IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E" : MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER

ITA.No.7791/Mum./2019
Assessment Year 2010-2011

Everest Industries Limited D-206, Sector-63, Noida – 201 301 Uttar Pradesh PAN AAACE7550N	vs.	The DCIT, Circle-1, Ashar I.T. Park, 6th Floor, B-Wing, 16-Z, Wagle Industrial Estate, Thane (W)- 400 604
(Appellant)		(Respondent)

ITA.No.554/Mum./2020
Assessment Year 2010-2011

The DCIT, Circle-1, Room No.22, B-Wing, 6th Floor, Ashar I.T. Park, Wagle Industrial Estate, Thane (W)- 400 604	vs.	Everest Industries Limited G-1, A-32, Genesis Mohan Coop. Industries, Mathura Road, New Delhi-110044 PAN AAACE7550N
(Appellant)		(Respondent)

For Assessee :	Sh Yogesh Thar, Sh Chaitanya Joshi & Sh Ansh Ajmera
For Revenue :	Shri Amol Kirtane, CIT-DR

Date of Hearing :	26.07.2022
Date of Pronouncement :	29.07.2022

ORDER

PER ANIKESH BANERJEE, J.M.

The above cross-appeals are filed by the Assessee and Revenue against the Order of the Learned Commissioner Income Tax (Appeals)-3 [In short "Ld. CIT(A)"] bearing Appeal No.NSK/CIT(A)-3/139/2017-18 vide order dated 16.10.2019 passed under section 250(6) of the I.T. Act, 1961 [In short "Act"] and arises out of the order of the Learned Assessing Officer [in short "A.O."], vide order dated 28.03.2013 passed under section 143(3) of the I.T. Act, 1961. Since common issues are involved in both the appeals, the appeals were heard together and are being disposed of by this common consolidated order.

2. The assessee has raised the following grounds in its appeal :

1. *That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) (here-in-after referred to as 'Ld. CLT(Appeals) was not justified & grossly erred in confirming disallowance in respect of*

provision for leave encashment debited to Profit & Loss Account amounting to Rs.35,89,347/- in computing total income under the normal provisions of the Act. [Tax effect Rs.12,20,019]

2. *That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified & grossly erred in confirming the action of the A.O. in not allowing additional depreciation u/s 32(1)(iia) amounting to Rs.17,66,22,964/- in respect of new Plant & Machinery acquired and installed after 31.03.2005 but before 01.04.2009. [Tax effect Rs.6,00,34,145/-]*
3. *That the appellant craves leave to add, to amend, modify, rescind, supplement or alter any of the Grounds stated here-in-above, either before or at the time of hearing of this appeal."*

3. During the course of hearing, the Learned Counsel for the Assessee did not press ground No.2. Therefore, the same is dismissed as not pressed.

4. The only ground remains for adjudication before us is that the Ld. CIT(A) was not justified & grossly erred in confirming disallowance in respect of provision for leave encashment debited to Profit & Loss Account amounting to Rs.35,89,347/- in computing total income under the normal provisions of the Act.

4.1. Briefly stated facts of the case are that the assessee has debited an amount of Rs.35,89,347/- to the P & L A/c on account of ' Provision for Leave Encashment' . The A.O. has not allowed the deduction of Rs.35,89,347/- on account of provision for leave encashment under section 43B(f) of the I.T. Act, 1961. Aggrieved by the order of the A.O. the assessee carried the matter in appeal before the Ld. CIT(A) who vide order dated 16.10.2019 confirmed the addition made by the A.O.

4.2. Aggrieved by the order of the Ld. CIT(A) the assessee is in appeal before the Tribunal. During the course of hearing, Learned Counsel for the Assessee reiterated the submissions made before the lower authorities and

submitted that leave encashment was not covered under section 43B(f) of the Act and this issue is stood covered by the decision of Ho'ble Calcutta High Court in the case of Exide Industries Ltd., vs., Union of India reported in 292 ITR 470 (Cal.). He further submitted that the Hon'ble Supreme Court vide its interim order dated 08.05.2009 had granted interim stay on the appeal filed by the Revenue. He prayed that the assessee be allowed the deduction of Rs.35,89,347/-.

5. The Ld. D.R. on the other hand relied on the orders of the lower authorities. He submitted that the Hon'ble Supreme Court decided the appeal filed by the Revenue in the case of Union of India & Others vs., M/s. Excide Industries Ltd., & Anr. vide order dated 24.04.2020 in Civil Appeal No.3545/2009 in favour of the Revenue. He submitted that the provisions of Section 43B(f) are in force as per the Judgment of Hon'ble Supreme Court in the case of M/s. Excide Industries Ltd., (supra) and, therefore, the orders of the authorities below be confirmed.

6. We have considered the rival submissions and carefully perused the material on record. We find that the issue with respect to applicability of provisions of Section 43B(f) is decided by the Hon'ble Supreme Court in the case of M/s. Exide Industries Ltd., (supra), in favour of the Revenue. We are reproducing the relevant observations of the Hon'ble Supreme Court as under for better appreciation:

> *" 40. Notably, this regulatory measure is in sync with other deductions specified in Section 43B, which are also present and accrued liabilities. To wit, the liability in lieu of tax, duty, cess, bonus, commission etc. also arise in the present as per the mercantile system, but assessees used to defer payment thereof despite claiming deductions there against under the guise of mercantile system of accounting. Resultantly, irrespective of the category of liability, such deductions were regulated by law under the aegis of Section 43B, keeping in mind the peculiar exigencies of fiscal affairs and underlying concerns of public revenue. A priori, merely because a certain liability has been declared to*

be a present liability by the Court as per the prevailing enactment, it does not follow that legislature is denuded of its power to correct the mischief with prospective effect, including to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to new regulatory measures. Strictly speaking, the Court cannot venture into hypothetical spheres while adjudging constitutionality of a duly enacted provision and unfounded limitations cannot be read into the process of judicial review. A priori, the plea that clause (f) has been enacted with the sole purpose to defeat the judgment of this Court is misconceived.

41. The position of law discussed above leaves no manner of doubt as regards the legitimacy of enacting clause (f). The respondents have neither made a case of nonexistence of competence nor demonstrated any constitutional infirmity in clause (f).

42. In view of the clear legal position explicated above, this appeal deserves to be allowed. Accordingly,

the impugned judgment of the Division Bench of the High Court is reversed and clause (f) in Section 43B of the 1961 Act is held to be constitutionally valid and operative for all purposes. No order as to costs. Pending interlocutory applications, if any, shall stand disposed of."

6.1. Since the Hon'ble Supreme Court has decided the provisions of Section 43B(f) is constitutionally valid and operative for all purposes, therefore, respectfully following the Judgment of Hon'ble Supreme Court in the case of Union of India & & Others vs., M/s. Excide Industries Ltd., & Anr. (supra), we dismiss grounds of appeal No.1 of the assessee.

7. In the result, appeal of the Assessee is dismissed.

ITA.No.554/Mum./2020 – [Revenue Appeal] :

8. The Revenue has raised the following grounds in its appeal :

1. *(i) Whether the CIT(A) erred on the facts and in the circumstances of the case and in law, in deleting an amount of Rs. 6,74,12,461/- being disallowance of claim of sales tax incentive.*

   (ii) Whether the CIT(A) erred on the facts and in the circumstances of the case and in law, in holding that Sales Tax was embedded in the Sales prices charged by the assessee and the same was in the nature of capital receipt. The Ld. CIT (A) ignored the fact that the assessee was legally required to collect Sales Tax on the Sales made, yet it had worked out the notional Sales Tax so collected and had claimed the same as capital receipts.

   (iii) Whether the CIT(A) erred on the facts and in the circumstances of the case and in law, in relying on the decision of ITAT, Mumbai and the decision of Bombay High Court (ITA No. 1299 of 2008) in the case of Reliance Industries Limited, even though subsequent to the Departmental appeal against the Order of High Court, the issue

has been remitted back to the Bombay High Court to decide afresh and the same is still pending for adjudication.

(iv) Without prejudice to the above grounds, whether the CIT(A) erred on facts and in law, directing the AO that the Sales Tax Incentive is not required to be deducted from the cost of assets, if the same is treated as capital receipts by the AO. ignoring the provisions of explanation 10 to section 43(1) of the Act.

2. *(i) Whether the CIT(A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs. 15,67,00,636/- stated to be collected by the assessee was capital in nature without any evidence placed on record to establish that the said amount was actually collected on account of excise duty.*

(ii) Without prejudice to the ground at (i) above, whether the CIT(A) erred on facts and in the circumstances of the case and in law in holding

that the excise duty of Rs.15,67,00,636 collected by the assessee was not revenue in nature despite the fact that the same was collected by the assessee on goods which were exempted from levy of any duty as per the Central Excise Department's Notification No. 50/2002 -CE dated 10.06.2003.

(iii) Whether the CIT(A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs.15,67,00,636/- collected by the assessee was capital in nature by comparing the scheme of exemption under which the claim was made by the assessee by such other schemes wherein the mode of incentive was in the nature of refund/reimbursement or subsidy.

(iv) Without prejudice to the above, whether the CIT(A) erred on facts and in law, directing the AO that the Excise duty exemption is not required to be deducted from the cost of assets, if the same is treated as capital receipts by the A. O. ignoring the

provisions of explanation 10 to section 43(1) of the Act ?

(v) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in not appreciating the fact that the provision to explanation 10 section 43(1) of the I.T. Act, was intended to cover any subsidy or grant or reimbursement directly or indirectly met by the Central or State Government or any authority established under any law and the asesseee's claim of excise duty exemption is covered in indirect subsidy ?

3. Whether the CIT (A) erred on facts and in law in allowing the foreign exchange fluctuation loss on re-instatement of loan without verifying whether the underlying transaction was on capital or revenue account and without verifying whether the underlying transaction was in US dollar and Japanese Yen.

4. *(i) Whether the CIT(A) erred on the facts and in the circumstances of the case and in law, in not following precedent in the decision of hon'ble ITAT vide order dated 31.01.2018 in assessee's own case for A.Y. 2009-10 wherein hon'ble ITAT rejected the grounds raised by the assessee in respect of Education Cess.*

   (ii) Whether the CIT (A) erred On the facts and in the circumstances of the case and in law, to appreciate that fact that the education cess has been levied under Finance Act as an item to increase income tax and it has been held to be part of "income tax" by Hon'ble Calcutta High Court in the case of Srei Infrastructure Finance Ltd.

5. *The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal."*

9. The Learned A.O. denied the claim of exclusion of sales tax incentive as capital receipt amounting to Rs.6,74,12,461/-, disallowance of excise duty as capital receipt amounting to Rs.15,67,00,636/-, disallowance of

foreign exchange fluctuation loss in respect of currency swap / derivative transactions at Rs.1,30,85,426/- and disallowance of education cess on income tax and dividend distribution tax amounting to Rs.17,67,138/-.

9.1. On Grounds of appeal no.1(i) to 1(iv) of the revenue i.e., "Sales Tax Incentive under New Package Scheme of Incentives (PSI), 1993. [Rs.2,23,92734/-], the Learned Counsel for the Assessee drew the attention of the Bench with respect to the brief facts of the case are that the assessee company had set-up a manufacturing unit in backward area of Nashik, Maharashtra. The assessee company is having its manufacturing unit of Asbestos cement sheets and accessories at Lakhmapur, Nasik. The said unit at Lakhmapur was eligible for sales tax incentive as per the Government of Maharashtra resolution vie Industries, Energy and Labour Notification No.IDL/ 1088/6603/I&D-8 dated 30.09.1988 which was extended further w.e.f. 01.10.1993. Under the said scheme, the assessee company was not required to pay (i) Sales Tax

"LST" and CST, additional sales tax, purchase tax, turnover tax payable on sale of finished products or purchase of material. Based on the said scheme, Sicom Ltd., the implementing agency has certified that the assessee company was eligible for incentives under the scheme and issued eligibility certificate No.FINC(I)/1993/EXEMPTION/ EC-4498 dated 01.01.2002, effective from 01.01.2002 to 31.01.2016 i.e., for 169 months granting sales tax exemption of Rs.17,30,13,750/- for additional investment of Rs.18.90 crores made at the factory at Lakhmapur. In terms of the said scheme, during the previous year i.e., for the A.Y. 2010-11 the assessee company availed the said incentives/subsidy on account of sales tax aggregating to Rs.6,74,12,461/-. In the return of income the assessee company excluded the above subsidy on account of sales tax incentive in computing the total income under normal provisions of the Act. The assessee took this said exclusion as capital receipt, however, the Revenue treated this amount as revenue receipt and added back to the total income of the assessee company.

10. The Ld. D.R. on the other hand strongly relied on the orders of the A.O. He specifically mentioned that the A.O. has distinguished the issue in relation to nature of incentives as the assessee has shown this amount as notional tax. He further submitted that the Government of Maharashtra has amended the scheme in the year 1993 and, therefore, the addition made by the A.O. treating the amount of Rs.6,74,12,461/- as revenue receipt be upheld.

11. In it's rejoinder, the Learned Counsel for the Assessee relied on the order of the Ld. CIT(A) and drew the attention of the Bench the findings of the Ld. CIT(A) on this issue. The relevant observations of the Ld. CIT(A) on the matter in issue is reproduced as under :

> *"Therefore it is clear that the Hon'ble Mumbai ITAT had considered this fact that notional Sales Tax was included in the sales price and the same bore the character of subsidy and came to conclusion that it was exempted being a capital receipt. In the present case, the notional sales tax liability for setting up the unit at*

Lakhmapur, District Nasik was in the nature of capital receipt as it was granted to encourage investment in the backward areas of the state of Maharashtra. The entitlement of industrial unit to claim eligibility for the Sales Tax incentive arose even while the industry was in the process of being set up. The scheme was oriented towards and subservient to investment in fixed capital assets. The object of the subsidy was to encourage the setting up of industries in the backward area. ***Para 5.1(11) of said 1993 Scheme gave the details of quantum of sales tax incentive which was to be calculated as percentage of fixed capital investment depending on the category of area in which the eligible unit was being set up. The Sales Tax incentive was envisaged only as an alternative to the cash disbursement and by its very nature to be available only after production commenced.*** *Thus in effect, the subsidy* ***in*** *the form of Sales Tax incentive was not given to the appellant company for assisting it in carrying out the business*

operations. ***I therefore hold that Sales Tax Incentive availed by the appellant company was on capital account.*** *The question that if a subsidy is on capital account then whether it has to be reduced from the cost of assets for allowing depreciation or not, also stands covered in the favour of the appellant company.* ***In the case of Sasisri Extraction Ltd. Vs. ACIT (307 ITR AT. 127),*** *it was contended that the subsidy granted under the scheme was to encourage entrepreneurs to establish industries and the mere fact that a specified percentage of the fixed capital cost was taken as the basis for determining the subsidy should not be mistaken as payment intended to subsidize the cost of capital. It was also contended that the scheme under which subsidy was granted to the assessee did not indicate that it was specifically meant to offset the cost of the capital assets purchased by the assessee. No doubt for the purpose of working out the amount of subsidy to be given, the fixed capital investment was considered but the fact remained that there was an*

outer ceiling of Rs.20 lakhs irrespective of the capital investment which only went to show that the subsidy was not meant to offset the cost of the assets. The Hon'ble Visakhapatnam IT AT held that even after insertion of Explanation 10 to section 43(1) of the Act, the basic principle underlying in the decision of the Apex Court in the case of P. J. Chemicals Ltd. (210 ITR 830), still held the field. ***The scheme was intended to accelerate industrial development of the State and the incentive was given for setting up of industries in Andhra Pradesh. The amount of subsidy to be given was determined by taking the cost of eligible investment as the basis.*** *The incentive in the form of subsidy could not be considered as a payment directly or indirectly to meet any portion of the actual cost and thus it fell outside the ken of Explanation 10 to section 43(1) of the Income-tax Act, 1961. Accordingly it was held that the subsidy amount could not be reduced from the actual cost of the capital asset for computing depreciation. In the present case, there is no link or*

nexus between the subsidy received and the acquisition of asset. The subsidy in the present case has been received for encouraging investment in backward area namely Lakhmapur, even if computed with reference to cost of investment in fixed assets, cannot be reduced from the cost of assets by applying the visions of Explanation 10 TO section 43(1). ***Reliance in this regard is also placed on the decision in the case of Rohit Exhaust Systems Pvt. Ltd. Vs. ACIT in IT A No. 1880/PN/2013 dated 31.03.2015*** *wherein the Hon'ble Pune ITAT, in respect of New Package Scheme of Incentive, 1993 held as under:*

> *"The perusal of the Package Scheme of Incentive, 1993 reflect that the scheme was formulated to give incentive for setting up the industries in certain belts of Maharashtra and for the purpose of working out the amount of subsidy, though the cost of eligible investment was taken as the base but the said subsidy was not specifically intended to meet the cost of assets. In view thereof, it could*

not be held that the incentive received by the assessee under the Package Scheme of 1993 in the form of subsidy was covered under provisions of Explanation 10 to section 43(1) of the Act and consequently, the subsidy amount was not to be reduced from the cost of the assets".

In the case of Inventaa Chemical Ltd. Vs. ACIT (42 SOT 249), *the Hon'ble Hyderabad Tribunal held that the payment of subsidy was not related to the actual acquisition of assets and subsidy was granted on capital investment on kind, building and machinery, therefore it could not be reduced from the value of asset (WDV).* ***Considering that the subsidy received by the appellant company in the present case was to promote/accelerate the development in backward areas of State of Maharashtra and the fact that disbursement was made on certain percentage of eligible investment, it did not imply that cost of assets to that extent had been met directly or***

indirectly by the State Government. *In these facts and circumstances, the impugned addition made by the AO cannot be sustained as the Sales Tax Incentives were on capital account. Accordingly I direct the AO to delete the addition of Rs.6,74,12,461/- made by him. This ground of appeal is accordingly allowed."*

12. We have heard the submissions of both the parties and perused the material available on record. We find that the present issue is fully covered in assessee's own case in ITA.No.814/Mum/2007 for the A.Y. 2003-04 wherein the Tribunal allowed relief in respect of the matter in issue. Further, the Special Bench of the Tribunal in the case of DCIT vs., Reliance Industries Ltd., [2004] 88 ITD 273 (Mum) held that sales tax subsidy received under the Package Scheme of Incentives, 1979 is for the purpose of industrial development of the backward districts as well as generation of employment, thus, establishing a direct nexus with the investment in fixed capital assets and hence, a capital receipt. Against this Special Bench order of the Tribunal, the Department filed an appeal before the Hon' ble

High Court of Bombay which is pending for adjudication. In this connection, it is relevant to state that the Hon' ble Supreme Court in the case of Union of India vs., Kamlakshi Finance Corporation Ltd., [1991] 55 ELT 433 (SC) has held that ' mere fact that the order of the appellate authority is not "acceptable" to the Department and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. We find that since the order of the Special Bench of the Tribunal is still holds the field and in absence of any contrary decision brought to our notice by the Ld. D.R, and the order of the Ld. CIT(A) in deleting the addition made by the A.O. is in accordance with law, we find no reason to interfere with the order of the Ld. CIT(A) on this issue and, therefore, we hold that the amount of incentive is not a revenue receipt, but, it is a capital receipt and, therefore, we direct the A.O. to delete the addition. The Revenue fails in its grounds of appeal Nos.1(i) to 1(iv) and, therefore, the grounds on this issue are dismissed.

13. The Grounds of appeal Nos.2(i) to 2(v) of the Revenue are relates to adding back the excise duty exemption amount of Rs.15,67,00,636/- to the total income of the assessee.

14. Learned Counsel for the Assessee submitted that during the previous year relevant to AY 2009-10, the assessee company has commenced commercial production at its Cement Unit and PEB Unit located in Bhagwanpur, Tehsil Roorkee, District Haridwar in Uttaranchal. The said Units are entitled to Excise Incentive under the Central Excise Notification No. 50/2003 -CE dated 10-06-2003 [Refer Page No. 263 -281 of FBI, since the same are situated in the specified backward area. Accordingly, the assessee availed Excise Duty Incentive amounting to Rs.15,67,00,636 and excluded the same in the Return of Income being capital receipt by relying on the Judgment of Hon'ble Supreme Court in the case of CIT vs. Ponni Sugars and Chemicals Ltd. (2008) 306 ITR 392 (SC).

14.1. However, the Learned A.O. noted that the claim of the assessee for Excise Duty Incentive is similar to Sales Tax Incentive claimed as capital receipt and hence denied the claim of Excise Duty Incentive following the reasoning given in respect of denial of claim for exclusion of Sales Tax Incentive.

14.2. Aggrieved by the order of the A.O. the assessee carried the matter in appeal before the Ld. CIT(A). The Ld. CIT(A) noted that Excise Duty Exemption availed by the assessee company was on capital account by relying on decision of Hon'ble Jammu & Kashmir High Court in the case of Shree Balaii Alloys vs.- CIT (2011) 51 DTR 217 (J&K) which has been affirmed by Hon'ble Apex Court vide Civil appeal No. 10061 of 2011 dated 19-04-2016. As regards the ground for non-exclusion of subsidy from cost of assets, Ld CIT(A) followed its decision in case of sales tax subsidy.

15. Aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before the Tribunal. The Ld. D.R. strongly relied on the order of the A.O. and submitted that the claim of excise duty incentive is similar to that of sales tax incentive and, therefore, the A.O. has rightly treated the amount as revenue receipt and prayed that the order of the A.O. be confirmed.

16. We have heard the rival submissions of both the parties and perused the material available on record. We find that the objective of grant of Excise Duty Incentive as envisaged in Office Memorandum dated 07-01-2003 [Refer Page No. 245-262 of FBI issued by Ministry of Commerce & Industry is industrialization of backward area of Uttaranchal for generation of employment and utilization of local resources. Hence, the incentive received by assessee is on capital account. The Ld. CIT(A) also treated the sum as capital receipt by taking strength from the Judgment of Hon'ble Jammu & Kashmir High Court in the case of Shree Balaii Alloys vs.- CIT (2011) 51 DTR 217 (J&K) which has

been affirmed by Hon'ble Apex Court vide Civil appeal No. 10061 of 2011 dated 19-04-2016. Further the Hon'ble Jammu and Kashmeer High Court while rendering its Judgment in the case of Shree Balaji Alloys -vs.- CIT (supra) had relied on the principles laid down by the Hon'ble Apex Court in the case of Sahnev Steel & Press Works - vs. - CIT (1997) 228 ITR 253 (SO & CIT - vs. - Ponni Sugars & Chemicals Ltd. (2008) 306 ITR 392 (SC) and after analyzing the Office Memorandum dated 14-06-2002 behind the grant of Incentive has held that Excise Duty refund granted with the object of creating avenues for Perpetual Employment, to eradicate the social problem of unemployment in the State by accelerated industrial development was a capital receipt. Further, the Departmental Appeal filed against the said High Court decision of Shree Balaii Alloys (supra) has also been dismissed by the Hon'ble Apex Court. So, this issue has attained finality. Since we find no infirmity in the order of the Ld. CIT(A) and the Ld. D.R. failed to put forth any contrary decision, we confirm the order of the Ld. CIT(A) on

this issue and dismiss the grounds of appeal no.2(i) to 2(v) of the Revenue.

17. With respect to grounds of appeal No.3 of the Revenue, the brief facts of the case are that during the previous year relevant to instant assessment year, the assessee company has debited an amount of Rs.3,62,93,426/- as loss on derivatives in the P/L account which includes mark to market loss of Rs.1,30,85,426/- in respect of the LIBOR hedging with ICICI Bank, Currency Swap Transaction with ICICI Bank and Currency Swap Transaction with Centurion Bank of Punjab [presently known as HDFC Bank]. With respect to LIBOR hedging with ICICI Bank for a CAP of 10% p.a. observed on 6 month USD LIBOR on the notional principal amount of USD 12 Million. For this arrangement, the assessee was required to pay premium @ 0.41 %p.a. semi-annually. The assessee is therefore protected against the risk of LIBOR going beyond 10% p.a. i.e. if the LIBOR crosses the level of 10% p.a., the

excess over 10% shall be received by the assessee from the ICICI bank.

17.1. With respect to Currency swap transaction with ICICI Bank, whereby the assessee has notionally lent USD 6 Million and notionally borrowed JPY 707.4 Million at the then prevailing exchange rate of USD 1 = JPY 117.90. In consideration of the same, the assessee has received interest of 3.5% p.a. payable half yearly on the USD lent by it. The transaction was for a tenor of 3 years

17.2. With respect to Currency swap transaction with Centurion Bank of Punjab (presently known as HDFC Bank), whereby the assessee has notionally lent USD 3 Million and notionally borrowed JPY 326.58 Million at the then prevailing exchange rate of USD 1 = JPY 108.86. In consideration of the same, the assessee has received interest of 2.7% p.a. payable half yearly on the USD lent by it. The transaction was for a tenor of 3 years.

17.3. The Ld. AO disallowed the claim on the contention that the swap loss arose on account of conversion of foreign exchange on the balance sheet date and such conversion was basically a mark to market loss and not the actual loss & hence it was purely notional in nature.

17.4. Aggrieved by the order of the A.O. the assessee carried the matter in appeal before the Ld. CIT(A) who has allowed the issue in favour of the assessee by following the decision of Hon'ble ITAT for AY 2008-09 & 2009-10.

18. Aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before the Tribunal. During the course of hearing, the Ld. D.R. strongly relied on the order of the A.O.

19. On the other hand, the Learned Counsel for the Assessee submitted that the issue is fully covered, in assessee's own case, in ITA No. 197Z/MA3 for AY 2008-09

and in ITA No.3804/Mum/2015 for AY 2009-10, wherein the Hon'ble ITAT has allowed the issue in favour of the assessee. The Learned Counsel for the Assessee submitted that the derivative loss of Rs.1,30,85,426/- has arisen as a result of Mark to Market valuation of outstanding derivative contracts on the Balance Sheet date and recognised as per AS -11 issued by the ICAI read with announcement of ICAI dated 29-03-2008 regarding accounting for derivative. The assessee had entered into currency swap agreement with the aforesaid banks to safeguard against the risk of foreign exchange fluctuations and thereby reducing the cost of borrowing. Therefore, it should be considered as a prudent commercial decision. Hence, the above loss should be considered as normal business loss and is allowable. The assessee has been consistently booking gain or loss in the Profit & Loss A/c in respect of derivative transactions. The Learned Counsel for the Assessee drew the attention of the Bench Judgment of Hon'ble Apex court in the case of CIT-vs.- Woodward Governor India Pvt. Ltd. (2009) 312 ITR 254 (Sc) wherein the Hon’ble Court held that "loss" suffered by

assessee on account of the exchange difference as on the date of the balance sheet is an item of allowable expenditure/s under section 37(1) of the I.T. Act, 1961 and an identical view was also taken by Apex Court in the case of ONGC Ltd. vs. CIT reported in (2010) 322 ITR 180 (SC). The Learned Counsel for the Assessee further submitted that the Mumbai Special Bench in the case DCIT vs. Bank of Bahrain and Kuwait reported in (2010) 132 TTT 505 (Mum.) (SB) has held that MTM losses in respect of forward foreign exchange contracts debited to profit and loss account is an allowable expenditure. The Learned Counsel for the Assessee further submitted that the derivate loss incurred by the assessee cannot be considered as speculative transactions as given in section 43(5) of the Act. The assessee has entered into derivative transactions in respect of foreign currency and there is no purchase or sale of any commodity including shares. The Learned Counsel for the Assessee further submitted that the transaction has been entered for hedging foreign exchange loss in respect of underlying transactions. In support of this contention, he

relied on several decisions of Hon'ble Jurisdictional Bombay High Court in the cases of CIT vs., Badridas Gauridu (P) Ltd., [2003] 261 ITR 256; CIT vs., D Chetan & Co. [2016] 75 taxmann.com 300; CIT vs., C.J. Exporters [2020] 121 taxmann.com 8 and other High Courts and Tribunals.

20. We have heard the rival submissions of both the parties and perused the material available on record. We find that the A.O. treated the swap loss arose on account of conversion of foreign exchange basically a mark to market loss and not the actual loss and hence, the A.O. disallowed the claim of loss on foreign exchange. However, the Ld. CIT(A) has allowed the issue in favour of the assessee. We find that the Hon'ble Supreme Court in the case of CIT vs., Woodard Governor India Pvt. Ltd., (supra) has held that "loss" suffered by assessee on account of the exchange difference as on the date of the balance sheet is an item of allowable expenditure/s under section 37(1) of the I.T. Act, 1961 and has taken consistent view in an another appeal in the case of ONGC Ltd. vs. CIT reported in (2010) 322 ITR

180 (SC). Since the order of the Ld. CIT(A) is in accordance with settled legal position of law, we, therefore, find no infirmity in his and in absence of any contrary decision/ material brought on record by the Ld. D.R, we dismiss the ground of appeal no.3 of the Revenue.

21. With respect to grounds of appeal nos.4(i) and 4(ii) relates to education cess, Ld. D.R. vehemently relied on the order of the A.O. and prayed that the order of the A.O. be confirmed on this issue.

22. The Learned Counsel for the Assessee on the other hand did not press this ground in view of subsequent amendment in the Act by Finance Act, 2022.

23. We have heard the rival submissions of both the parties and perused the material on record. Since the order of the A.O. is in conformity with the subsequent amendment in the Act by Finance Act, 2022 and the Learned Counsel for the Assessee has also not pressed the same, the order of the A.O. holds the field and we confirm the order of the A.O.

on this issue. Accordingly, grounds of appeal no.4(i) and 4(ii) of the Revenue is allowed.

24. In the result, appeal of the Revenue is partly allowed.

To sum-up, appeal of Assessee is dismissed and appeal of Revenue is partly allowed.

Order pronounced in the open Court on 29.07.2022.

Sd/-	Sd/-
(B.R. BASKARAN)	(ANIKESH BANERJEE)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated 29th July, 2022

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'E' Bench, Mumbai
6.	Guard File.

// By Order //

Assistant Registrar : ITAT Delhi Benches : Mumbai

Sl.No.	Particulars	Date	
1.	Date of Dictation	27.07.2022	Sr. P.S.
2.	Date of draft order placed before the Hon'ble Member	28.07.2022	Sr. P.S.
3.	Date of draft order approved by the Hon'ble Second Member		JM/AM
4.	Date of receipt of approved draft order		Sr. P.S.
5.	Date of pronouncement		Sr. P.S.
6.	Order uploaded on the website of the Tribunal		Sr. P.S.
7.	Order sent to Bench clerk		Sr. P.S.
8.	Order signed by the Head Clerk		
9.	Order Signed by Asst. Registrar		
10.	Date of Dispatch of order		