Guj), a decision which was relied upon by the ld. Representative for the assessee in the course of the hearing. However, the Id. Representative for the assessee. quite fairly conceded that insofar as the proportion of fee relatable to the restructuring and raising of equity share capital was concerned, such expense would fall for disallowance as per the ratio of Brooke Bond (India) Ltd. (supra). In this context, having regard to the entirety of facts and. circumstances of the case, in our view, it would be in fitness of things that 10% of the expenditure, i.e. Rs.5,05,080/- be disallowed and balance of the expense be allowed as a revenue expenditure. In our considered opinion, the aforesaid conclusion is quite justified inasmuch as the entirety of the expenditure cannot be considered as a capital expenditure by applying the judgment of the Hon'ble Supreme Court in the case of Brook Bond India Ltd. (supra) because factually speaking the fee is paid primarily for restructuring of bank debts and not entirely for raising of the equity. Therefore, we set- aside the order of CIT(A) and direct the Assessing Officer to restrict the disallowance to Rs.5,05,080/- and delete the balance. As a consequence, insofar as Ground of appeal no. 1 is concerned, assessee partly succeeds.*

9.6 We have heard the rival contentions and perused the record. In the present case, the assessee had incurred total expenditure of Rs.1,85,70,000/- for consultancy charges towards identifying suitable investor for the Company and this amount was paid to M/s. Veda Corporate Advisors Pvt. Ltd. in connection with whose efforts, M/s. Duckworth Limited had consequently invested Rs.49.83 crores in equity share capital and Rs. 6.4 crores approx. in convertible warrants invested in assessee's company. Out of Rs.1,85,70,000/-, the assessee apportioned Rs.1.10 crores to a Group company. Thus, the assessee claimed expenditure of professional and consultancy charges of Rs.75,70,000/- as revenue expenditure in the hands of the assessee. Consequent to incurring this expenditure, assessee's capital was enhanced from Rs.24 crores to Rs.80.50 crores. The claim of the assessee that the entire expenditure incurred towards consultancy charges which resulted in enhancement of share capital is of revenue nature, is devoid of merit. In our considered opinion, expenses which are incurred in connection with increase in share capital base of the company, are obviously capital in nature. This view of ours is fortified by the judgment of the Supreme Court in the case of Brooke Bond India Ltd. vs. CIT (225 ITR 798) (SC) wherein it was held that any expenditure incurred by a company in connection with the issue of shares with a view to increase in share capital is directly related to the expansion of the capital base of the company, and in profit making. The order of the CIT(A) is in conformity with the judgment of the Supreme Court in the case of Brooke Bond India Ltd. cited supra. Hence, we do not find any infirmity in the order of the CIT(A) and the same

is confirmed. This ground of appeal of the assessee is dismissed. The appeal of the assessee in ITA No. 357/Coch/2017 is dismissed.

10. In the result the appeal of the Revenue is partly allowed for statistical purposes, the appeal of the assessee is dismissed and the Cross Objection of the assessee is dismissed.

Order pronounced in the open Court on this 01st March, 2019

sd/-	sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Kochi
Dated: 01st March, 2019
GJ

Copy to:
1. M/s. JRG Securities Ltd., (Presently Inditrade Capital Limited) JRG House, Ashoka Road, Kaloor, Kochi-682 017.
2. The Income Tax Officer, Ward-1(1), Kochi.
3. The Commissioner of Income-tax(Appeals)-I, Kochi.
4. The Pr. Commissioner of Income-tax, Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin