

IN THE INCOME TAX APPELLATE TRIBUNAL
“J” Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

ITA Nos.4775 & 4776/Mum/2016
(Assessment Years: 2009-10 & 10-11)

63 Moon Technologies Limited (formerly Financial Technologies (India) Limited) FT Tower, CTS No.256-257, Suren Road, Chakala, Andheri(E) Mumbai-400 093	Vs.	DCIT, CC-8(3) Room No.659, Aaykar Bhawan M.K.Road, Mumbai-400 021
PAN/GIR No. AAACF5737C		
(Assessee)	:	(Revenue)
Assessee by	:	Shri Chetan A.Karia
Revenue by	:	Shri Vatsalya Saxena
Date of Hearing	:	27.09.2021
Date of Pronouncement	:	16 .12.2021

ORDER

Per Shamim Yahya(A.M.):

These appeals by the Assessee are directed against the respective orders of the learned Commissioner of Income Tax (Appeals), Mumbai ('ld.CIT(A) for short) and pertain to the respective assessment years as above.

2. Since the issues are common and connected and the appeals were heard together, these have been consolidated and disposed of by this common order.
3. In assessment year 2009-10, the Ld.CIT(A) has followed his order of AY 2010-11. Hence, we are taking up AY 2010-11 first.

ITA No. 4776/Mum/2016 for AY 2010-11

4. The grounds of appeal read as under:-

1. The Learned Commissioner of Income Tax (Appeals) has erred in partly confirming the action of the Ld Assessing Officer ('AO') and Ld Transfer Pricing Officer ('TPO') proposing an upward adjustment of INR 1,58,66,730 in respect of the international transactions relating to receipt of interest on loan granted to ICX Platform Pty South Africa ('ICX'), Financial Technologies Mid East ('FTME') and Singapore Mercantile Exchange Pte Ltd ('SMX') (ICX, FTME and SMX. All these concerns are collectively referred-to as Associated Enterprises ('AEs')) u/s. 92CA(3) of the IT Act, 1961 ('the Act').
 - a. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in rejecting the benchmarking analysis of the Appellant and further erred in imputing / upholding benchmarking which is neither specific to the facts of the case nor in accordance with Section 92C read with Rule 10B (2).
 - b. The Ld. CIT(A) erred in following an arbitrary approach of applying an interest spread of 300 basis points on LIBOR and SIBOR rate for loan given to AEs based on the Hon'ble Mumbai Tribunal's decision in case of Firestar International Limited (ITA No. 488/Mum/2015) without appreciating the facts that the interest spread depends on various factors such as the amount of loan, tenure, credit rating of the borrower, repayment terms, etc. and hence it cannot be generalized.
2. The Ld. CIT(A) erred in confirming the disallowance made by the AO for Rs.32,41,87,313/-being the proportionate claim of the premium on ZCCBs written off during the tenure of Zero Coupon Convertible Bonds which is in the nature of interest without appreciating the facts and written submission made before him.
3. The Ld. CIT(A) erred in holding that the claim of provision of proportionate premium of Redemption of ZCCB is a contingent liability and failed to appreciate that liability to pay premium(interest) at the time of redemption was always ascertainable particularly when none of the bonds were converted into equity.
4. The Ld. CIT(A) erred in holding that the assessee is treating provision of proportionate premium of Redemption of ZCCB as capital expenses.
- 5.The Ld. CIT(A) failed to follow the various judgments quoted before him including the judgment of Supreme Court and Mumbai Tribunal in their true spirit.
- 6.The Ld. CIT(A) erred in confirming the action of the AO that the claim of premium/ interest cannot be allowed u/s 40(a)(ia) since tax was not deducted at source.
7. The Learned CIT(A) failed to follow the binding CBDT's circulars in respect of TDS on interest on Deep Discount Debentures in its true spirit and also failed to appreciate that both instrument Deep Discount Bonds and the ZCCBs are of the same nature, and as such accordingly the CBDT circular in the matter of TDS on Deep Discount Debenture *mutatis mutandi* applies to the ZCCBs also. ;

8. The Ld. CIT(A) has erred in confirming the disallowance made by the AO u/s 14A up to the extent of Rs.4,57,78.992/-.

9. The Id. CIT(A) failed to appreciate that when the appellant itself calculated the disallowances in a scientific manner u/s 14A(1) then he AO could not have applied rule 8D without giving specific finding that the working made by the appellant was incorrect.

10. The learned CIT(A) erred in holding that it is difficult to accept that appellant has incurred only Rs. 32,85,993/- to maintain a huge portfolio without putting any specific finding about the correctness of working made by the appellant u/s!4A(I) of the Act.

11. Without prejudice to ground no. 8 to 10, the Ld. CIT(A) ought to have accepted the alternate plea taken by the appellant to calculate the disallowance u/s 14A at the rate of 1% of dividend income in spirit of decisions of Mumbai Tribunal quoted by the appellant.

12. Without prejudice to ground no. 8 to 11, the Learned CIT(A) failed to appreciate that the investments on which no exempt income could be earned during the year and the investments made for strategic purpose cannot be taken into consideration while calculating the amount of average investment for the purpose of computing the disallowance under section 14(2) read with rule 8D of I.T.Rules.

5. Apropos ground No.1

At the outset, Ld. Counsel of the assessee submitted that he shall not be pressing this ground. Hence, this ground is dismissed as not pressed.

6. Apropos ground No. 2-10

Ground No.2 to 10 relate to the issues of Ld.CIT(A) confirming the disallowances made by the AO for Rs. 32,41,87,313 being the proportionate claim of the premium on ZCCBs written off during the tenure of Zero Coupon Convertible Bonds.

7. The assessee company is engaged in the business of application product, software development services etc. The AO has observed that during the course of hearing it was found that the assessee has claimed a deduction on account of premium (interest)

payable on maturity of Zero Coupon Convertible Bonds (ZCCB) raised by the company in FY 2006-07 to the extent of Rs. 32,41,87,313/- as per revised return of income filed on 31.03.2012. The AO noted that the assessee has claimed such amount as deduction on the ground that the liability of payment has already crystallized on accrual basis and although no such interest has been paid such amount may be allowed as deduction. That the assessee has also cited various judgments in this regards in support of his submission for claim of the deduction. That the assessee was also confronted to explain as to why such expenses should be allowed. The AO noted that assessee has filed its written reply dated 20.02, which the AO reproduced in his order as under:

“Deduction of interest (premium) on Zero Coupon Bonds

We refer to the admissibility of our claim of interest as deduction on account of Zero Coupon Convertible Bonds (ZCCB) issued by the company in FY 2006-07 & have to state as under:

- i) The claim is for each financial year although payment of premium amount shall be paid at the end of the period.
- ii) As per mercantile method of accounting income / expense for the respective period has to be considered as income/ expense of the respective accounting period. If such amount is not claimed as deduction, the same shall not be allowed as deduction in the year of actual payment.
- iii) The Income Tax Act does not recognize the concept of deferred income or deferred expenses,
- iv) The assessee is a company & is following mercantile methods of accounting.

CBDT Notification No. S.O.459(E) dated 30.03.2006; CBDT Circular No. 56 dated 19.03.1971 also confirms that expenses incurred for raising /can / Issue of debentures is allowable as revenue expenditure. As per para 45 of the CBDT circular No. 56

dated 19.03.1971 it may be noted that the provision for amortization is not intended to supersede any other provision in the income - tax law under which the expenditure is allowable as a deduction against profits. For instance, where a company which is already in business, incurs expenditure on issue of debentures, and such expenditure is admissible as a deduction against profits of the year in which is incurred by virtue of the decision of the Supreme Court in the case of India Cements Ltd. v. CIT [1966] 60 ITR 52, section 35D will not have the effect of bringing that expenditure within the scope of the expenditure to be amortized against profits over a 10 year period. As a corollary of this, where any expenditure has been included for the purpose of amortization under section 35 D on a claim being made by the assessee in that behalf, such expenditure will not qualify for deduction under any other provision of the Act for the same or any other assessment year vide sub section (6) of section 35D,

It has been in following cases, that such interest / premium can be claimed in the respective year on pro-rata basis, Following the view taken by the Supreme Court in Madras Industrial Investment Corporation Ltd. vs. CIT (1997) 225 ITR 802 (SC), the High Court held that the liability should be spread over the period of the debentures as was held in the case of National Engineering Industries Ltd, Vs.. CIT (1999) 236ITR 577 (Cal).

In the case of CIT vs. Tungabhadra Industries Ltd. (1994) 207 ITR 553, it was held that where debentures were redeemable at a premium on expiry of certain nos. of years after allotment, debenture premium was held to be allowable as revenue expenditure.

In the case of National Engineering Industries Ltd, v. CIT the Question was whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessee was entitled to deduction of entire premium of Rs. 10,00,000 payable on debentures in computing Its total income in the year when the debentures are redeemed and not in the year of issue? Following the view taken by the

Supreme Court in Madras Industrial Investment Corpn. Ltd, v. CIT, the High Court held that the liability should be spread over the period of the debenture. In the case of case of CIT v. Tungabhadra Industries Ltd., it was held that where debentures were redeemable at a premium on expiry of certain number of years after allotment, debenture premium was held to be allowable as revenue expenditure.

The Company has adjusted the premium payable on redemption of bonds against the Share Premium Account in its books. In this context, it is important to note the well settled principle that the entries made by an assessee in his books of accounts are not determinative of the question whether the assessee has earned any profit or suffered any loss. What is necessary to be considered is true nature of the transaction and whether in fact it has resulted in profit / loss to the assessee [See Suttej Cotton Mills ltd, vs. CIT - 116 ITR 1 - SC], Further, whether the assessee 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 take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter. [See Kedarnath Jute Manufacturing Co. Ltd. vs. CIT - 82 ITR 363- SC].

Considering the purpose of the bonds aforesaid, the premium would be allowable as deduction subject however to the principle of proportionate write off over its period. [See Madras Industrial Investment Corporation Ltd, V. CIT - 225 ITR 802 - SC in the context of write off of the discount on debentures proportionately each year over the period for redemption]. The allowability or otherwise of the foreign exchange fluctuations would be decided based on the aforesaid principles. Also, needless to add, in the event that such bonds are converted into equity (in which case, no premium would be payable), the deductions so obtained in respect of such liability would become taxable in terms of sect/on 41(3.) of the Act in the year in which such conversion takes place.

The following judgment is a directly applicable judgment wherein the issue of payment of premium was considered. In the given case, the assessee had issued convertible debentures/ bonds and had claimed a deduction of interest, it was held that such interest was fully allowable as deduction.

* DCIT v, Gujrat Narmada Fertiliser Valley Corporation Ltd. (2013} 215 taxmann 616, Gujrat High Court

viii) The provisions as per the Companies Act, 1956 are provided in section 78(2) of the Companies Act, 1956,

Since the Companies Act, 1956 and the applicable provisions thereof are adhered to and since the books of account of the company are prepared as per the Companies Act, 1956, the treatment given for claiming deduction from share premium account is in consonance with the provisions of the Companies Act, 1956.

We draw your attention to S, 36 (1)(iiia) which provides for deduction for the discount on a Zero Coupon bond which shall be allowed on a pro rata basis to be calculated in the manner as may be prescribed. So the discount will be treated as deferred revenue expenditure but the manner of calculation will be prescribed under the Section 36 (1)(liia), Further Rules have been provided Rule 88 & Rule 8C have been provided for calculation of pro rata amount of discount in case of discount on a Zero Coupon Bond. Although such Rules are made applicable in the case of Zero Coupon Bond, the same can be made applicable in case of premium on Zero Coupon Bond.

The expenses may be allowed u/s 36 (1) (iii) or u/s 37 (i) of the Income Tax Act.

The assessee has incidentally started repaying such ZCCB during the financial year 2009-10 without conversion of such bonds into equity shares. This also confirms and strengthens the view point of the assessee that the amount repaid is the debt repaid.

Since it is the expenses incurred in connection with debt, premium (interest) wherever applicable shall be allowed on pro rata basis to be claimed as deduction, The assessee company has further placed reliance on various judicial decisions which have been discussed in the said submission of the assessee company.”

8. However, AO rejected the assessee’s contentions and held as under:-

- (a) The assessee has not debited such expenses to the profit and loss account and has adjusted such expenses out of share premium account, in its books of account, the benefit has been claimed in the computation of Income for Income tax purpose. Since no amount is debited to profit and loss account, such expense cannot be claimed as deduction. The expenses which are claimed as deduction are appropriated out of securities premium account to the extent of Rs. 32,41,87,313/- and are not shown as expenses in the profit and loss account
- (b) No TDS on such expense was deducted and hence such amount cannot be allowed as deduction u/s 40(a)(i) of the Income Tax Act, 1961 and hence I am not allowing the claim of the assessee as deduction.
- (c) Moreover as against the facts and judgment stated by the assessee the facts in present case are different. In the present case it is not “Zero coupon bonds” but 'Zero Coupon Convertible Bond'. In the first case the liability to pay interest is predetermined whereas in the later case it is contingent as it depends whether the bonds are converted in equity or not.

As such the claim of the assessee for deduction of interest on repayment of ZCCB cannot be allowed, The sum of Rs, 32,41,87/313/- is added back to the total **income of the assessee**. Penalty proceedings U/s 271(1)(c) initiated for furnishing inaccurate particulars of income.

9. Against the above order, assessee appealed before the Ld.CIT(A). Upon assessee appeal Ld.CIT(A) noted that assessee’s submissions. Ld.CIT(A) reproduced the assessee’s submissions, however Ld.CIT(A) was not convinced, he upheld the order of AO, which read as under:-

“I have gone through the Impugned Order made by the AO and the submissions made by the appellant. The AO stated three reasons for not allowing the claim of the appellant. First of the reasons was that the assessee has not claimed these amounts of premium in the profit & loss account but adjusted against the shares premium account which according to appellant AR, is permissible under the

provisions of companies Act and thus, claim was made in the computation of income only.

I find that the appellant itself in the books of accounts, treated the impugned amount of premium as capital expenses and chooses not to debit the expenses in the profit & loss account rightly, but now taking the shelter of the provisions of companies act to do so is claiming it as revenue expenses for the instant year. It is seen that, the provisions of companies act do not compel the assessee to adjust the premium payable on ZCCB against the security premium and also do not prohibit the appellant to do so but made in optional only. The consistent conduct & action of the appellant company shows that the appellant itself treats the premium on ZCCB as capital expenses for the last three years since AY 2008-09 continuously where none of the bond holder had exercised his option for conversion so that it's impact could have been reflected in the Final accounts of the relevant year/s. This alone, is sufficient to establish the fact that the impugned claim actually relate to contingent liability depending on the eventuality of claim of bond holder being entertained by Appellant for conversion and incur amount to that ascertained amount and not as much as the so-called claim in the instant year.

9.5. Interestingly the appellant company itself in its notes to accounts i.e. Schedule 15 "Significant accounting policy" (which is part of audited financial accounts) did mention that:-

The movement in provision of redemption of premium payable on redemption of ZCCB's in accordance with the Accounting standard (AS29) "Provision, Contingent Liabilities and Contingent Assets' is as follows"....

Thus the appellant company itself has treated the liability of redemption premium payable as a contingent liability and made provision for such contingent liability and that is the reason such provision was not debited in to profit & loss account but was directly reduced rightly form the security premium lying in the reserve and surplus in the Balance Sheet.

It is true that the accounting entries are not determinative about the true character of the transaction however, in the present case it was never a case of the appellant company that the accounting entries are wrongly made. The appellant itself mentioned in the audited Financial Statement the liability as a contingent liability and never stated that such treatment in the account was wrongly made. The appellant is a limited listed company and the accounts of the company are published and available in public domain and the Auditors have not objected about the entries were made in the books of accounts about the premium payable on ZCCB, so it is difficult to assume that the accounting treatment is incorrect. This supports the findings already made in para 4.4 above.

Further, none of the case law binding over the jurisdiction of Mumbai is applicable in the instant case, relied by the appellant as neither the Hon'ble Supreme Court nor Bombay High Court has ever said that ZCB and ZCCB are same and there is no difference between these two items. As far as the case law relied by appellant from the Jurisdictional IT AT, Mumbai is concerned, I find that there was no case of ZCCB

but was of FCCB, the premium payable of ZCCB was treated as contingent liability in the books of account accordingly the case quoted by the appellant are distinct and distinguishable.

The AO stated that the appellant company has not paid the withholding tax on the amount of premium claimed as expenses in the computation of income so the expenses are other-wise disallowable u/s 40(a)(ia).

In the written submission the appellant has relied upon the CBDT Circular no. Circular NO. 4/2004, DATED 13-5-2004 which prescribed that tax will be required to be deducted only at the time of redemption on bond. However this circular was issued in respect of Deep Discount Debentures and not about the ZCCB. Both the instruments are different so the circular issued in respect of Deep Discount Debentures can- not be applied automatically on the ZCCB also.

In view of the above the addition made by the AO for Rs.32,41,87,313/- is sustained and the ground no. 8 to 12 of the appellant are dismissed.”

10. Against the above order assessee is in appeal before us.

11. We have heard both the parties and perused the records. Ld. Counsel for the assessee has summarized his submissions as under by reference to the paper book submitted which is on record.

“ The assessee had issued zero coupon convertible bonds (ZCCB) in December 2005 and raised 100 million US dollars for the purpose of its business. The terms of the bond can be briefly summarised as follows:

- i) the bonds were listed in Singapore Stock Exchange,
- ii) The principle agent for the issue was Deustche Bank,
- iii) Bonds matured on 21.12.2011 and were to be repaid on the said date along with premium.
- iv) No interest was provided,
- v) On maturity, bonds were to be repaid with premium of 47.14%, ie bond holder will be entitled to 147.14 US dollars on investment of 100 US dollars.
- vi) The bonds could be converted in certain specified events and the price of share at which the same will be converted was also provided.

The brief terms for ZCCB is at page 266-269 of paper book. As the funds borrowed through ZCCB was utilised for the purpose of business and no separate interest was provided, the assessee spread the premium amount over the financial years relevant to A Y 2007-08, 2008- 09. 2009-10, 2010-11, 2011-12 and 2012-13 and claimed the same as deduction. The statement of debit of premium in various years is at page 510-516 of paper book no 2. The assessee submits that A Y 2010-11 is the first year in which the learned Commissioner of Income Tax (Appeals) has passed speaking order.

Except for A Y 2009-10 and 2010-11, appeals for all other years on the said issue are pending before the learned Commissioner of Income Tax (Appeals).

In its books of accounts, the assessee debited share premium account and credited provision for premium on ZCCB. The assessee submits that section 78(2)(d) of Companies Act permits such a charge against share premium account. The assessee claimed the same as deduction in computation of total income. The assessee draws attention to computation and financial statements at pages 1a, 126, 129, 137, 143 and 156 of the paper book.

The learned Assessing Officer disallowed the claim for deduction of proportionate premium on ZCCB and the same has been confirmed by the learned Commissioner of Income Tax (Appeals), for following reasons: i) The premium has not been debited to profit and loss account, ii) As the bonds are optionally convertible, liability is contingent, iii) Notes to account shows that it is contingent liability, iv) TDS has not been deducted.

The learned Assessing Officer has dealt with the issue on page 2 to 7 and conclusion on page 6 and 7. The learned Commissioner of Income Tax (Appeals) has dealt with the issue on page 55 to 57 of his order.

The assessee submits that funds raised through ZCCB has been utilised for the purposes of business and premium on the same is allowable as deduction on proportionate basis over the period of the bond.

The assessee relies on judgment of Hon'ble Supreme Court in case of Madras Industrial Investment Corporation Ltd, 225 ITR 802. (copy enclosed at page 572-580 of Paper book 2). In the said case, assessee had issued deep discount bonds and the Hon'ble Supreme Court held that discount is liability incurred and is allowable as deduction by being spread over the term of the bond. The assessee seeks to draw attention to last para of para 7 on page 578, and para 8, 9, 10 and 11 on page 578 and 579 of paper book 2.

The assessee further relies on judgment of Hon'ble Bombay High Court in case of Taparia Tools, 260 ITR 102 (Bom), copy enclosed at page 581 to 598 of paper book 3. The assessee in the said case had issued debentures with upfront fee plus redemption premium and the issue was allowability of the same. The findings in the said judgment are from page 589 to 598 of paper book 3, and it was held that the upfront fee and redemption premium have to be apportioned and allowed as deduction over the period of the debentures.

The assessee further submits that entries passed in the books of accounts though relevant are not determinative of the issue for determination of taxable income under the provisions of the Act. Even if the proportionate premium has not been debited to profit and loss account, as the liability has been incurred and the same is expenses for the purpose of business, absence of debit to profit and loss account cannot be the reason to disallow the claim for deduction. The assessee relies on judgment of

Hon'ble Supreme Court in case of Kedarnath Jute Mills, 82 ITR 363 (SC) in support of the said claim.

The assessee submits that merely because bonds could be converted into shares in certain specified circumstance, it cannot be said that liability to pay is contingent. It will be appreciated that the liability to pay premium had been incurred the moment funds were raised through bonds. The assessee submits that even on facts, the bonds have not been converted into shares.

In this regard, the assessee relies on judgment of Hon'ble Bombay High Court in case of S M Holding 264 ITR 370 and Hon'ble Rajasthan High Court in case of Shree Rajasthan Syntex Ltd 269 ITR 461.

In case of S M Holding 264 ITR 370 (Bom), copy enclosed at page 599-601 of Paper book 3, the premium on redemption of debentures was disallowed on the ground that the same is contingent liability. The assessee draws attention to para 5 on page 600 of paper book 3.

In case of Shree Rajasthan Syntex Ltd 269 ITR 461 (Raj), copy enclosed at page 551 to 571 of paper book 2, too the contention of the department was that premium is a contingent liability. The Hon'ble High Court has discussed the issue threadbare from page bottom of page 560 to // page 580 and the assessee seeks to draw attention to conclusion in para 10 and 11 on page 579 and 580 of paper book 2.

As regards deduction of tax at source, the assessee submits that the bonds are listed on Singapore Stock Exchange and till redemption on maturity, the beneficiary of the premium is not known. The assessee submits that liability to tax arises when the recipient is identified and TDS deducted can be given credit for. The assessee submits that when the bonds were redeemed on maturity in previous year relevant to A Y 2012-13, tax was deducted at source in accordance with the provisions of the Act. The said fact is recorded in the assessment order u/s 143(3) for A Y 2012-13 at page 518-9 of paper book no 2.

The assessee submits that the Central Board of Direct Taxes had issued a circular in the year 2004 providing that TDS in case of Deep Discount Bond is to be deducted on redemption. The circular has been extracted in written submissions to CIT(A) for A Y 2009-10 and the same can be seen at page 158 of paper book for A Y 2009-10.

The assessee also relies on judgment of Hon'ble Delhi High Court in case of UCO Bank Ltd, 369 ITR 335 (Del), copy enclosed at page 602-608 of paper book 3. The Hon'ble High Court has identified the issue in para 8 and 9 on page 604 and assessee draws attention to conclusion in para 18, 19 and 20 on page 607 of paper book 3.

The assessee also relies on decision of Hon'ble Mumbai Bench of Income Tax Appellate Tribunal in case of Stides Shasun Ltd, ITA no 8614/M/II, order dated 08.06.2018, copy enclosed at page 609 to 666 of paper book no 3. The issue is

discussed in para 35 to 39 on page 654 to 657 of paper book 3. In similar circumstances, proportionate premium has been allowed as deduction.

The assessee submits that observation of the learned Commissioner of Income Tax (Appeals) in para 9.5 and 9.6 on page 55 to 57 that the assessee itself has treated the premium as contingent liability is erroneous.

The assessee submits that the relevant note to account is at page 156 of paper book in para (c) and it refers to name of the accounting standard AS -29. The assessee submits that the name of the AS 29 has been mentioned in the impugned note and the relevant accounting standard refers to three separate and distinct items - provisions, contingent liability and contingent asset. It is the name given by Institute of Chartered Accountant of India(ICAI), and the assessee has merely written the name given by ICAI in the notes to accounts.

The assessee submits that the amount mentioned in the table below the impugned note is reflected in balance sheet at page 126, in provisions in schedule 10 detailed at page 137 of the paper book. The contingent liabilities are at page 143 and premium on ZCCB is not part of the said schedule of contingent liability.

The assessee submits that the premium is correctly reflected in the balance sheet as provision and not reflected as contingent liability. The part extracted by the learned Commissioner of Income Tax (Appeals) is name of AS 29 as given by ICAI and the choice of words are not of the assessee.

The assessee submits that proportionate premium on ZCCB claimed as deduction is allowable and prays that the same may be allowed as claimed. “

12. Per contra Ld. DR relied upon orders of the authorities below.

13. Further, during the course of hearing, certain quarries were put to the Ld. Counsel of the assessee regarding compliance with provision of companies Act & change in stand in income tax computation, Ld. counsel who has submitted following written submission in this regard.

“Regarding the share premium account

The assessee had debited proportionate premium on ZCCBs to Share Premium account. The assessee company, 63 Moons Technologies Ltd, was born out of merger and amalgamation of three companies during the FY:2000-01. The amalgamation has been accounted for under the 'pooling of interests method' as prescribed by AS-14 issued by ICAI. An amount of Rs. 6,75,08,670/- was credited to Share Premium account accordingly at the time of amalgamation. The assessee has prepared a

detailed account of share premium account with narrations from 01.04.2000 and the same is enclosed in paper book 5 filed herewith (please refer page 831-832). As on the said date, i.e., 01.04.2000, opening balance of share premium is Rs. 10,20,000/- which has been written off by following due process of reduction of share capital in FY: 2002-03.

Provisions of Companies Act as regards use of Share Premium account

The assessee submits that section 78 of Companies Act, 1956 deals with share premium account and reads as follows: "Application of premiums received on issue of shares. 78. (1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called "the [securities] premium account"; and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the [securities] premium account were paid-up share capital of the company.

(2) The [securities] premium account may, notwithstanding anything in sub-section (1), be applied by the company-

(a) in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares;

(b) in writing off the preliminary expenses of the company;

(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company; or

(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company.

(3) Where a company has, before the commencement of this Act, issued any shares at a premium, this section shall apply as if the shares had been issued after the commencement of this Act: **Provided** that any part of the premiums which has been so applied that it does not at the commencement of this Act form an identifiable part of the company's reserves within the meaning of Schedule VI, shall be disregarded in determining the sum to be included in the [securities] premium account."

11. The assessee submits that bonds are treated as debentures as per section 2(12) of Companies Act, 1956 which defines debentures as follows:

"(12) "debenture" includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not".

The assessee submits that though as provided in sub-section (1) of section 78 of Companies Act, 1956, share premium account has to be given similar treatment as share capital and the same cannot be reduced except by due process of law for reduction of share capital, sub-section (2) carves out four exceptions to the same. Clause (d) of section 78(2) clearly provides that premium payable on redemption of debentures can be provided out of share premium account. As per section 2(12), debentures includes bonds. The assessee therefore submits that accounting treatment in books of the assessee of providing premium on redemption Zero Coupon Convertible Bonds (ZCCB) out of Share Premium account is permissible under the Companies Act, 1956.

Assessee has not adopted shifting stand

The assessee submits that since the first year of issue of ZCCB, the assessee has debited proportionate premium on ZCCB out of share premium account and in the computation of income, it has claimed proportionate premium on ZCCB as expenditure. The assessee has adopted a consistent stand over the years.

The assessee further submits that, it is permissible for assessee to treat a transaction differently in its income tax return than its treatment in books of accounts. The assessee submits that computation of total income has to be made as per provisions of Income Tax Act, 1961 and accounting treatment is not sacrosanct. It has been held by the Hon'ble Supreme Court in the following cases that entries in books of accounts are not determinative of its tax treatment:

- Kedarnath Jute 82 ITR 363 (SC)
- Godhra Electricity 225 ITR 746 (SC)
- Bokara Steel 236 ITR 315 (SC)
- United Commercial Bank 240 ITR 355 (SC)

The assessee submits that adopting differing treatment in books of accounts and Income Tax Return cannot be equated with shifting stand. The assessee respectfully submits that it has not shifted its stand. What the assessee has done is computed its income as per specific provisions of law independent of treatment in its books of accounts and the same is permissible.”

14. Upon careful consideration, we note that in this case, the assessee has claimed premium/interest payable at maturity of Zero Coupon Convertible Bonds(ZCCB) in the revised return of income. In the accounts of the assessee the said amount was debited to the share premium account. But, in the computation of income assessee claimed the said amount as deduction from income. For admissibility of this claim the assessee submission is that the claim is for each financial year although payment of premium amount shall be paid at the end of the period. That as per mercantile method of accounting income/expense has to be accounted for in the respective accounting period. That the income tax Act does not recognize the concept of deferred income or deferred expenses. That the Assessee is following mercantile methods of accounting. Assessee has also referred to CBDT notifications which confirms that expenses incurred for raising issue of debentures is allowable as revenue expenditure. Further Page No. 45 of CBDT circular No. 56 has been referred for proposition that the provision for amortization is not intended to supersede any other provision in the

income tax law under which the expenditure is allowable as a deduction against profits. Certain case laws have been referred for the proposition that interest/premium can be claimed in the respective year on pro-rata basis. The decision relied upon are as under:-

- i) Madras Industrial Investment Corporation Ltd. vs CIT 225 ITR 802(SC)
- ii) National Engineering Industries Ltd. vs. CIT 1236 I TR 577(Cal)
- iii) CIT vs Tungabhadra Industries Ltd. 207 ITR 553
- iv) Taparia Tools, 260 ITR 102 (Bom)

Further the submission, as regards the different treatment in books of accounts and income tax computation is that entries made by the assessee in books of accounts are not determinative of the question whether the assessee has earned any profit or suffered any loss. In his regard, decision of Hon'ble Supreme Court in the case of Suttej Cotton Mills (supra) and Kedarnath Jute Manufacturing Co.Ltd. (supra) have been referred. Further, it has been pleaded that provision of Companies Act as well as Income tax Act have been duly complied with. It has also been submitted that assessee has incidentally started repaying such ZCCB during the financial year 2009-10 without conversion of such bonds into equity shares. That this also confirms and strengthens the view point of the assessee that the amount is repaid. Now the AO has rejected the claim firstly on the basis of the plank that amount has not been debited into profit and loss account and has been adjusted in the share premium account. Now this plank of the AO is not sustainable on the touchstone of proposition that accounting entries are not determinative of the true nature of the transaction. The accounting treatment has been given in compliance with the companies Act provisions. There is no claim of any violation in this regard. The claim in income tax Act has to be made as per mercantile system and consistent method accounting. A liability which has been accrued has to be provided and allowed. It is not that liability

is allowed only on the payment basis. Following case laws in this regard are relevant, germane and support the case of the assessee.

- i) Madras Industrial Investment Corporation Ltd (supra)
- ii) National Engineering Industries Ltd. (supra)
- iii) CIT vs Tungabhadra Industries Ltd. (supra)
- iv) Taparia Tools (supra)

15. Another plank of the AO in rejecting the claim is that no TDS on such expenses was deducted and such amount cannot be allowed as deduction u/s. 40(a)(ia) of the I.T.Act, 1961. In this regard assessee has referred CBDT circular which provides that TDS in case of Deep Discount Bond is to be deducted on redemption. Further it has been submitted that as regards, the deduction of TDS, these bonds are listed on Singapore Stock Exchange and till redemption on maturity, the beneficiary of the premium is not known. In this regard, assessee's claim is that liability to tax arises when the recipient is identified and TDS deducted can be given credit for. It has been submitted that when the bonds were redeemed on maturity in previous year relevant to AY 2012-13, tax was deducted at source in accordance with the provisions of the Act. Further, it is submitted that the said fact is duly recorded in the assessment order u/s. 143(3) for AY 2012-13. In this regard decision of Hon'ble Delhi High Court in case of UCO bank Ltd. (supra) and ITAT, Mumbai decision in case of Stides Shasun Ltd. ITA NO. 8614/Mum/2011, 08.06.2018 have been referred.

16. In our considered opinion, adverse inference cannot be taken for non deduction of TDS as reasons submitted by the assessee are cogent. As submitted above, these bonds are listed on Singapore Stock Exchange and till redemption on maturity, the beneficiary of the premium is not known. In such circumstances in absence of the identification of recipient and TDS deduction cannot be given credit for. Further, though not directly on this issue the CBDT circular on deep discount bond referred above also provides that on similar issue, TDS has to be deducted on the point of

redemption. Furthermore as submitted, at the time of redemption tax was deducted at source in accordance with the provisions of the Act. This submission has not been disputed. Hence, this reasoning for rejection is also not sustainable,

17. Another claim of the authorities is below is that liability is contingent as it depends whether the bonds are converted in equity or not. In this regard, the claim of the assessee is that merely because bonds could be converted into shares in certain specified circumstances, it cannot be said that liability to pay is contingent. That liability to pay premium has been incurred the moment funds were raised through bonds. It has further been submitted that even on facts the bonds have not been converted into shares, in this regard various case laws have been referred.

18. The argument of revenue that the amount has not been debited in account is also not sustainable as the assessee has very much been debited in the account to the debit of share premium account. The Companies Act duly permits the same. Hence, the plea that amount is contingent and not debited is not correct, when revenue itself has accepted the debit in this regard of the amount to the share premium account. Revenue authorities cannot take a shifting stand that the amount is correctly accrued and debit to share premium account is correct, but the same is still a contingent amount. The assessee could have very well debited the amount to the profit and loss account, but it has chosen to debit the amount to share premium account in the books, which is also permitted as per Companies Act. No infraction of law in this regard was pointed out. Since revenue has accepted the debit of the premium to share premium account, it is clear that revenue has accepted that redemption premium amount has been accepted as accrued. Nevertheless the case law in this regard duly support the proposition. In this regard, we may refer to the decision of Hon'ble Bombay High Court in the case of S.M.Holding & Finance (P) Ltd. 264 ITR 370 as under:-

“Both the above appeals raised a common question of law and fact and, therefore, they are heard together and disposed of by this common judgment. Both the appeals have been preferred by the Department. They concern asst. yrs. 1995-96 and 1996-97, respectively. For the sake of convenience, we reproduce herein the facts in IT Appeal No. 215 of 2001. The following question is referred for opinion of this Court:

"Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal has erred in deleting the addition of Rs. 54,75,000 made on account of 1/5th (1/10th) of premium on the redeemable debentures without considering the fact that no liability had accrued during the year under appeal and it was a contingent liability which was payable only after the expiry of 10 years and directed the AO to follow the decision of Supreme Court in the case of [Madras Industrial Investment Corporation Ltd. v. CIT](#) where facts of the case are different from those of Supreme Court's decision?"

Facts

2. During the assessment year in question, the assessee-company had issued zero interest unsecured redeemable convertible debentures of Rs. 100 each redeemable after 10 years at a premium of 100 per cent. These debentures are redeemable after 10 years from the date of allotment at a premium of 100 per cent. Assessee claimed before the AO a spread over, Assessee claimed that the premium payable by it was Rs. 5,47,50,000 after expiry of 10 years. However, the assessee claimed deduction of Rs. 54,75,000 per annum. The said amount was debited to the P&L a/c for the accounting year ending 31st March, 1995. In the annual report, a footnote was added that premium on zero interest unsecured redeemable debentures of Rs. 100 each was redeemable after 10 years at a premium of 100 per cent. The AO disallowed the assessee's claim for deduction of Rs. 54,75,000. He added back that figure to the income of the assessee on the ground that the liability was not ascertainable during the accounting year ending 31st March, 1995. That, it was a contingent liability. This decision was confirmed by the CIT(A). However, the Tribunal overruled the case of the Department in view of the judgment of the Supreme Court in the case of [Madras Industrial Investment Corporation Ltd. v. CIT](#). Being aggrieved, the Department has come by way of the appeal to this Court.

Arguments

3. None appears for respondent though served.

4. Mr. R.V. Desai, learned counsel appearing for the Department/appellant, submitted that the ratio of the judgment of the Supreme Court in the case of [Madras Industrial Investment Corporation \(supra\)](#) as also the judgment of this Court in the case of [Tapatia Tools Ltd. v. Jt CIT](#) (2003) 126 Taxman 544 (Bom) was not applicable as in this case the AO found alteration in the terms of issue of debentures during the life of the issued debentures. He submitted that originally the debentures were issued at 2 per cent. which was changed to 0 per cent during the life of issued debentures. That, originally the issued debenture was for 5 years which was changed to 10 years during

the existence of the issued debentures. He submitted that in the case of Madras Industrial Investment Corporation (supra) as also in the case of Taparia Tools Ltd. (supra), there was no discretion vested in the assessee to alter the terms of the issued debentures during the subsistence of the issued debentures whereas in the present case the borrower had the discretion to change the terms of the issued convertible debentures. He, therefore, submitted that during the assessment year in question, there was no ascertainment of liability to the tune of Rs. 54,75,000 and, therefore, the AO was right in disallowing the claim for deduction.

Findings

5. We do not find any merit in the above arguments advanced on behalf of the Department. Firstly, we have gone through the records and proceedings (R & P). In the entire R & P, there is nothing to indicate alterations of terms and conditions during the subsistence of the issued convertible debentures during the assessment year in question. Secondly, in the annual reports of the company and also in the audit reports given by the auditors, it has been certified that zero interest unsecured redeemable convertible debentures of Rs. 100 each redeemable after 10 years at a premium of 100 per cent had been issued during the assessment year in question. There is no reason for us to discard this note of the auditor. Even in the assessment order, no reasons have been given by the AO for discarding this note of the auditors. Lastly, we may point out that even assuming for the sake of argument that the borrower had a discretion to change the terms of the issued debentures, there is nothing in the record to show that during the assessment year in question the borrower had exercised such a discretion. In the absence of factual matrix; we have no option but to confirm the judgment of the Tribunal. In our view, the judgment of this Court in the case of [Taparia Tools Ltd. v. Jt CIT](#) (supra) is applicable to this case. In our view, the judgment of the Supreme Court in the case of [Madras Industrial Investment Corporation v. CIT](#) (supra) is also applicable.

Order In the circumstances, we answer the above quoted question in the affirmative i.e., in favour of the assessee and against the Department.

6. Accordingly, both the above appeals are disposed of with no order as to costs.”

19. We note that in the above case Hon'ble Jurisdictional High Court has duly taken note of Hon'ble Supreme Court decision in the case of Madras Industrial Investment Corporation (supra) and Hon'ble Bombay High Court decision in the case of Taporia Tools Ltd. (supra) and had found no fault even on the ground that the borrower had the discretion to change the terms of the issued debentures. As there was nothing in the record to show that during the assessment year in question, the borrower had exercised such a discretion. In the present case also, there is nothing on record that the

borrower had exercised any such discretion. In this view of the matter, the said case law is fully applicable on the facts of the case and the liability on account of debenture redemption premium is liable to be deducted from the income and cannot be treated as contingent liability. Furthermore Mumbai Tribunal in the case of Mahindra and Mahindra ITA No. 8597/Mum/2010 held as under:-

“Next ground of appeal is about disallowance of pro rata premium of Rs.5.39 crores payable on redemption of 'Foreign Currency Convertible Bonds'(FCCB).As per the AO the bonds were convertible into shares and, therefore, could not be construed as a borrowing, that they increased capital base of the company and that the expenditure incurred was capital in nature.

The AR submitted that FCCB were a form of borrowing that they were shown in the balance- sheet under loans that premium payable on redemption was cost of borrowing, that option of conversion of bonds into shares was only with the bond holders, that conversion was a subsequent event which did not change the initial character of the bonds of a debt, that in the event of redemption payment of premium was mandatory, that premium being a cost of borrowing was allowable on time ,that premium was neither capital nor contingent in nature, that issue of FCCB had been held to be revenue in appellant is own case for the assessment year 1997-98 (ITA/7845/M/2004).DR supported the order of the AO.”

20. From the above, it is clear that the amount of debenture redemption premium is accrued and liable to be deducted. Hence, in the background of aforesaid discussion and precedents, we set aside the orders of the authorities below, and decide the issue in favour of the assessee.

21. Ground No.8 to 12 relates to the issue of disallowance u/s. 14A. On this issue, the AO noted the following expenses in assessment order.

“ The assessee has filed the return of income wherein certain amount has been disallowed u/s. 14A (1) of the Act. The company has disallowed the following expenses u/s. 14A(1):

Nature of expenses	Amount
Rent	3,00,000
Repairs to computers	15,000
Salary expenses	29,00,993
Electricity and Security Charges	45,000
Telephone & Fax Charges	25,000
TOTAL	32,85,993

The assessee has provided the basis of working of disallowance out of actual expenses incurred. The assessee has Identified the other expenses which were incurred to earn exempt Income. The assessee also provided details of interest expenses and corresponding income for which such Interest expenses were incurred. The assessee has identified interest payment and the cause for such payment of interest and corresponding income or receipt thereof.”

22. The AO was not satisfied, he was of the opinion that disallowances should be made as per section 14A. The AO reproduced the assessee’s submissions, however he was not satisfied, he proceeded to make the disallowances as per Rule 14A r.w. Rule 8D resulting in disallowance of further sum of Rs. 4,57,08,856/-.

23. Upon assessee’s appeal Ld.CIT(A) confirmed the order of AO giving only a small relief on account of proportionate interest disallowances, the order of Ld.CIT(A) in this regard is as under:-

“ I have carefully gone through the submission of the appellant as well the order of the AO. The appellant has earned dividend of Rs. 36,99,61, 927/- which has

been claimed exempt from tax. Further the total investment outstanding as on 31st March 2016 were to the tune of Rs. 2,001,94,74,908. So I am inclined to accept the contention of the AO that it is difficult to accept that the appellant has incurred only Rs.32,85,993/- to maintained such a huge portfolio.

Rule 8D provide the mechanism to compute the disallowance u/s 14A and the Hon'ble Bombay high court in the case of Godrej and Boyce Mfg. Co. Ltd 328 ITR 81 held that from A.Y 2008-09 onward disallowance should be computed under rule 8D. However, in the recent decision of the Bombay High Court it was held that when if the assessee's own fund is more than the investment made it will be presumed that the investment were made out of own fund and no disallowance for interest will be made u/s 14A.

Following the binding decision of the Hon'ble Bombay High Court in the case of HDFC Bank Ltd the AO is directed to delete the disallowance of Rs.29,864/- being the proportionate amount of interest disallowed. In the light of the decision of Hon'ble Bombay High Court in the case of Godrej and Boyce (*supra*) remaining addition made by the AO u/s 14A read with rule 8D are confirmed.”

24. Against the above order, assessee is in appeal before us.

25. We have heard both the parties and perused the records. The submissions of the Ld. Counsel of the assessee summarized as under:-

“The assessee has large amount of own funds which is invested in associated enterprises. The surplus funds are invested in debt and liquid funds of Mutual Funds. The assessee has earned dividend of Rs. 36,99,61,627/- during the year.

The assessee has an identified treasury division which invests surplus funds. The assessee has from its books of accounts identified expenses relating to the said division and quantified the same at Rs. 32,85,993/- and suo moto disallowed the same u/s 14A. The details of the expenditure and basis thereof is extracted at pages 7 to 9 of the assessment order.

The learned Assessing Officer, in para 4.5 on page 14, held that it is difficult to accept the hypothesis that only Rs. 32,85,993/- was spent and invoked and disallowed in accordance with Rule 8D.

The learned Commissioner of Income Tax (Appeals) in para 10.4 to 10.6 at pages 58 and 59, affirmed the action of the Assessing Officer except that a very small amount of Rs. 29,864/- disallowed out of interest has been deleted.

The assessee submits that it has made an honest and scientific approach to identify expenditure incurred to earn exempt income. The assessee submits that over a last few years, it had generated lot of liquidity and a specified treasury department was assigned with the job to invest surplus funds in low risk funds. It will be appreciated that there are many mutual fund schemes where funds are invested in bonds and money market and they are lowest risk

funds with very low returns. As can be seen from schedule of investment at page 132 - 136 of paper book, all the outside investments are either in Government Bonds or debt or liquid mutual funds. They are low risk and their credit rating and other data is available on public domain. Not much decision making is required as the risk is predefined and the same is Nil or very low. Further, investment in mutual fund does not require any expenses as distributor of mutual fund renders such services free to the investor. The assessee seeks to draw your Honours attention to submission made before AO and extracted at page 7 to 9 of the assessment order.

The assessee submits that disallowance made is based on actual reality and of expenses incurred and debited in books of accounts.

The assessee submits that the reasons assigned by both the lower authorities can be ground for enquiry but cannot be ground for rejection. Sub-section 2 of section 14A is very specific as to grounds on which method of the assessee can be rejected and those conditions for rejection are not satisfied in the present case.

The assessee relies on judgment of Hon'ble Supreme Court in case of Maxopp 402 ITR 640 (SC) that method cannot be lightly rejected. The assessee also relies on judgment of Hon'ble Bombay High Court in case of Bombay Stock Exchange Ltd (2020) 113 taxmann.com 303 (Bom), copy enclosed at page 667 to 672 of paper book 3.”

26. Without prejudice to the above submission, Ld. Counsel of the assessee has given following submission:-

Without prejudice to above, the assessee has reworked disallowance of 0.50% of average investments by excluding investments on which no income has been earned in the impugned year. The working is enclosed in paper book 5 (please refer page 833-834). The same can be summarised as follows:

Assessment Year	Disallowance out of expenses made as per the assessment order	Disallowance as reworked (detailed working in Paper book 5)
2009-10	Rs.4,57,01,438	Rs. 3,49,03,876
2010-11	Rs.4,90,64,985	Rs.3,90,70,237

27. We note that assessee has given the reasons for expenditure, which as per the assessee is disallowable u/s.14A. Assessee has provided the basis of working of

disallowance, however, the same has been rejected by the authorities below without cogent reasoning. The AO and Ld.CIT(A) are mentioning that “it is difficult to accept that assessee has incurred only that much of expenditure.” This is no reason at all. It is settled law that proper satisfaction is necessary in this regard in rejecting assessee’s contentions. In this regard, we note that Hon’ble Bombay High court in the case of Bombay Stock Exchange 113 taxmann.com 303 has held as under:-

“Non-satisfaction with the disallowance offered by the assessee has to be arrived at on the basis of the accounts submitted by the assessee. In this case, the Assessing Officer had not carried out the aforesaid exercise but rejected the disallowance claimed by the assessee only on the ground that it was not in accordance with Rule 8D of the Rules. The application of Rule 8D of the Rules would only arise once the Assessing Officer is not satisfied on an objective criteria in the context of its accounts, that suo motu disallowance claimed by the assessee is not proper.

In fact, the Supreme Court in the case of *Maxopp Investment Ltd. v. CIT* [2018] 91 taxmann.com 154/254 Taxman 325/402 1TR 640 while upholding the view of the Delhi High Court has held that the Assessing Officer needs to record his non-satisfaction having regard to the suo motu disallowances claimed by the assessee in the context of its accounts. It is only thereafter, the occasion to apply rule 8D of the Rules for apportionment of expenses can arise.

In the present facts, the Tribunal has correctly come to the conclusion that non-satisfaction as recorded by the Assessing Officer for rejecting the suo motu disallowances claimed by the assessee is not done as required under section 14A(2) of the Act. On facts, the view taken by the Tribunal is a possible view and calls for no interference.”

28. We find that facts in the present case are identical and following the precedent, we set aside the order of authorities below. This ground is allowed.

ITA No.4775/Mum/2016 for AY 2009-10

29. Grounds of appeal read as under:-

1. The Learned Commissioner of Income Tax Appeals ('Ld. CIT(A)') erred in partly confirming the action of the Learned Assessing Office ('Ld. AO') / Learned Transfer Pricing Officer ('Ld. TPO') of proposing an upward adjustment of INK 2,32,65,9657- in respect of the international transactions of receipt of interest on loan granted to its Financial Technologies Mid East ('FTME') (INR 85,13,398) and issuance of corporate

guarantee facility to FT Group Investment Private Limited ('FTGIPL') (FTME and FTGIPL together referred to as 'Associated Enterprises' or 'AEs') (INR 22,90,845) u/s. 92CA(3) of the Income Tax Act, 1961 ('the Act').

2. The Ld. CIT(A) erred in partly confirming the adjustment of Rs. 85,13,3987- in respect of the international transactions of receipt of interest from FTME u/s. 92CA(3) of the Act.

2.1. The Ld. CIT(A) failed to appreciate the fact that the loan granted by the appellant to FTME were in nature of advances given with the intention of converting the same into equity subsequently and hence should be characterized as quasi equity and not loan.

2.2. The Ld. CIT(A) erred in applying the interest rate of LIBOR plus 300 basis point on the loans granted by the appellant to FTME, which is in the nature of quasi equity and hence, interest shouldn't be charged on the same.

2.3. The Ld. CIT(A) erred in following of arbitrary approach of applying an interest rate of LIBOR plus 300 basis points based on the Hon'ble Mumbai Tribunal's decision in case of Firestar International Limited (ITA No. 4887Mum72015), without appreciating the facts of the case.

2.4. Without prejudice to above, even if the interest rate is applicable for the loan given to FTME, it should be of 6-months LIBOR rate which is being charged by the appellant to FTME for the same loan from financial year 2009-10.

3. The Ld. AO and / or the Ld. TPO erred in proposing and the Ld. CIT(A) erred in upholding partly adjustment of Rs. 22,90,844/- in respect of issuance of corporate guarantee by the Appellant to FTGIPL,

3.1 The Ld. CIT(A) erred in not appreciating the fact that issuance of corporate guarantee is not covered under the definition of international transaction as provided under section 92BoftheAct.

3.2 The Ld. CIT (A) erred in not considering the fact that corporate guarantee facility is given by the appellant to expand the business operations and achieve overall growth in the business of the appellant itself, the ultimate parent of the group and hence should be considered as a part of its shareholder activity,

3.3 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in imputing the corporate guarantee fee at the rate of 2% relying on the Safe Harbour rules, which itself is in the nature of presumptive taxation and not an arm's length price and hence cannot be applied.

4. The Ld. CIT(A) erred in confirming the disallowance made by the AO for Rs. 56,72,69,087/- being the proportionate claim of the premium on ZCCBs written off during the tenure of Zero Coupon Convertible Bonds which is in the nature of interest with out appreciating the facts and written submission made before him

5. The Ld. CIT(A) erred in holding that the claim of provision of proportionate premium of Redemption of ZCCB is a contingent liability and failed to appreciate that liability to pay premium(interest) at the time of redemption was always ascertainable particularly when none of the bonds were converted into equity.

6. The Ld. CIT(A) erred in holding that the assessee is treating provision of proportionate premium of Redemption of ZCCB as capital expenses.

7. The Ld. CIT(A) failed to follow the various judgments quoted before him including the judgment of Supreme Court and Mumbai Tribunal in their true spirit.

8. The Ld. CIT(A) erred in confirming the action of the AO that the claim of premium/ interest cannot be allowed u/s 40(a)(ia) since tax was not deducted at source.

9. The Learned CIT(A) failed to follow the binding CBDT's circulars in respect of TDS on interest on Deep Discount Debentures in its true spirit and also failed to appreciate that both instrument Deep Discount Bonds and the ZCCBs are of the same nature, and as such accordingly the CBDT circular in the matter of TDS on Deep Discount Debenture *mutatis-mutandi* applies to the ZCCBs also.

10. The Ld. CIT(A) has erred in confirming the disallowance made by the AO u/s 14A up to the extent of Rs.4,26,34,850/-.

11. The Ld. CIT(A) failed to appreciate that when the appellant itself calculated the disallowances in a scientific manner u/s 14A(1) then he AO could not have applied rule 8D without giving specific finding that the working made by the appellant was incorrect.

12. The learned CIT(A) erred in holding that it is difficult to accept that appellant has incurred only Rs. 30,66,5887- to maintain a huge portfolio without putting any specific finding about the correctness of working made by the appellant u/s 14A(1) of the Act.

13. Without prejudice to earlier grounds, the Ld. CIT(A) ought to have accepted the alternate plea taken by the appellant to calculate the disallowance u/s 14A at the rate of 1% of dividend income in spirit of decisions of Mumbai Tribunal quoted by the appellant.

14. Without prejudice to earlier grounds, the Learned CIT(A) failed to appreciate that the investments on which no exempt income could be earned during the year and the investments made for strategic purpose cannot be taken into consideration while calculating the amount of average investment for the purpose of computing the disallowance under section 14(2) read with rule 8D of I.T.Rules.

30. At the outset, Ld. Counsel for the assessee submitted that he shall not be pressing ground No.1 to 2. Hence, these issues are dismissed as not pressed.

31. Ground No.3 relates to the issue of corporate guarantee commission. On this issue, the TPO has calculated the ALP @ 6.67. Ld.CIT(A) upon assessee's appeal reduced the same 2% following his decision for AY 2010-11. Against this assessee is in appeal before the ITAT. The plea of the assessee is that adjustment on account of corporate guarantee should be restricted @0.50% in accordance with the Hon'ble Bombay High Court decision in this regard.

32. Upon careful consideration and after hearing both the parties, we note that Hon'ble Bombay High Court in CIT vs.Everest Kento Cylinders Ltd. Kanto, order

dated 08.05.2018 has confirmed the ITAT order of 0.5% corporate guarantee commission by observing as under:-

“In the matter of guarantee commission, the adjustment made by the TPO were based on instances restricted to the commercial banks providing guarantees and did not contemplate the issue of a Corporate Guarantee. No doubt these are contracts of guarantee, however, when they are Commercial banks that issue bank guarantees which are treated as the blood of commerce being easily encashable in the event of default, and if the bank guarantee had to be obtained from Commercial Banks, the higher commission could have been justified. In the present case, it is assessee company that is issuing Corporate Guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which applied for issuance of a Corporate guarantee are distinct and separate from that of bank guarantee and accordingly we are of the view that commission charged cannot be called in question, in the manner TPO has done. In our view the comparison is not as ita1165.13 between like transactions but the comparisons are between guarantees issued by the commercial banks as against a Corporate Guarantee issued by holding company for the benefit of its AE, a subsidiary company. In view of the above discussion we are of the view that the appeal does not raise any substantial question of law and it is dismissed.”

Hence, following the precedent, we direct that disallowance should be restricted @0.5%

33. Ground No.4 to 9 relate to the issue of disallowance with respect to premium of ZCCB written off. Since facts are identical and Ld.CIT(A) has followed this order for AY 2010-11. Our above adjudication for AY 2010-11 applies mutatis mutandis on this issue. Hence, this ground raised by assessee is allowed.

34. Ground No. 10 to 14 relate to the issue of disallowance u/s 14A. Our above adjudication for AY 2010-11 applies mutatis mutandis on this issue also. Hence, this issue is allowed.

35. In the result, assessee's appeals are partly allowed.

Order pronounced in the open court on 16 .12.2021

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated :. 16 .12.2021

Thirumalesh, Sr. PS

Copy of the Order forwarded to :

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

BY ORDER,
(Dy./Asstt.Registrar)
ITAT, Mumbai