IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI

BEFORE SHRI R.C. SHARMA, HON'BLE ACCOUNTANT MEMBER AND SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER

ITA No. 4502/MUM/2016 (A.Y. 2009-10)

Audco India Limited Taxation Department, L&T House N.M. Marg, Ballard Estate Mumbai – 400 001 **PAN: AAACA9647E**	*v.*	Addl. Commissioner of Income-tax Central Circle – 2(1) Room No. 551, 5th Floor Aayakar Bhavan, M.K. Road Mumbai – 400 020
(Appellant)		**(Respondent)**

ITA No. 4503/MUM/2016 (A.Y. 2010-11)

L&T Valves Limited {Formerly Audco India Limited} Taxation Department, L&T House N.M. Marg, Ballard Estate Mumbai – 400 001 **PAN: AAACA9647E**	*v.*	DCIT, Central Circle – 2(1) Room No. 551, 5th Floor Aayakar Bhavan, M.K. Road Mumbai – 400 020
(Appellant)		**(Respondent)**

Assessee by	**:**	**Shri Vijay Mehta**
Department by	**:**	**Shri T. Roumuan Paite & Shri Anand Mohan**
Date of Hearing	**:**	**18.12.2019**
Date of Pronouncement	**:**	**26.02.2020**

O R D E R

PER C.N. PRASAD (JM)

1. These two appeals are filed by the assessee against different orders of the Learned Commissioner of Income Tax (Appeals)-4, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 27.04.2016 and 11.04.2016 for the A.Y. 2009-10 & 2010-11 respectively.

2. For the A.Y. 2009-10, assessee raised following grounds in its appeal: -

> *"1. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in upholding the action of the assessing officer of taxing the alleged transaction with M/s. Hero Honda Motors Limited ("Party") of Rs. 15,40,521/- on the basis of confirmation received by the Assessing Officer from the Party. In doing so, the learned CIT(A) disregarded the invoices raised by the Parent company of appellant i.e. Larsen & Toubro Limited. The learned CIT(A) also disregarded that the transaction with the Party was appearing in Form 26AS of the appellant since the Party had erroneously quoted the PAN of the appellant while filing its TDS return. This was proved from the fact that the Party had issued TDS certificate in the name of Larsen & Toubro Limited. The CIT(A) did not take cognizance of the invoices raised by Larsen & Toubro Limited on the Party submitted before itself by the appellant.*
>
> *2. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in confirming the action of the assessing officer by disallowing expenses paid towards reimbursement of ESOP costs of employees of L&T deputed on long-term basis to the appellant company. In doing so, the learned CIT(A) failed to appreciate the expense was not in the nature of ESOP expense for the appellant but reimbursement of personnel-related costs of the deputed employees.*
>
> *3. The appellant company craves leave to add to, alter or modify any of the above grounds of appeal."*

3. The first issue is relating to difference in Form 26AS in the transaction with M/s. Hero Honda Motors Limited. In the course of assessment proceedings Assessing Officer required the assessee to reconcile the transactions reported in Form 26AS at Sr.Nos. 30, 32 & 33. Assessee submitted that M/s. Hero Honda Motors Limited has wrongly mentioned assessee's PAN against its entry and the assessee has not carried out any transactions with them during the year and therefore the income does not pertain to the assessee. To verify the above contention of the assessee, Assessing Officer issued notice u/s.133(6) of the Act to M/s. Hero Honda Motors Limited and it had confirmed the transactions to the extent of ₹.15,40,521/- entered into M/s. Larsen & Toubro Ltd and filed a duplicated TDS certificate wherein the PAN of the assessee was mentioned. Therefore, since the PAN of the assessee was mentioned in the TDS certificate the Assessing Officer treated the amount of ₹.15,40,521/- as assessee's income for the year under consideration.

4. Before the Ld.CIT(A) the assessee contended that it had not entered into any such transaction with the said party. It was also submitted that assessee had requested M/s. Hero Honda Motors Limited to rectify its TDS return. However, the Ld.CIT(A) confirmed the action of the Assessing Officer in treating ₹.15,40,521/- as income of assessee observing that the assessee failed to reconcile the discrepancy noticed by

the Assessing Officer. Accordingly, the addition made by the Assessing Officer was sustained.

5. Before us Learned Counsel Shri Vijay Mehta appearing for the assessee submitted that the Assessing Officer made addition of ₹.15,40,521/- on the basis of transaction reported in Form 26AS pertaining to M/s. Hero Honda Motors Ltd. ('the party') and details submitted by the party in response to notice issued u/s. 133(6) of the Act by the Assessing Officer. The assessee vide letter dated 12.02.2013 submitted to the Assessing Officer that the assessee had not carried out any transaction with the party and that the party had wrongly mentioned PAN of the assessee in Form 26AS However, the Assessing Officer rejected contention of the assessee for want of evidence. During the first appellate proceedings, the assessee brought to the notice of the Ld.CIT(A) that the assessee did not enter into any transaction with the party and the TDS certificate was issued in the name of M/s. Larsen & Toubro Ltd, ('L&T Ltd.') the holding company of the assessee which had supplied material to the party but inadvertently PAN of the assessee was mentioned in the TDS certificate. Ld. Counsel for the assessee submitted that it was brought to the notice of the Ld.CIT(A) that assessee is not engaged in the business of "spray aluminizing coating the Boiler chimney" which is the item sold as per the invoice but the same is the business of the holding company of

the assessee. In support of these contentions the assessee had filed before the CIT(A), copy of invoices raised by the holding company to the party, ledger account of the party in the books of the holding company together with bank details. It is submitted that these details are at pages 19-22 of the paper book filed before the Tribunal. However, the Ld.CIT(A) upheld the addition made by the Assessing Officer for the reason that unless contrary evidence or rectified TDS is issued or furnished the finding of the Assessing Officer could not be discarded.

6. The Ld. Counsel for the assessee referring to pages 19-22 of the paper book submitted that on perusal of the details furnished i.e. bills issued by the holding company, relevant ledger accounts and bank details it is evident that the party had entered into transaction with the holding company of the assessee i.e. L&T Limited and not with the assessee. It is evident that Invoices and Form 16A issued by the party were in the name of L&T Limited. However, inadvertently the party has mentioned PAN of the assessee. Ld. Counsel for the assessee further submitted that during the course of the hearing before Tribunal, the Bench had directed the assessee to file confirmatory certificate from the holding company confirming that the relevant bills of the party and TDS thereon had been duly offered to tax. Accordingly, the assessee had filed a certificate dated 17.01.2018 of the holding company confirming that TDS certificate issued

by the party had been claimed by the holding company. It was further submitted that when the appeal was fixed for clarification on 30.11.2018, the Bench pointed out that the certificate dated 17.01.2018 filed did not mention that income arising out of the transaction with the party was offered to tax and directed to file proper certificate. Accordingly, the assessee furnished such certificate of holding company confirming that it has offered to tax the corresponding income from transactions under consideration with the party in A.Y.2009-10 and that it has claimed credit for TDS as per the certificates issued by the party in A.Y.2009-10.

7. Ld. Counsel for the assessee further submits that since the assessee had not entered into transaction with the party, the addition is not warranted in the hands of the assessee, more so when the income arising from such transaction with the party is offered to tax by the related entity i.e. holding company of the assessee which had undertaken the transaction with the party. It is further submitted that the action of the Assessing Officer and Ld. CIT(A) in adding this income in the hands of the assessee would result in double taxation of same income which is not permissible under law. Therefore, it is submitted that the impugned addition should be deleted.

8. Ld. DR vehemently supported the orders of the authorities below.

9. We have heard the rival submissions, perused the orders of the authorities below and the Paper Book filed before us. It is the contention of the assessee that the transaction was not entered into by the assessee with M/s. Hero Honda Motors Limited at any point of time and it is its holding company which has entered into transaction with M/s. Hero Honda Motors Limited. We have also perused the invoices furnished in Paper Book at Page Nos. 19-22 and these invoices pertains to M/s Larsen & Toubro Ltd and not of that of the assessee. We have also perused the certificate issued by M/s Larsen & Toubro Ltd stating that it had availed credit of TDS by M/s.Hero Honda Motors Limited to the tune of ₹.31,375/- in the A.Y. 2009-10 as per their certificate Nos. HHM/DHR/08-09/100 and HHML/DHR/08-09/145 dated 25th April, 2009 and 25th July, 2008 respectively. The letter issued by M/s. Hero Honda Motors Limited to the Assessing Officer in response to the notice u/s. 133(6) of the Act also states that TDS certificate for ₹.31,735/- for the A.Y. 2009-10 has been released in the name of Larsen & Toubro Ltd having PAN: AAACA9647E unit of Audco India Limited. It is the contention of the assessee that the PAN of the assessee has been wrongly mentioned in the TDS certificate. Considering the submissions of the assessee and the evidences produced before us, we are of the view that there is considerable merit in the submissions of the assessee when the transactions were not entered

into at all by the assessee and it is the holding company which has carried out the transaction with M/s. Hero Honda Motors Limited, the addition cannot be made in the hands of the assessee simply because PAN of the assessee is quoted on the TDS certificate by M/s. Hero Honda Motors Limited. M/s Larsen & Toubro Ltd has also confirmed that the income was offered in its return and TDS was also claimed by them. In such circumstances the addition cannot be made in the hands of the assessee. Thus, we direct the Assessing Officer to delete the addition of ₹.15,40,521/- made in the hands of the assessee.

10. Coming to Ground No.2 of grounds of appeal the Assessing Officer while completing the assessment noticed that assessee claimed expenses of ₹.52,26,650/- in respect of Employees Stock Option Plan [ESOP]. The assessee was required to explain as to why these expenses should be allowed as deduction. Assessee stated that these expenses represent the amounts paid to its holding company M/s. Larsen & Toubro Ltd towards employees deputed to the assessee company on long term basis and ESOP is a facility granted to the employees under the growth option plan and loyalty and it is an allowable expenditure. However, the Assessing Officer observed that it was not known whether the ESOP option was opted by employees particularly in view of the said employees were actually in the pay rolls of M/s. Larsen & Toubro Ltd and they are

regular employees and not top executives of the company and hence reimbursement of ESOP expenses cannot be claimed under the head ESOP. He also observed that assessee is a subsidiary to M/s. Larsen & Toubro Ltd and assessee claimed said expenses as reimbursement of salary, therefore the same is not ESOP.

11. On appeal the Ld.CIT(A) sustained the addition observing that Employees Stock Option Plan [ESOP] is not the expenditure of the assessee as none of the employees are in the pay rolls of the assessee and further assessee is not obliged for incurring such expenses. Ld.CIT(A) observed that ESOP has been incurred by the holding company M/s. Larsen & Toubro Ltd and the same has been charged to the assessee for reimbursement of expenses and therefore the Ld.CIT(A) was of the opinion that ESOP of M/s. Larsen & Toubro Ltd is not allowable in the case of assessee company and accordingly he sustained the disallowance.

12. Before us, Ld. Counsel for the assessee submits that in the present case the employees of L&T Ltd are deputed to the assessee and the cost of employees is recovered from the assessee by raising debit notes as per the agreement. It is submitted that FBT paid by L&T Ltd forms one of the components of total cost recovered from assessee. It is submitted that

what the assessee pays to the holding company is the total man power cost charged to it. It is undisputed that the assessee has availed the services rendered by the persons deputed by the holding company. It is submitted that reimbursement of cost of such deputation does not involve any profit element and hence, the assessee was not required to deduct any tax at source and as such, there is no question of applicability of provisions of section 40(a)(ia) of the Act. It is also undisputed that the holding company had deducted and paid tax at source in respect of salary and other benefits granted to its employees. Since this expenditure is neither personal nor capital in nature and it is incurred wholly, and exclusively for the purposes of the business, it is submitted that the expenditure related to reimbursement of cost of deputed employee is allowable as deduction u/s.37(1) of the Act.

13. Ld. Counsel for the assessee further submits that a query was raised on the issue whether the said FBT was claimed as deduction by the holding company and whether provisions of section 40(a)(ic) would apply for payment of FBT by the assessee. Ld. Counsel for the assessee submitted that the holding company also has not claimed any deduction in respect of FBT paid on the benefits provided by it to its employees, including those who were deputed to the assessee. Ld. Counsel for the assessee submits that a certificate stating that holding company has not

claimed FBT as deduction while computing its taxable income has been placed on record. It is further submitted that provisions of section 40(a)(ic) of the Act will not apply in the present case since assessee has not claimed any deduction for the FBT paid in respect of its own employees. It is submitted that the disallowance u/s.40(a)(ic) of the Act contemplates tax of liability pertaining to assessee's own case. The liability to pay FBT on benefit provided to these employees is on the employer i.e. L&T Ltd., the holding company. It is undisputed that the amount paid in respect of FBT paid on ESOP did not pertain to the employees of the assessee and hence, provisions of section 40(a)(ic) will not apply in the case of the assessee. The assessee has merely paid for the man power cost charged to it by L&T Ltd in accordance with the agreement which includes FBT on ESOP without any element of profit and the same constitutes cost of employees deputed which is not covered by provisions of section 40(a)(ic) of the Act.

14. Ld. Counsel for the assessee submitted that it is not the case of the Assessing Officer that the expenditure claimed is not genuine. It is also undisputed that this expenditure is not capital in nature. It is also not disputed that the deputed employees have rendered services for the purpose of the business of the assessee. It is submitted that as per the chart furnished it is evident that the assessee has been reimbursing such

cost of deputation of employees in earlier and subsequent years also and the same have been allowed by the Assessing Officer except for impugned years i.e. A.Y.2009-10 (ESOP is allowed as deduction but FBI paid on ESOP is disallowed) and A.Y.2010-11 wherein ESOP is disallowed but salary reimbursed in respect of deputed employees is allowed. Therefore, Ld. Counsel for the assessee requested that applying the rule of consistency, the Assessing Officer may be directed to allow deduction in respect said reimbursement made by the appellant in respect of deputed employees.

15. Ld. DR vehemently supported the orders of the authorities below.

16. We have heard the rival submissions, perused the orders of the authorities below. During the previous year relevant to the assessment year under consideration the assessee debited an amount of ₹.52,26,650/- under the head 'ESOP' cost which were grouped under the head "Misc. Expenditure". During the course of assessment proceedings, it was submitted that the expenses represents amount paid to L&T Ltd the holding company towards consideration of employees deputed by it to the assessee. However, the Assessing Officer rejected the submissions of the assessee for the reason that the assessee is a subsidiary of L&T Ltd., and the reimbursement of salary as ESOP is not covered under stock option

plan, the appellant did not submit details such as difference in price per share, amount, number of days, no of options lapsed, etc. nor the assessee had established commercial expediency, the expense is for the benefit of third party, etc. Thus, the Assessing Officer disallowed the expenditure of ₹.52,26,650/- u/s 37 of the Act holding that claim of reimbursement is not directly related to business activities carried out by the assessee. Before the Ld. CIT(A), it was clarified by the assessee that the said expenditure of ₹.52,26,650/- is reimbursement of FBT on ESOP and is forming part of salary cost of deputed employees and hence has to be allowed as an expenditure. The assessee also filed debit note issued by the holding company in support of the clarification. The Ld.CIT(A) called for a remand report from the Assessing Officer and the same is extracted at Page No. 6 of the first appellate order. On its perusal, it can be seen that the Assessing Officer is of the opinion that the claim of ESOP has to be made by L&T Ltd since the employees are of the said company and ESOP as well as FBT on ESOP are not allowable in the hands of the appellant. The Assessing Officer also submitted that since the assessee had not deducted tax at source in respect of employee deputation expenses, the issue of disallowance may also be looked into while deciding the appeal. In reply to the rejoinder, the assessee submitted that since the assessee has merely reimbursed the cost of the employees

deputed and it does not involve any element of profit, no tax at source was to be deducted. Further, the holding company had deducted proper tax at source while making payment of salaries to these employees. The assessee also submitted the details of employees deputed and claimed that FBT on ESOP is merely reimbursement of cost of employees and the expenditure is incurred wholly and exclusively for the purpose of business of the assessee. Hence, the said expenditure should be allowed as deduction u/s.37 of the Act and provisions of section 40(a)(ia) are not applicable to reimbursement of expenses in relation to deputed employees. However, the Ld.CIT(A) held that reimbursement of salary cannot be presumed to be covered under Stock Option Plan, the Ld.CIT(A) also stated that the appellant did not demonstrate with evidence that all the employees have shown such ESOP as their salary income or perquisite value and merely furnished names of 96 employees without details of ESOP, share certificates, etc. Therefore, Ld.CIT(A) concluded that the Assessing Officer rightly made disallowance u/s.37 of the Act.

17. From the details furnished before us the Assessing Officer allowed the claim of the assessee towards reimbursement of ESOP expenses during the earlier assessment years and also the subsequent assessment years as detailed hereunder: -

Sr. No	Particulars	Amount (In ₹.)				
		AY 2008-09	**AY 2009-10**	**AY 2010-11**	**AY2011-12**	**AY 2012-13**
1.	Salary	6,27,75,124	5,09,20,107	7,04,73,192	8,60,34,168	7,74,56,931
2.	Reimbursement of ESOP	1,21,13,018	65,77,856	1,48,42,928	1.69,78.654	1,60,29,190
3.	Reimbursement of FBT on ESOP	---	52,26,650	NA	NA	NA
	Remarks	Allowed as deduction. Assessment completed u/s.143(3).	Allowed as deduction. (Except FBT on ESOP)	Allowed as deduction. (Except ESOP)	Allowed as deduction. Assessment completed u/s. 143(3).	Allowed as deduction. Assessment completed u/s. 143(3).

Note: FBI was abolished w.e.f. AY 2010-11.

18. As could be seen from the above the Assessing Officer allowed ESOP reimbursement by the assessee to its parent company and holding company during the A.Y. 2008-09 which is immediately preceding Assessment Year and also in the A.Ys. 2011-12 & 2012-13. Only during the A.Y. 2009-10 the Assessing Officer disallowed reimbursement of FBT on ESOP. Similarly, in A.Y.2010-11 as the provisions of FBT were abolished and are not applicable for the A.Y. 2010-11, he disallowed reimbursement of ESOP. The Assessing Officer allowed reimbursement of salary and ESOP expenses for A.Y.2008-09, 2011-12 and 2012-13 and reimbursement of salary was allowed for the A.Y. 2009-10, 2010-11 also. For the A.Y. 2009-10 reimbursement of ESOP expenses were allowed except FBT on ESOP. Therefore, there is no consistency in the approach of the Assessing Officer in disallowing/allowing the reimbursement of ESOP. There is a substantial merit in the submission of the assessee.

Therefore, applying rule of consistency we direct the Assessing Officer to allow deduction in respect of reimbursement of ESOP in respect of deputed employees subject to verifying all the details of the employees by the Assessing Officer. The assessee shall provide complete details of the employees who availed the ESOP including the details of allotment of shares to the employees by the employer the holding company. Subject to filing all these details by the assessee and verification by the Assessing Officer the claim of the assessee is allowed. This ground is allowed as indicated above.

19. In so far as the appeal of the assessee for the A.Y. 2010-11 is concerned, the assessee has raised following grounds in its appeal: -

> *"1. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in confirming the action of the assessing officer by disallowing expenses paid towards reimbursement of ESOP costs of employees of L&T deputed on long-term basis to the appellant company. In doing so, the learned CIT(A) failed to appreciate the expense was not in the nature of ESOP expense for the appellant but reimbursement of personnel-related costs of the deputed employees.*
>
> *2. Without prejudice to the above ground, the learned CIT(A) erred in confirming that reimbursement of salary costs was covered under TDS provisions and non-deduction of such TDS would trigger disallowance under section 40(a)(ia) of the Income-tax Act, 1961. In doing so, the CIT(A) erred in facts and in law in holding that TDS provisions are applicable to reimbursement of salary costs.*
>
> *3. The appellant company craves leave to add to, alter or modify any of the above grounds of appeal."*

20. These grounds are identical to Ground No.2 of grounds of appeal of the assessee for the A.Y. 2009-10 and the decision rendered therein shall

apply mutatis mutandis to the A.Y. 2010-11. Accordingly, grounds of appeal are allowed.

21. In the result, appeals of the assessee for the A.Ys. 2009-10 and 2010-11 are partly allowed. is partly allowed and appeal of the assessee for the A.Y. 2010-11 is allowed.

Order pronounced in the open court on the 26th February, 2020

Sd/-	Sd/-
(R.C. SHARMA)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 26/02/2020
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum