

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 5634/DEL/2014 (A.Y 2008-09)

Quippo Oil & Gas Infra Ltd. D-2, 5 th Floor, Southern Park, Saket Place New Delhi AAACQ1278P (APPELLANT)	Vs	The Additional Commissioner of Income Tax, Range-14 New Delhi (RESPONDENT)
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ITA No. 5710/DEL/2014 (A.Y 2008-09)

DCIT Circle-14(1) New Delhi (APPELLANT)	Vs	Quippo Oil & Gas Infra Ltd. D-2, 5 th Floor, Southern Park, Saket Place New Delhi AAACQ1278P (RESPONDENT)
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Appellant by	Sh. Surender Pal, Sr. DR
Respondent by	Ms. Alka Arren, AR

Date of Hearing	12.02.2019
Date of Pronouncement	03.04.2019

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the assessee and the Revenue against the order dated 4/7/2014 passed by CIT(A)-XVII, New Delhi for Assessment Year 2008-09.

2. The grounds of appeal are as under:-

ITA No. 5634/DEL/2014

“1.0 That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) [here-in-after referred to as Ld. CIT (Appeals)] was not justified and grossly erred in confirming the disallowance of Foreign Exchange Fluctuation loss amounting to Rs. 30.88.634 /- -treating it to be capital in nature in computing total income under the provisions of the Act other than Sec. 115JB.

2.0 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in confirming the disallowance of leave encashment claimed on provision basis amounting to Rs. 4,66,803/- in computing total income under the provisions of the Act other than Sec. 115JB.

3.0 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in confirming the addition of Foreign Exchange Fluctuation loss amounting to Rs. 30,88,634/- in computing Book Profit u/s 115JB.

4.0 That the appellant craves leave to add, to amend, modify, rescind, supplement or alter any of the Grounds stated here-in-above, either before or at the time of hearing of this appeal.”

ITA No. 5710/DEL/2014

“1. On the facts and circumstances of the case, the Ld.CIT(A) has erred in deleting the disallowances of Rs.9,98,89,316/- made on account of depreciation claimed by the assessee at a higher rate by not appreciating that the facts of the case on which relied is different from the case of the assessee company.

2. On the facts and circumstances of the case, the appellant craves to be allowed to add any fresh grounds of appeal and/or delete or amend any of the grounds of appeal.”

3. First we are taking the appeal of the assessee. The assessee is a Public Limited Company engaged in the business of infrastructure/construction equipment rental service as reported in Clause 8 (a) of the Tax Audit Report. During the year, the Company had debited foreign exchange fluctuation loss of Rs. 18,11,419/- (Net) in Schedule 17 of the Annual Accounts. The foreign exchange loss given in the ordinary course of business is allowable during the Financial Year 2007-08 as per the submissions of the assessee before the Assessing Officer. The assessee debited foreign exchange fluctuation loss of Rs. 18,11,419/- (Net) (Fluctuation loss of Rs.34,06,10/- and fluctuation gain of Rs. 15,94,691/-) to the profit and loss account. The Assessing Officer made an addition amounting to Rs.30,88,634/- by disallowing the same and treating it to be capital in nature by relying upon the decision in case of Woodward's Governor India Pvt. Ltd. 312 ITR 254 (S.C) wherein it was held that foreign exchange loss on capital account will not be allowed as expenditure u/s 37 of the Act. During the previous year, the assessee made a provision on account of leave encashment amounting to Rs. 4,66,803/- and the same amount has been claimed as deduction in computing the taxable income relying on the decision in Excide Industries Ltd. Vs. Union of India 292 ITR 470. The Assessing Officer made disallowance on the contention that the same is allowable on payment basis as per provision of Section 43B (F). The assessee also debited an amount of Rs. 18,11,419/- (after NET OFF) to the profit and loss account on account of foreign exchange fluctuation loss which was disallowed contending that this loss is on account of change in the method of accounting. Therefore, the Assessing Officer considered the same for the purposes of books profits u/s 115JB.

5. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

6. The Ld. AR submitted that during the year, the Company had debited foreign exchange fluctuation loss of Rs. 18,11,419/- (Net) in Schedule 17 of the

Annual Accounts. The detailed break up of amount debited to profit and loss account and its treatment in computation total income is as under:-

Sl. No.	Particulars	Amount (in Rs.)	Treatment in Computation of Total Income	Order u/s 143(3)
1.	Foreign Exchange fluctuation loss - on account of Interest received from RIDO	3,17,476	Claimed as revenue expenditure	Allowed
2.	Foreign Exchange fluctuation loss - on account repayment of Loan by RIDO	25,52,021	Claimed as revenue expenditure	Disallowed
3.	Foreign Exchange fluctuation loss Restatement of amount outstanding against Hongua International	5,36,613	Claimed as revenue expenditure	Disallowed
4.	Foreign Exchange fluctuation gain - on change in accounting method	(15,62,104)	Excluded while computing total income and reduced against WDV of Fixed Assets in Tax Audit Report.	
5.	Foreign Exchange fluctuation gain -on account of amount remitted	(32,587)	Offered to tax	
	Total	18,11,419		

7. The Ld. AR submitted that the assessee has earned interest @ 12% p.a. on such loan and interest so earned has been treated as income in the books, as evident from schedule 18 of the Audited Accounts. The assessee offered the interest earned on loan given to Russia Indian Drilling Oil (RIDO) to income tax. The entire loan was repaid by RIDO during the assessment year under consideration as can be seen from Schedule 9 of the Notes to Accounts. The

Ld. AR further submitted that the CIT(A) erred in holding that Foreign exchange fluctuation loss is not allowable as no transaction has taken place during the year whereas during the year the entire loan was repaid by RIDO. As the loan was given during the ordinary course of business and interest earned on such loan was treated as income of the assessee and was offered to tax u/s 28 under the profits and gains from business, foreign exchange loss on the repayment of such loan should be allowed as revenue expenditure u/s 37(1). In this regards, the Ld. AR relied upon the decision of Hon'ble Calcutta High Court in the case of CIT vs. Gujarat NRE Coke Ltd. (ITA No. 193/2013 wherein it was held that the foreign exchange loss on loan given to sister concern for ensuring the supply of raw material was an allowable expenditure as the loan is given during the normal course of business and the interest income on the said loan is treated as income. The Hon'ble High Court further held that the judgment in the case of CIT vs. Woodward Governor India (P) Ltd (2009) 312 ITR 254 (SC) would not be applicable in the given case as the judgment in that case pertained to liabilities (i.e. loan received) and not assets (i.e. loan given). Further, the Ld. AR relied upon the decision of Tribunal in case of ETP International Limited vs. CIT (ITAT 6506/Mum/2011) wherein it was held that foreign exchange loss on loan to subsidiary company for the purpose of business is an allowable expenditure. In this connection, the Ld. AR submitted that the assessee had debited foreign exchange loss to the tune of Rs. 5,36,613/- on account of restatement of the outstanding from Hongua International towards purchase of capital assets. Provision of Section 43A specifically deals with the taxability of Foreign exchange loss. One of the conditions for applicability of Section 43A is actual payment. Since no payment was made during the year, the provision of Section 43A is not applicable. The assessee has claimed such foreign exchange loss as an allowable expenditure u/s 37(1) in accordance with the principle laid down by the Hon'ble Apex court in case of India Cements Limited vs. CIT (1966) 60 ITR 52 (SC) wherein it was held that the nature of expenditure being capital or revenue does not depend on the purpose for which foreign currency loan was obtained or on nature of

ultimate utilization of loan amount. Further, the Ld. AR relied upon the decision of the jurisdictional High Court in the case of CIT vs. L.G. Electronics India (P) Ltd. (2009) 309 ITR 265 (Delhi) wherein it was held that loss due to foreign exchange rate fluctuation in respect of imported machinery is allowable expenditure. The Ld. AR also relied upon the decision of Hon'ble Apex Court in case of ONGC vs. CIT (2010) 189 Taxmann 292 (SC) wherein it was held that when assessee maintained its accounts on mercantile system of accounting, there was no finding by Assessing Officer on correctness or completeness of account and assessee had complied with Accounting Standards laid down by Central Government, 'loss' suffered by assessee on account of fluctuation in rate of foreign exchange as on date of balance sheet could be allowed as an expenditure under section 37(1) notwithstanding fact that liability had not been actually discharged in year in which fluctuation in rate of forex had occurred. In absence of specific provision, taxability will be determined as per treatment in Accounts. The treatment in the book of Accounts is done as per Accounting Standards 11 which suggests that treatment of 'gain/loss' attributable to foreign borrowings should be reflected in profit and loss account as per para 13 of AS-11 issued by ICAI. The same treatment was also clarified by MCA that accounting treatment of exchange differences will be made as per AS 11 and further categorically mentioned that provisions of AS-11 is required to be followed irrespective of the relevant provision of Schedule-VI to the Companies Act, 1956. Therefore in view of the same, the exchange difference is required to be recognized in profit and loss account. Hence, any loss arising out of foreign currency fluctuation is allowed to be deducted. The Ld. AR relied upon the principle laid down by Hon'ble Karnataka High Court in the case of Prakash Leasing Ltd. vs. DCIT [2012] 23 taxmann.com 3 (Kar.), wherein the Hon'ble High Court held that there is no specific provision that deals with the taxability, the taxation of the same will be based on accounting treatment made in the books. Similar view was reiterated by the Tribunal in M/s MFAR Hotels & Resorts Ltd vs. ACIT (ITA 63/Coch/2015) wherein the Tribunal held that foreign exchange fluctuation loss should be allowed as revenue

expenditure in view of the amended AS -11 (2003).

8. The Ld. DR submitted that as regards Ground No.1 of the assessee's appeal, the Assessing Officer rightly disallowed Foreign Exchange Fluctuation loss of Rs.30,88,634/- treating the same as capital in nature. The Ld. DR relied upon the Hon'ble Supreme Court decision in case of Woodward Governor India (P) Ltd. (supra). The Ld. DR relied upon the Assessment Order and the order of the CIT(A). The Ld. DR submitted that the disallowance is a capital nature and no transaction has been entered during the year by the assessee.

9. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that during the year, the Company had debited foreign exchange fluctuation loss of Rs. 18,11,419/- (Net) in Schedule 17 of the Annual Accounts. The assessee earned interest @ 12% p.a. on the loan given to Russia Indian Drilling Oil (RIDO) and interest so earned was treated as income in the books, as evident from schedule 18 of the Audited Accounts. The assessee offered the interest earned on loan given to RIDO to income tax. The entire loan was repaid by RIDO during the assessment year under consideration as can be seen from Schedule 9 of the Notes to Accounts. As per AS-11, treatment of foreign exchange loss arising out of foreign currency fluctuations in respect of fixed assets acquired through loan in foreign currency shall required to be given in profit and loss account and the same should be allowed as revenue expenditure. The Hon'ble Apex Court in Woodward Governor India (P) Ltd (supra) had followed treatment of exchange loss or gain as per AS-11 (1994). In view of revision made in AS-11 in 2003, exchange gain or loss on foreign currency fluctuations in respect of foreign currency loan acquired for acquisition of fixed asset should be allowed as revenue expenditure. In the present case, the CIT(A) as well as the Assessing Officer has not taken into account the decision of the Apex Court in case of Indian Cements Ltd. (supra) wherein it was held that the nature of expenditure being capital or revenue does not depend on the purpose for which foreign currency

loan was obtained or on nature of ultimate utilization of loan amount. Thus, in light of the decision of the Hon'ble Apex Court in case of Indian Cements Ltd. and also as per the accounting policy AS-11 (2003), the assessee is entitled to claim such foreign currency fluctuation loan as an allowable expenditure u/s 37 (1) of the Act. Thus, the CIT(A) was incorrect in disallowing the foreign exchange fluctuation loss of Rs. 30,88,634/- by treating it as capital in nature. Ground No. 1 of assessee's appeal is allowed.

10. As regards Ground No. 2 relating to disallowance of claim of Leave Encashment on provision basis amounting Rs.4,66,803/-, the Ld. AR submitted that leave encashment not being a statutory liability is not liable for disallowance u/s 43B of the Act. Leave Encashment is the benefit that accrues to an employee of an organization in lieu of the un-availed leave during the tenure of one's service in the organization. The same under no circumstance can be called as a statutory liability/payment so as to invoke the provision of Section 43B. The Ld. AR relied upon the decision in case of Exide Industries Ltd. Vs. Union of India (2007) 292 ITR 470 (Cal). The Ld. AR submitted that the issue is squarely covered by the decision of the Jurisdictional Tribunal in the case of DCIT vs. Indraprastha Gas Ltd. (ITA No. 5875/Del/2011) wherein leave encashment has been allowed on provision basis. Further, Hon'ble Kerala High Court in the case of CIT vs. Hindustan Latex Ltd. (ITA No. 64 of 2012) has held that section 43B(f) which allows deduction for leave encashment only on payment basis is ultra vires. Provision for leave encashment is an ascertained liability since it is determined on the basis of actuarial valuation. The Ld. AR relied upon the decision of Apex Court in case of Bharat Earth Movers vs. CIT (2000) 245 ITR 428 (SC) wherein it was held that if a business liability has arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. It does not make any difference if the future

date on which the liability shall have to be discharged is not certain. The Hon'ble Apex Court vide its interim order dated 08-09-2008, has provisionally stayed the order of the Hon'ble Calcutta High Court in the case of Exide Industries (Supra), the Ld. AR submitted that the Hon'ble Apex Court vide its interim order in Civil No. 12060/2008 dated 08-09-2008, had granted stay to the said order of Exide Industries Ltd (supra), but not reversed the decision of Hon'ble High Court. However, vide subsequent order in Civil No. 22889/2008 dtd. 08-05-2009, the stay has been vacated. Hence, the lower authorities are bound by the decision of Hon'ble High Court. Since Hon'ble Apex Court has vacated the stay on the order of the Calcutta High Court, decision of the Calcutta High Court is still a binding precedent.

11. The Ld. DR relied upon the Assessment Order and the order of the CIT(A). As regards Ground No. 2 of assessee's appeal, the Ld. DR submitted that the Assessing Officer has rightly disallowed claim of leave encashment on provision basis as the same is allowable on payment basis as per provision of Section 43B (F) and is not ascertain liability.

12. We have heard both the parties and perused all the relevant material available on record. Leave Encashment under no circumstance can be called as a statutory liability/payment so as to invoke the provision of Section 43B as it is for the benefit of employees which accrues in lieu of the un-availed leave during the tenure of one's service in the organization. The ratio set out in case of Exide Industries Ltd. (supra) by Hon'ble Calcutta High Court is applicable in the present case as in that decision it was held that leave encashment not being a statutory liability or a contingent liability, enactment of Sec. 43B(f) is not consistent with the original provision of Sec. 43B, and the legislature having disclosed no reasons while inserting the said clause, Sec. 43B(f) is struck down being arbitrary and unconscionable. Ground No. 2 of the assessee's appeal is allowed.

13. As regards to Ground No. 3 relating to disallowance of loss on account of

foreign exchange fluctuation in computing book profit u/s 115JB amounting to Rs. 30,88,634/-, the Ld. AR submitted that Section 115JB is an overriding section, wherein it has been specifically mentioned that the other provisions of this act is not applicable while computing book profit u/s 115JB of the Act. In the absence of any provision in Explanation 1 to Sec, 115JB to make addition on account of expenditure towards foreign exchange fluctuation loss, the addition made by the Assessing Officer is erroneous. The Ld. AR relied upon the decision of Apex Court in the case of Apollo Tyres Ltd. vs. CIT (2002) 255 ITR 273 (SC). The Ld. AR also relied upon the decision in the case of ITO vs. Max Well Dyes & Chemicals (P) Ltd. (2005) 2 SOT 461 (Mum.) wherein the Tribunal has held that the Assessing Officer does not have jurisdiction to re-scrutinize the P&L A/c once it is certified by the statutory auditors of a company and that he can make only those adjustments which are permitted by Explanation to section 115JA(2). Similar view has been taken in the case of ITO vs. Orson Trading (P) Ltd. (2005) 2 SOT 503 (Mum).

14. As regards Ground No. 3 of the assessee's appeal, the Ld. DR submitted that the Assessing Officer has rightly considered Rs. 30,88,634/- as book profits u/s 115 JB because there is a change in the method of accounting and loss is capital nature. The Ld. DR relied upon the Assessment Order and the order of the CIT(A).

15. We have heard both the parties and perused all the relevant material available on record. The contentions of the Ld. AR that Section 115JB is an overriding section, as it is specifically mentioned in that section that the other provisions of this act is not applicable while computing book profit u/s 115JB of the Act is correct as per the Income Tax Act, 1961. In the absence of any provision in Explanation 1 to Sec. 115JB to make addition on account of expenditure towards foreign exchange fluctuation loss, the addition made by the AO is erroneous. The reliance upon the decision of Apex Court in the case of Apollo Tyres Ltd. vs. CIT (2002) 255 ITR 273 (SC) by the Ld. AR is apt as the Apex Court held that the Assessing Officer while computing the book

profits of a company u/s 115J of the Income Tax Act, 1961, has only the power of examining whether the books of accounts are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. Sub-section (1A) of section 115J does not empower the Assessing Officer to embark upon a fresh enquiry in regard to the entries made in the books of accounts of the company. Ground No. 3 of the assessee's appeal is allowed.

16. As regards Revenue's appeal, the Assessing Officer allowed depreciation at 15% on Oilers Gas, instead of 60% and disallowed excess depreciation to the tune of Rs. 14,07,32,100/- on the contention that higher rate of depreciation is only for Mineral Oil Concerns. The CIT(A) deleted the disallowance relying on the decision of Hon'ble Delhi High court in case of HLS India Ltd. (supra).

17. The Ld. DR submitted that the Assessing Officer has rightly allowed depreciation at 15% on Oilers Gas as 60% depreciation is excessive as the assessee is not in the field of Mineral Oil Concerns.

18. The Ld. AR submitted that identical issue has been decided in favour of the assessee by Tribunal in assessee's own case for AY 2007-08 in ITA No. 5709/Del/14 wherein the Tribunal held that SLP filed by the department against the decision of Hon'ble Delhi High Court in CIT -vs.- HLS India Ltd. 120111 335 ITR 292 (Del) has been dismissed and therefore, following the ratio laid down in that case, disallowance was rightly deleted. The assessee is a public limited company engaged, inter alia, in the business of rendering services to mineral oil concerns for drilling operations on charter hire basis by using own oil rigs for the purpose of exploration & extraction of mineral oil. For claim of depreciation u/s 32, the following two conditions need to be satisfied:

- ❖ The assets must be owned by the assessee,
- ❖ The assets must be used for the purposes of business or profession.

In the instant case of the assessee, both the conditions are duly satisfied since the oil rigs being plant of 'specific category' are owned by the assessee and further it is used in drilling operations for the purpose of exploration & extraction of mineral oil in the field of mineral oil concerns. The assessee claimed depreciation @ 60% on Oil rigs which has been used for drilling operations in the oil field of mineral oil concerns as per entry at Part A-III-(8) (xii) of New Appendix I, applicable from Assessment Year 2006-07 onwards. The same is evident from Annexure B to the Tax Audit Report for relevant assessment year. The Ld. AR relied upon the decision of Hon'ble jurisdictional High Court in the case of CIT vs. HLS India Ltd. (2011) 335 ITR 292. Further, the Special Leave Petition filed by revenue against the decision of the Hon'ble Delhi High Court in case of HLS India Ltd (Supra) has been dismissed by the Hon'ble Apex Court [SLP No. 2723/20121 and hence the decision has attained finality. The Ld. AR also relied upon the decision of the Tribunal in DCIT vs. Gearhert India Ltd (1999) 64 TTT 63 (Del) wherein it was held that if the plant and equipment are of the same nature as used in mineral concerns, depreciation has to be allowed at higher rate. In order to determine the rate of depreciation, it is not necessary that the assessee should own the mineral oil concern, but the principle of end use of the assets is applicable. The Ld. AR relied upon the decision of Jurisdictional High Court in CIT vs. Bansal Credits Ltd. & Ors (2003) 259 ITR 69 (Del) wherein it was held that it is the end user of the specified asset which is relevant for determining the rate of depreciation. Further, Hon'ble Apex Court in the case of CIT(A) vs. Shaan Finance Pvt. Ltd. (1992) 231 ITR 308 (SC) has observed that the owner is entitled to depreciation on the machinery which has been hired out. Similar view was given in the case of CIT(A) vs. First Leasing Co. of India Ltd. (1995) 216 ITR 455 (Mad) and CIT vs. M.G.F. (India) Ltd. (2006) 285 ITR 142 (Del).

19. We have heard both the parties and perused the material available on record. In the instant case of the assessee, both the conditions are duly satisfied since the oil rigs being plant of 'specific category' are owned by the

assessee and further it is used in drilling operations for the purpose of exploration & extraction of mineral oil in the field of mineral oil concerns. The assessee claimed depreciation @ 60% on Oil rigs which has been used for drilling operations in the oil field of mineral oil concerns as per entry at Part A-III-(8) (xii) of New Appendix I, applicable from Assessment Year 2006-07 onwards. The same is evident from Annexure B to the Tax Audit Report for relevant assessment year. The Hon'ble jurisdictional High Court in case of CIT vs. HLS India Ltd. (2011) 335 ITR 292 held that:

"Depreciation allowance is a kind of tax benefit which is given to the business concerns for promotion of business activities in any particular field of business. In the instant case depreciation is allowable to mineral oil concerns @ 100% on the equipments used below the earth surface. If the same depreciation is not allowed to other business concerns on the ground that tire owner of these equipments is not a mineral oil concern but it is just providing an assistance or leasing these equipments to a mineral oil concern then definitely this "other concern" will charge more for these services and consequently the mineral oil concerns will be commercially forced not to outsource wireline logging activities to other companies but to do it themselves".

Further, the Special Leave Petition filed by revenue against the decision of the Hon'ble Delhi High Court in case of HLS India Ltd (Supra) has been dismissed by the Hon'ble Apex Court [SLP No. 2723/20121 and hence the decision has attained finality. The issue in present case is also squarely covered. Hence appeal of the revenue is dismissed.

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

Order pronounced in the Open Court on 03rd April, 2019.

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER
 Dated: 03/04/2019

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	12.02.2019
Date on which the typed draft is placed before the dictating Member	12.02.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	03.04.2019
Date on which the final order is uploaded on the website of ITAT	03.04.2019
Date on which the file goes to the Bench Clerk	03.04.2019
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	