IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-1' : NEW DELHI)

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA Nos.2501 /Del./2014
(Assessment Year : 2008-09)

DCIT, Circle 2 (1), New Delhi.	vs.	M/s. Asahi India Glass Limited, 12, Basant Lok, Vasant Vihar, New Delhi.

(PAN : AADCA7706R)

ITA Nos.1638/Del./2014
(Assessment Year : 2008-09)

M/s. Asahi India Glass Limited, 12, Basant Lok, Vasant Vihar, New Delhi.	vs.	DCIT, Circle 2 (1), New Delhi.

(PAN : AADCA7706R)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Sandeep Sapra, Advocate
REVENUE BY : Ms. Shashi Kajle, Senior DR

Date of Hearing : 04.03.2020
Date of Order : 14.05.2020

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Present cross appeals filed by the assessee as well as by the revenue are being disposed off by way of composite order to avoid repetition of discussion.

2. Appellant, DCIT, Circle 2 (1), New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeal sought to set aside the impugned order dated 03.02.2014 passed by the ld. Commissioner of Income-tax (Appeals)-XX, New Delhi in an appeal challenging the orders passed by the ld. TPO/AO qua the assessment year 2008-09 on the grounds inter alia that :-

> ***"1. Whether on the facts and in the circumstances of the case, the Lcf CIT(A) has erred in deleting the adjustment made by the TPO while determining the Arm's Length Price of Royalty paid of Rs.2,20,00,000/- crores for the Taloja Plant as NIL inter alia holding that the plant had received patented technology and support for manufacturing of float glass from Asahi Glass Company, Japan in lieu of royalty payment and no independent company which provide such services free of charge.***
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> ***2. In deleting the addition amounting to Rs.84,93,675/- made on account of provision for gratuity to book profit as per provision of section 115JB of the Income Tax Act 1961."***

3. Appellant, M/s. Asahi India Glass Limited (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 03.02.2014 passed by the ld. Commissioner of Income-tax (Appeals)-XX, New Delhi in an appeal challenging the orders passed by the ld. TPO/AO qua the assessment year 2008-09 on the grounds inter alia that :-

> ***"1. That the learned OT(A) erred on facts and under the law in upholding the action of the assessing officer in making disallowance of Rs.963964/- u/s 14A read with Rule 8D of the IT Rules under the normal provisions of the IT Act and u/s 115JB. No nexus between the interest paid on borrowed funds and tax free income was established by the authorities below. At any rate without prejudice, the addition as made is excessive.***

2. The learned CIT(A) erred on facts and under the law in upholding the addition of Rs.1670000/- on account of Mark to Market Loss. Various facts, circumstances and legal position as submitted were not properly appreciated. At any rate without prejudice, the addition as made is excessive.

3. That the learned CIT(A) erred on facts and under the law in not allowing deduction of Rs.390911373/ - on account of foreign currency gain of loan taken for purchase of capital asset without considering the provisions u/s 43A of the IT Act. Various facts, circumstances and documentary evidence as submitted were not properly appreciated. At any rate without prejudice, the addition as made is excessive.

4. That the learned CIT(A) erred on facts and under the law in disallowing the provision for gratuity of Rs.8493675/ - under the normal provisions of the IT Act. At any rate without prejudice, the addition as made is excessive.

The learned CIT(A) is wrong in stating that the provision for gratuity of Rs.8493675/- has been added to the taxable income under normal provision of the IT Act."

4. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Asahi India Glass Limited, the taxpayer was established in the year 1987 for manufacturing of high quality automotive glass for the Indian automobile industry. Subsequently, the taxpayer also forayed into manufacturing of architectural and float glass. During the year under assessment, the taxpayer had 3 lines of business viz. auto glass, float glass and architectural glass but due to low sales volume in the architectural glass segment, this segment was aggregated with auto glass division and consequently organized its business into 2 strategic business units of auto glass and float glass.

5. During the year under assessment, the taxpayer was an associate of Asahi Glass Company, Japan (AGC Japan) with the latter holding 22% shares of the taxpayer. AGC Japan has appointed one Executive Director on the Board of the taxpayer which was also Chief Technical Officer of the taxpayer and as such, AGC Japan was considered a deemed Associated Enterprises (AE) of the taxpayer and consequently all the subsidiary of AGC Japan were considered as AE of taxpayer.

6. During the year under assessment, taxpayer entered into international transactions with its AE as under :-

International Transaction	***Auto-motive***	***Float***	***Method***
Purchase of raw material	***66.7***	***-***	***TNMM***
Import of stores & machinery spares	***8.94***	***0.076***	***TNMM***
Import of clear float and reflective glass	***-***	***4.17***	***TNMM***
Purchase of Capital Goods	***44.53***	***-***	***TNMM***
Import of refractories bricks & machinery	***-***	***34.61***	***TNMM***
Royalty for use of technical know-how	***4.29***	***14.65***	***TNMM***
Fee for Technical consultancy services, repair & maintenance, exhibition, engineering services	***3.3***	***7.15***	***TNMM***
Commission Income on Sales	***-***	***1.33***	***TNMM***

7. The taxpayer in order to benchmark its international transactions used Transactional Net Margin Method (TNMM) with

Operating Profit/Sales (OP/Sales) on an entity-wise basis as the Profit Level Indicator (PLI) as the Most Appropriate Method (MAM), chosen 5 comparables having margin of 2.5% as against taxpayer's margin of 9.76%. To demonstrate arm's length nature of its royalty payment, taxpayer had adopted comparable rate for Sona Koya Steering Ltd. at 3%. However, TPO considered it expedient to analyze both the segments viz. float glass and automotive glass segments and called for segmental result of the taxpayer company and preferred to apply Arm's Length Price (ALP) on a transaction-by-transaction basis. Ld. TPO in order to determine the ALP of royalty paid of Rs.2,20,00,000/- noticed that although float glass margin of the taxpayer had dipped from 6.02% to 4.27% in FYs 2006-07 & 2007-08 respectively, the royalty payment has actually increased to Rs.3.17 crores in FY 2007-08 agreeing with the contentions raised by the taxpayer company, the ld. TPO extended benefit of the royalty agreement pertaining to Roorkee plant. However, in case of Taloja plant of the taxpayer company shows operating profit margin of (-) 0.04% which proves that licence technology availed by this plant has failed to generate any economic value for the taxpayer's business and ordered to reduce the amount of Rs.2,20,00,000/- to nil by using CUP method in the absence of any evidence to show that if any benefit has

accrued to the taxpayer and thereby enhanced the income of the taxpayer by Rs.2,20,00,000/-.

8. AO made a disallowance of Rs.9,63,964/- u/s 14A of the Act read with Rule 8D of the Income-tax Rules, 1962 (for short 'the Rules') under the normal provisions of the Act and u/s 115JB of the Act. AO also made addition of Rs.16,70,000/- by following the Instruction No.3/2010 dated 23.03.2010 of CBDT by way of making disallowance on account of mark to market basis on the ground that the same has been booked as expenditure as forward contract. AO also made addition of 84,93675/- under the normal provisions of the Act and also u/s 115JB on the ground that the provision made by the taxpayer for payment of gratuity as per genesis is an ascertained liability.

9. Assessee carried the matter before the ld. CIT (A) by filing the appeals who has given part relief. Feeling aggrieved, both the taxpayer as well as the Revenue have come up before the Tribunal by way of filing the present appeals.

10. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1 OF REVENUE'S APPEAL
(ITA No.2501/DEL/2014)

11. Undisputedly, the ld. TPO has accepted royalty of Rs.10.95 crores paid to Glaverbel Nederland BV for float glass manufactured at Roorkee unit but taken the adverse view in case of its Taloja unit on the ground that licence technology availed by the taxpayer from AGC Japan has failed to generate any economic value for taxpayer's business and thereby reduced the amount to Rs.2,20,00,000/- on account of royalty to nil by using CUP method. Detail of royalty payment made by the taxpayer in its float glass division is as under :-

Particulars	*Amount (INR crores)*	*Patent Details*
Float Glass (Taloja)	*2.22*	*4940479*
Float Glass (Roorkee)	*7.16*	*US 2005/ 0028559*
Reflective Glass	*3.59*	*US RE 40, 315E*
Mirror	*0.20*	*190380*
Total	*13.17*	

12. The detail of margin of taxpayer's two plants, namely, Tajola and Roorkee plants for manufacture of float glass is as under :-

Particulars	*Taloja*	*Roorkee*	*Float Glass*
Segment revenue	-	-	-
External	*27,250*	*22,725*	*49,975*
Inter segment sales (Net of excise duty)	*1,275*	*4,445*	*5,720*
Total revenue	*28,525*	*27,170*	*55,695*
Segment result	*-108*	*2,240*	*2,132*
Operating Profit / Sales	*-0.40*	*9.86%*	*4.27%*

13. It is also not in dispute that from the Tajola plant, the taxpayer makes an operating profit margin of (-) 0.40% thus failed to generate any economic value of the licensed technology to its business.

14. Ld. CIT (A) deleted the addition of Rs.2,20,00,000/- on account of adjustment made by the ld. TPO in order to determine the ALP of royalty by returning following findings :-

> ***"11.7 The appellant has highlighted that the Asahi brand and associated technology is quintessential for its continued existence and sustenance in the float glass industry. In this connection, the appellant has submitted that the technology and know-how of float glass is only restricted to Asahi Glass, Saint Gobain and Guardian. The appellant has also explained that all the players in the float glass industry would be licensing the technology and know-how of their respective group companies for the production and sale of float glass in its region. Based on the discussion hereinabove, it is fair to conclude that there is no meaningful analysis/ evidence provided by the TPO to hold that the entire royalty payment should be reduced to zero. The appellant has been able to demonstrate that the Taloja plant of the appellant has received patented technology and support for the manufacturing of float glass from Asahl Glass Company Japan in lieu of royalty payment and no independent company will provide such services free of charge. The royalty payments were made by the appellant for availing patented technology. The above benefits derived by the appellant are critical to the smooth functioning of its business. Considering facts of the case, I am of the view that the action of the TPO in determining the ALP of "Royalty" paid for the Taloja plant of the appellant at Nil is incorrect and unsustainable. Accordingly the AO /TPO is directed to delete the addition of Rs. 2.20 Crores on account of Transfer Pricing Adjustment in respect to Royalty for the Taloja plant of the appellant."***

15. Ld. DR for the Revenue challenging the impugned addition made by the ld. CIT (A) relied upon the order passed by the TPO and has referred to para 6.2 of the TP order.

16. However, ld. AR for the taxpayer to repel the arguments addressed by the ld. DR for the Revenue relied upon the order passed by the ld. CIT (A) and contended that the identical issue was decided by the ld. CIT (A) in favour of the taxpayer in AY 2007-08 and appeal filed by the Revenue has also been dismissed by the Tribunal vide ***order dated 26.02.2018 passed in ITA No.2183/Del/2014,*** copy of order is available at pages 70 to 110 of the paper book.

17. Perusal of the ***order dated 26.02.2018 passed by the coordinate Bench of the Tribunal in ITA No.2183/Del/2014*** goes to prove that identical issue as to determining ALP of royalty paid by the taxpayer company for its Tajola plant of the taxpayer at nil has been decided in favour of the taxpayer by returning following findings :-

> ***"46. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the ld. CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the TPO made an addition Rs.4.09 crores to the total income of the assessee by disallowing payment of royalty by the assessee to its AE being at arm's length price. We find the ld. CIT(A) deleted the addition made by the AO/TPO, the reasons of which have already been reproduced in the preceding paragraphs. We do not find any infirmity in the order of the ld. CIT(A) on this***

issue. We find the assessee before the TPO had given analysis of the comparables with an average/mean margin of 8.66%. The details of which are as under :-

Company Name	*Sales (Cr.)*	*Total cost (TC) (Cr.)*	*Operating Profit (OP) (Cr.)*	*OP/ Sales %age*
1) Bharat Glass Tube Ltd.	*41.36*	*40.08*	*0.56*	*1.35%*
2) Gujarat Guardian Ltd.	*484.63*	*359.3*	*125.33*	*25.86%*
3) Hindustan National Glass & Inds. Ltd.	*596.17*	*531.06*	*65.11*	*10.92%*
4) Saint Gobain Glass India Ltd.	*854.28*	*783.12*	*71.16*	*8.33%*
5) Sejal Architectural Glass Ltd.	*43.87*	*39.04*	*4.83*	*11.01%*
6) Triveni Glass Ltd.	*106.23*	*112.07*	*-5.84*	*-5.50%*
Mean/Average				*8.66%*

47. The operating margin of the assessee company for float glass division was shown at 6.02% which the TPO has reproduced at page 4 of his order. We find the TPO in the order rejected three comparables namely Bharat Glass Tubes Ltd., Hindustan National Glass & Inds. Ltd. and Triveni Glass Ltd. as comparables and worked out the average/mean operating margin of three comparables at 15.99%. After comparing the operating margin of the float glass division of the assessee company at 6.02%, the TPO made addition of Rs.4.09 crores on the ground that the assessee company had not derived any benefit from payment of royalty and determined the arm's length price of royalty at Nil under CUP. We find ld. CIT(A) deleted the addition which has been already been reproduced in the preceding paragraph. We do not find any infirmity in the order of the ld. CIT(A) on this issue. We find the assessee company has paid royalty of 4.09 crores on net sales of float glass of Rs.238.61 crores to its AEs which works out to only 1.71% of the sales. We find merit in the argument of the ld. counsel for the assessee that due to the licensed technology made available by the AEs, the assessee company was able to maintain quality and increase its sales. For the year ending March, 2005 the turnover was Rs.67,606/- lakhs which has gone up to Rs.68,283/- lakhs for the year ending March, 2006 and Rs.87,830/- lakhs for the year ending March, 2007 and Rs.111,382/- for the ending March,

2008. This indicates that there is huge jump in the turnover between the year 2006 to 2008 as compared to financial years 2004-05 and 2005-06. Further, the royalty paid by the assessee to AE for float glass technology has been accepted by the Department in the earlier years. We also find merit in the submission of the ld. counsel for the assessee that since the assessee is a public limited company with only 22.21% shareholding by its AE and Indian promoters holding 33.03% and the general public holding 44.76%, therefore, the AEs were not in a position to wield significant influence over assessee's business as its performance and commercial expediency were subject to intense scrutiny by shareholders of the companies which are listed on BSE and NSE. We further find the Revenue has accepted the royalty paid at the rate of 3% by Sona Steering Systems Ltd. to its AE which is much more than 1.71%. Further, in the immediately preceding year 2006-07, the Tribunal had directed the TPO to include Bharat Glass Tube Ltd. and Triveni Glass Ltd. as comparables. If these two companies are included as comparables, the average margin comes to 1.39% which is much less than the operating margin of 6.02% of the assessee company.

48. We find the Hon'ble Delhi High Court in the case of CIT vs. EKL Appliances Ltd. (supra) has held that the financial health of the assessee could never be a criterion to judge the allowability of an expense. There was no authority for that. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purpose of business; it was no concern of the TPO to disallow it on any extraneous reasoning. He was expected to examine the international transaction as he actually found them and then make suitable adjustment but a wholesale disallowance of the expenditure is not warranted. It has further been held that it is not open to the TPO to question the judgment of the assessee as to how it should conduct its business and regarding the necessity or otherwise of incurring the expenditure in the interest of its business. It is entirely the choice of the assessee as to from whom it contemplates to source its technology or technical knowhow and as to what steps should be taken to meet the competition prevalent in the market and to stave off the competitors. This is the domain of the businessman and the TPO has no say in the matter. The Revenue cannot justifiably claim to place itself in the arm chair of businessman or in the position of the Board of Directors and assume the role to decide how much is the reasonable expenditure having regard to the circumstances of the case. In view of the above discussion and in view of the detailed reasoning giving by the ld. CIT(A) while deleting the disallowance made by the Assessing Officer. We find no infirmity in the same. Accordingly, the order of the ld. CIT(A) is upheld and the ground raised by the Revenue is dismissed."

18. So, following the order passed by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2007-08 (supra), we are of the considered view that ld. CIT (A) has rightly deleted the adjustment made by the ld. TPO while determining the ALP and royalty payment of Rs.2,20,00,000/- for its Tajola plant as nil because when it is not in dispute that the expenditure or payment of royalty has been paid / incurred for the purpose of business, it cannot be disallowed on the ground that it has failed to generate any economic value for the taxpayer's business. Moreover, it is not the duty of the ld. TPO to advise the taxpayer company as to how the business affairs are to be run. So, when the taxpayer has successfully proved that it has received patented technology and support for the manufacturing of float glass from AGC Japan in lieu of royalty payment, the same cannot be disallowed on the basis of conjectures and surmises. So, ld. CIT (A) has rightly deleted the addition made by the AO/TPO, hence ground no.1 of Revenue's appeal is determined against the Revenue.

GROUND NO.2 OF REVENUE'S APPEAL
(ITA No.2501/DEL/2014)

19. Ld. CIT (A) deleted the addition of Rs.84,93,675/- made by the AO on account of provision for gratuity to book profit u/s 115JB of the Act.

20. Ld. DR for the Revenue by relying upon the order passed by the AO contended that when the provision for gratuity has been made on the basis of actuarial and actual payment of gratuity is deferred to a later date on the happening of a certain event, namely, death or voluntary retirement of the employees which are unascertained events, the provisions made by the taxpayer is for ascertained liability, AO has rightly added back the same to the book profit of the taxpayer u/s 115JB of the Act.

21. However, on the other hand, ld. AR for the taxpayer contended that this issue has also been decided by the Tribunal in favour of the taxpayer by dismissing the appeal filed by the Revenue in ***AY 2007-08 in ITA No.2183/Del/2014 vide order dated 26.02.2018.***

22. Undisputedly, identical issue has been decided by the coordinate Bench of the Tribunal in taxpayer's own case for ***AY 2007-08*** (supra) by returning following findings :-

> ***"52. After hearing both the sides, we do not find any infirmity in the order of the ld. CIT(A). It is an admitted fact that the provision for such gratuity was made on the basis of actuarial valuation which even has been accepted by the Assessing Officer. The only grievance of the Assessing Officer is that since the actual payment of the gratuity is deferred to a later date on the happening of certain events namely death or voluntary retirement of the employee which are uncertain events, therefore, such provision is as an unascertained liability. However, the various Benches of the Tribunal are continuously and consistently holding that when the provision for gratuity is being made on the basis of actuarial valuation, it cannot be said to be***

an unascertained liability and added in terms of clause (c) to Explanation (1) to section 115JB of the I.T. Act.

53. The Hon'ble Bombay High Court in the case of CIT vs. Echjay Forgings Private Limited reported in 251 ITR 15 has held that since provision for gratuity was made on the basis of actuarial valuation, it was an ascertained liability and the said amount would not be added to the net profits. Similar view has been held by the Indore Bench of the Tribunal in the case of Eicher Motors Ltd. vs. DCIT reported in 82 TTJ 61. The various other decisions relied on by the ld. counsel for the assessee also support its case. In view of the above and in absence of any contrary material brought to our notice by the ld. DR against the order of the ld. CIT(A), we do not find any infirmity in the same. Accordingly, the order of the ld. CIT(A) on this issue is upheld and the ground raised by the Revenue is dismissed."

23. Following the order passed by the coordinate Bench of the Tribunal in taxpayer's own case, we are of the considered view that by now, it is settled proposition of law that when provision for gratuity is being made on the basis of actuarial valuation, it cannot be said to be an unascertained liability and added in terms of clause (c) of section 115JB of the Act and as such, the said amount would not be added to the net profit. So, we find no illegality or perversity in the deletion made by the ld. CIT (A), hence ground no.2 of Revenue's appeal is deleted.

GROUND NO.1 OF ASSESSEE'S APPEAL (ITA NO.1638/DEL/2014)

24. AO by invoking the provisions contained u/s 14A read with Rule 8D made a disallowance of Rs.9,63,964/- under the normal

provisions of the Act as well as u/s 115JB of the Act which has been confirmed by the ld. CIT (A).

25. Ld. AR for the taxpayer challenging the impugned order passed by the ld. CIT (A) contended that since the taxpayer has suo motu disallowed an amount of Rs.2,96,016/- u/s 14A of the Act on account of expenses incurred to earn the dividend income of Rs.7,47,820/-, no further disallowance can be made as the AO has not recorded any satisfaction if the working given by the taxpayer is not correct and relied upon the decisions rendered by ***Hon'ble Supreme Court in Godrej & Boyce Co. Ltd. vs. DCIT 394 ITR 449*** and ***Hon'ble Delhi High Court in the cases of CIT vs. Taikisha Engineering India Ltd. 370 ITR 338, CIT vs. Hero Management Service Ltd. 360 ITR 68 and Maxopp Investment Ltd. vs. CIT 347 ITR 272.***

26. Ld. AR for the taxpayer further contended that the issue as to the similar disallowance made in the preceding year for 2007-08 has been restored to the AO by the Tribunal vide ***order dated 26.02.2018*** (supra). Keeping in view the request made by the ld. AR for the taxpayer, we are of the considered view that this issue is also required to be restored to AO to decide afresh in view of the decision relied upon by the ld. AR for the taxpayer referred in the preceding paras. So, this ground is allowed for statistical purposes.

GROUND NO.2 OF ASSESSEE'S APPEAL (ITA NO.1638/DEL/2014)

27. Ld. CIT (A) confirmed the addition of Rs.16,70,000/- made by the AO on the ground that the taxpayer has failed to explain as to how the decision of ***Hon'ble Supreme Court in the case of Woodward Governor India P. Ltd. 312 ITR 254*** is applicable to this fact but without returning any finding on facts.

28. Undisputedly, the taxpayer brought on record the fact that vide letter dated 21.11.2011, available at pages 131 to 135 of the paper book, that the taxpayer has entered into forward contracts to hedge its exposure against foreign currency fluctuation risks towards outstanding export receipts and ECBs, entire details available at page 131 of the paper book, and the entire contracts remained unmatured as on 31.03.2008 but due to foreign exchange fluctuation, the taxpayer earned Mark to Market (MTM) gain of Rs.27,30,000/- and MTM loss of Rs.16,70,000/- on forward contracts resulting in net MTM gain of Rs.10,60,000/- which was declared as taxpayer income of the taxpayer company.

29. Undisputedly, foreign currency fluctuation is a commercial expediency and necessity. The taxpayer gave detail of forward contract outstanding as on 31.03.2008 in Notes to the Accounts of

the audited balance sheet, available at page 112 of the paper book as under :-

Currency Exchange	*Nos.*	*USD Lakhs*
a) Number of buy contracts	*1*	
b) Aggregate amount		*40*
c) Number of sell contracts	*6*	
d) Aggregate amount		*60*

30. AO disallowed the gross MTM loss of Rs.16,70,000/- by relying upon Instruction No.3/2010 dated 23.03.2010 by treating MTM loss as a notional loss being contingent in nature.

31. Coordinate Bench of the Tribunal in the case of ***DCIT vs. Bank of Bahrain & Kuwait 132 TTJ 505*** decided the identical issue by returning following findings :-

> ***"56. The controversy stands now resolved in view of the decision of the Supreme Court in the case of Sutlej Cotton Mills Ltd., 116 ITR 1 (SC), wherein, it has been held that fluctuation on account of foreign exchange rate is an allowable deduction and is not capital in nature. The observation of the Hon'ble Supreme Court is as under:-***
>
> > ***"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature(emphasis supplied)"***
>
> ***57. At the end we may further observe that when profits are being taxed by the department in respect of such unmatured forward foreign exchange contracts then there was no reason to***

disallow the loss as claimed by assessee in respect of same contracts on the same footing. In this regard, we may refer to the details furnished by assessee vide their letter dt. August 05, 2010 to establish that the Department has assessed the Bank in respect of the profit shown by the Bank on restatement of outstanding forward foreign exchange contracts for A.Ys.2002-03 and 2003-04. There is no dispute on this count and, therefore, we refrain from referring the details.

58. In view of the above discussion, we allow the assessee's appeal for the following reasons:-

- ***i) A binding obligation accrued against the assessee the minute it entered into forward foreign exchange contracts.***
- ***ii) A consistent method of accounting followed by assessee cannot be disregarded only on the ground that a better method could be adopted.***
- ***iii) The assessee has consistently followed the same method of accounting in regard to recognition of profit or loss both, in respect of forward foreign exchange contract as per the rate prevailing on March 31.***
- ***iv) A liability is said to have crystallized when a pending obligation on the balance sheet date is determinable with reasonable certainty. The considerations for accounting the income are entirely on different footing.***
- ***v) As per AS-11, when the transaction is not settled in the same accounting period as that in which it occurred, the exchange difference arises over more than one accounting period.***
- ***vi) The forward foreign exchange contracts have all the trappings of stock-in-trade.***
- ***vii) In view of the decision of Hon'ble Supreme Court in the case of Woodward Governor India (I) P.Ltd., the assessee's claim is allowable.***
- ***viii) In the ultimate analysis, there is no revenue effect and it is only the timing of taxation of loss/profit.***

59. We, accordingly, hold that where a forward contract is entered into by the assessee to sell the foreign currency at an agreed price at a future date falling beyond the last date of accounting period, the loss is incurred to the assessee on account of evaluation of the contract on the last date of the accounting period i.e. before the date of maturity of the forward contract."

32. So, following the decision rendered by the coordinate Bench of the Tribunal, we are of the considered view inter alia that when MTM gain of Rs.10,60,000/- is being taxed by the department in respect of such unmatured forward foreign exchange contracts then there was no ground to disallow the loss as claimed by the taxpayer in respect of the same contracts on the same footing. The entire detail is there on record. Even otherwise, the obligation accrued against the taxpayer the minute it entered into forward foreign exchange contracts. So, the forward foreign exchange contracts debited to the profit & loss account are allowable one being the liability having been crystallized when a pending obligation on the date of balance sheet is determinable with reasonable certainty. So, we are of the considered view that disallowance of Rs.16,70,000/- is liable to be deleted, hence deleted. Ground No.2 is determined in favour of the taxpayer.

GROUND NO.3 OF ASSESSEE'S APPEAL (ITA NO.1638/DEL/2014)

33. Ld. CIT (A) confirmed the disallowance of Rs.39,09,11,373/- on account of foreign currency gain on the ground that taxpayer did not furnish any supporting document in respect of its claim to prove that the gain of reinstatement of liability of Foreign Currency Loan – External Commercial

Borrowing taken for acquiring capital goods by applying the provisions contained u/s 43A of the Act.

34. Undisputedly, the taxpayer has raised External Commercial Borrowings (ECB) OF us $ 153 million during the AY 2006-07 which were utilized for importing the machinery and payment thereof was to be made primarily after 3 years meaning thereby no payment in respect of such ECB was made during the year under assessment and as such, the same was reinstated at the foreign currency rate as on 31.03.2008. The taxpayer has duly given the break-up of foreign currency gain of Rs.52,43,15,371/- in para 13 of letter dated 21.11.2011, available at pages 131 to 135 of the paper book, which includes gain in question of Rs.39,08,11,373/- of reinstatement of ECB loans.

35. Ld. AR for the taxpayer relied upon the Notification dated 07.12.2016 issued by the Ministry of Company Affairs vide which amendment was made to AS-11, copy of which is available at pages 197 to 200 of the paper book, the exchange difference on ECB was hitherto to be increased/reduced from the cost of fixed assets were to be shown as income/loss in the profit & loss account. This amendment came into effect in respect of accounting periods commencing on or after the publication of these accounting standards. In other words, the amendment was effected from FY

2007-08 relevant to AY 2008-09, the year under assessment. Consequently, the taxpayer credited foreign currency gain of Rs.39,08,11,373/- to the P&L account as is evident from the Notes to Account of the audited balance sheet for the year under assessment, available at page 70 of the paper book, which is extracted as under :-

> ***"Pursuant to Accounting Standard (AS)-11 notified as part of Companies (Accounting Standards), Rules 2006 exchange rate fluctuations arising on loans/liabilities incurred for acquisition of Fixed Assets (other than capital projects under progress) are recognized in the Profit and Loss Account which were hitherto capitalized. Due to above change, the profit for the year is higher by Rs. 39.08 Lac."***

36. So, in view of AS-11 and section 43A of the Act, foreign currency gain of Rs.39,08,11,373/- on account of fluctuation being notional gain was credited to P&L account and reduced from taxable income as the same could not be construed as real income.

37. The coordinate Bench of the Tribunal in the case of ***Vodafone East Ltd. & Ors. vs. ACIT 156 ITD 337*** by relying upon the decision rendered by Hon'ble Supreme Court in case of ***CIT vs. Woodward Governor of India Pvt. Ltd. 312 ITR 254*** decided the identical issue in favour of the taxpayer by returning following findings :-

> ***"We have heard the rival submissions and perused the materials available on record. The facts stated hereinabove are undisputed. There is no dispute that the provisions of section 43A of the Act would become applicable for recognizing the exchange fluctuation if the loan was obtained for acquisition of fixed assets***

only at the time of making payment and accordingly the exchange gain, if any, would go to reduce the cost of the fixed asset. Since in the instant case, the exchange gain is derived only on a notional basis and is unrealized, by applying the provisions of section 43A of the Act, the said gain needs to be reduced from the taxable income. We also find that the Learned Assessing Officer having accepted to the facts of the case and the relevant provision of the Income Tax Act in his remand report, ought not to have come on appeal before us on this issue. We also find that this issue is covered by the decision of the Supreme Court in the case of CIT vs Woodword Governor of India P Ltd reported in 312 ITR 254 (SC) wherein the principles were laid down for recognition of exchange gain/loss under various circumstances. Respectfully following the provisions of the act and the decision of the apex court, we are not inclined to interfere with the decision of the Learned CIT(Appeals). Accordingly, the ground no. 1 raised by the revenue is dismissed."

38. So, following the order passed by the coordinate Bench of the Tribunal on identical facts, the addition of Rs.39,08,11,373/- on account of reinstatement of foreign currency loan is not sustainable, hence ordered to be deleted. So, ground no.3 is determined in favour of the taxpayer.

GROUND NO.4 OF ASSESSEE'S APPEAL (ITA NO.1638/DEL/2014)

39. Ld. CIT (A) confirmed the disallowance of Rs.84,93,675/- on account of provision for gratuity under the normal provisions on the ground that gratuity amounting to Rs.84,93,675/- has been added to the taxable income under the normal provisions of the Act. We are of the considered view that when provisions of gratuity has been made on accrual basis it is not an unascertained liability rather an ascertained liability which aspect has not been

examined by the ld. CIT (A), so the issue is remanded back to the ld. CIT (A) to decide afresh accordingly after providing an opportunity of being heard to the taxpayer, in view of the order dated 26.02.2018 passed by the Tribunal in taxpayer's own case for AY 2007-08 in ITA No.1637/Del/2014. So, ground no.4 is determined in favour of the taxpayer for statistical purposes.

40. Resultantly, the appeal filed by the Revenue bearing ITA No.2501/Del/2014 is dismissed and the appeal filed by the taxpayer bearing ITA No.1638/Del/2014 is allowed for statistical purposes.

Order pronounced in open court on this 14th day of May, 2020.

Sd/-	**sd/-**
(R.K. PANDA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 14th day of May, 2020.
TS

Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A).
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.