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

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.1515/Mum./2022
(Assessment Year : 2011–12)

Dy. Commissioner of Income Tax
Central Circle–8(3), Mumbai ……………. Appellant

v/s

M/s. 63 Moon Technologies India Ltd.
FT Tower, CTS no.256–257, Suren Road
Chakala, Andheri (E), Mumbai 400 093
PAN – AAACF5737C ....Respondent

Assessee by : Shri Sukhsagar Syal
Revenue by : M/s. Vatsalaa Jha

Date of Hearing – 06/09/2022	Date of Order – 21/11/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the Revenue challenging the impugned order dated 31/03/2022 passed under section 250 of the Income Tax Act, 1961 ('*the Act*') by the learned Commissioner of Income Tax (Appeals) – 58, Mumbai ['*learned CIT(A)*'], for the assessment year 2011–12.

2. In this appeal, the Revenue has raised the following grounds:

"1. Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is correct in restricting the quantum of Financial Guarantee Commission to Rs.29.96.743/-as against Rs. 1,49,83,713/- arrived at by the TPO?

1.2 Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is righting reducing the rate of Financial guarantee fee from 2.50/0 to 0.50/0 ignoring the Appropriate CUP with mark-up as applied by the TPO?

1.3 Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is correct in relying on the decision in the case of CIT Vs. Everest Kanto Cylinders Ltd.. [2015] 378 ITR 57 in arriving at the 0.50% rate of corporate guarantee fees, which is in violation of provisions of Rule 10B(4) of IT Rules as the determinants of corporate guarantee fee like the credit rating, interest rate and FAR analysis etc., differ case to case and year on year and so arate arrived at in a particular case and for particular assessment year cannot be blindly adopted in every case and in every assessment year which also violates Rule 108(4) of the I.T. Rules?

1.4 Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is correct in relying on the decision in the case of Everest Kanto Cylinders Ltd., without appreciating certain important facts having bearing on the benchmarking such as:

i) The quotation obtained by the Everest Kanto Cylinders Ltd.. India (EKC India) was in respect of transaction of a guarantee obtained by the Indian entity having strong financials and asset base and not in respect of Everest Kento Dubai the foreign entity with weaker financial strength and thereby impacting the comparability in view of difference in credit rating of entities which admittedly form basis for guarantee rates/quotations.

ii) Not appreciating the fact that the EKC ruling is for A.Y 2007-08 ignored the fact that entity obtaining loan in foreign jurisdiction for which EKC India stood as guarantor had lower credit rating.

(iii) That the starting point for benchmarking in the case of EXC was obtaining of bank guarantee quote by the EKC India, which was used for benchmarking corporate guarantee and therefore, it was not appropriate to hold that bank guarantee and corporate guarantee are different.

iv) Tat decision in the case of Everest Kanto Cylinders Ltd., cannot be standard for every assessee as benchmarking for different assessee's is a factual exercise dependent upon number of factors including credit rating, financial strength, country of AE attendant risks, etc.

(v) That recently the Hon'ble ITAT Kolkata in the case of DCIT Vs. National Energy ITA No. 986 and 987/Kol/17 has held that the decision in Everest Kanto Cylinders Ltd cannot be a standard for every case.

(vi) That the Tribunal failed to fully appreciate that the corporate guarantee transaction acts as important function for the AEs consequently enabling the AEs to rise funds generally at a favourable rates and enhance their asset base simultaneously exposing the guarantor to risk in the event of failure of AE to repay or service loan which is always contingent in nature.

1.5 Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is correct in holding that the fee for the financial guarantee issued by

the assessee for the loans availed by the AE from banks should be charged at 0.50%, without realizing the fact that the transfer pricing study is highly facts-based and it differs from case to case and that all the factors in Rule 108 have to be considered for every case and every year independently and that a rate decided in a different case for different set of facts and for different year cannot be adopted as such to the instant assessee, which would be violative of the specific provisions in Rule 108?

1.6 Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is correct in arriving at the ad-hoc rate of 0.50%, without adopting any of the methods prescribed in Section 92C which is violation of law?

1.7 Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is correct in failing to recognize the facts of the case that the assessee has given corporate guarantee to its AES, thereby exposing itself to a 'lending business' risk as well as the 'single customer risk by not charging fee for such guarantee at arm's length which the assessee would have done, had it stood guarantee to any third party in uncontrolled conditions as in section 92F(ii)?

1.8 Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is correct in failing to see that AB had no credit-worthiness and financial capacity to service its own loan and in such a situation assessee standing guarantee for the loan, It had to be remunerated at arm's length as per section 92F(ii)?

1.9 Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is correct in ignoring the decision in the case of Teenimont ICB Pvt. Ltd Vs DCIT TS-251-ITAT 2013(Mum)-TP. wherein the Hon'ble ITAT upheld the addition made by the TPO for guarantee commission at 3% on the ground that the taxpayer has not submitted any contradictory evidence to suggest that the rate applied by the TPO was not appropriate?

1.10 Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is correct in ignoring the decision in the case of Technocraft Industries (Ind) Ltd Vs Addl. CIT TS-3 ITAT-2014 Mum)-TP, wherein the Hon'ble ITAT upheld the corporate guarantee fee rate of 2.08% being the average of rates charged by various banks?

2. Whether on the facts and under the circumstances of the case and in Law, the Id. CIT(A) was justified in deleting the disallowance made by the AO for Rs.45,30,80.094/- without appreciating the fact that the proportionate claim of the premium on ZCCBs written off during the tenure of Zero Coupon Convertible Bonds was is in the nature of interest?

2.1 Whether on the facts and under the circumstances of the case and in Law, the Id. CIT(A) was justified in deleting the disallowance without appreciating the fact that the claim of provision of proportionate premium of Redemption of ZCCB is a contingent liability?

2.2 Whether on the facts and under the circumstances of the case and in Law, the Id. CIT(A) was justified in deleting the disallowance without appreciating

the fact that the assessee is treating provision of proportionate premium of Redemption of ZCCB as capital expenses.?

2.3 Whether on the facts and under the circumstances of the case and in Law, the ld. CIT(A) was justified in deleting the disallowance without appreciating the fact that the claim of premium/ interest cannot be allowed u/s 40(a)(ia) since tax was not deducted at source?

3. Whether on the facts and under the circumstances of the case and in Law, the Id. CIT(A), Mumbai has erred in deleting the disallowance u/s 14A of the Income Tax Act, 1961 thereby overlooking the computational procedure laid down in Rule 8D of the IT Rules, 1962 which has to be necessarily followed whenever a disallowance u/s 14A was to be made?

3. The brief facts of the case are: The assessee is a company and is engaged in the business of application products, software development services, and software consultant etc. For the year under consideration assessee e-filed its return of income on 29/11/2011 declaring a total income of INR 57,16,88,452. The return was selected for scrutiny and notice under sections 143 (2) and 142 (1) alongwith questionnaire were issued to the assessee. Pursuant to the reference by the Assessing Officer ('*AO*'), the Transfer Pricing Officer ('*TPO*') vide order passed under section 92CA(3) of the Act proposed a total transfer pricing adjustment of INR 4,06,21,316. In conformity, the AO vide order dated 15/05/2015 passed under section 144C(3) r/w section 143(3) of the Act determined the total income of the assessee at INR 108,37,39,010, inter-alia, after making certain additions. The learned CIT(A) vide impugned order dated 31/03/2022 partly allowed the appeal filed by the assessee. Being aggrieved by the relief granted by the learned CIT(A), the Revenue is in appeal before us.

4. The issue arising in ground No. 1, raised in Revenue's appeal, is pertaining to transfer pricing adjustment on account of guarantee commission.

5. The brief facts of the case pertaining to this issue are: During the transfer pricing assessment proceedings, it was noticed that the assessee has given guarantees to lenders that enabled its overseas subsidiaries to borrow funds from the bank during the last 2 years. As the assessee has not charged any guarantee fee, the assessee was asked to show cause as to why the corporate guarantee has not been charged. In reply, the assessee, inter-alia, submitted that objective of giving a guarantee to its associated enterprise was to facilitate the associated enterprise to make investments in various downstream subsidiaries. It was further submitted that the main objective of the guarantee was to expand the business operations and achieve overall growth in the business of the assessee and thus the facility extended by the assessee is in the form of shareholders or stewardship activity, therefore, guarantee fee is not chargeable. The TPO vide order dated 08/01/2014 passed under section 92CA(3) of the Act computed the arm's length rate of corporate guarantee at 2.5% and accordingly computed the transfer pricing adjustment on account of corporate guarantee fee at INR 1,49,83,713.

6. The learned CIT(A), vide impugned order decided this issue following the decision of the coordinate bench of the Tribunal rendered in assessee's own case for assessment year 2009–10 and directed the AO/TPO to compute the guarantee amount chargeable to the associated enterprise at 0.5% in respect of corporate guarantees given to Deusche Bank AG Singapore, DBS Bank and Societe Generale. Further, in respect of the corporate guarantee given to HSBC Bank, the learned CIT(A) restricted the guarantee fee to the amount which

was claimed to have been charged by HSBC India to the assessee and which was recovered by the assessee from the associated enterprise. Being aggrieved, the Revenue is in appeal before us.

7. During the hearing, the learned Departmental Representative ('learned DR') objected to the application of 0.5% for benchmarking the transaction of corporate guarantee fees.

8. On the other hand, the learned Authorised Representative (*'learned AR'*) placed reliance upon the decision of the coordinate bench of the Tribunal on this issue.

9. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee's own case in 63 Moon Technologies Ltd (formerly Financial Technologies India Ltd) vs DCIT, in ITA No. 4775 and 4776/Mum/2016, vide order dated 16/12/2021, for assessment years 2009–10 and 2010–11, while deciding similar issue directed the corporate guarantee fee be computed at 0.5%. The relevant observations of the coordinate bench of the Tribunal, in the aforesaid decision, are as under:

> *"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:-*
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> > *"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%."

10. Thus, respectfully following the decision of the Hon'ble Jurisdictional High Court in CIT vs. Everest Kento Cylinders Ltd., [2015] 378 ITR 57 (Bom.), which has also been followed in assessee's own case in the preceding assessment year, we find no infirmity in the impugned order passed by the learned CIT(A) on this issue. As a result, ground No. 1 raised in Revenue's appeal is dismissed.

11. The issue arising in ground No. 2, raised in Revenue's appeal, is pertaining to the deletion of disallowance made on account of interest on payment of Zero Coupon Convertible Bonds.

12. The brief facts of the case pertaining to this issue are: During the course of assessment proceedings, it was found that the assessee has claimed a deduction on account of interest/premium payable on maturity of Zero Coupon Convertible Bonds raised by the company in financial year 2006–07 to the extent of INR 45,30,80,094 as per revised return of income filed on 29/11/2011. The assessee has claimed such amount as a deduction on the

ground that the liability of payment has already crystallised on accrual basis and although no such interest has been paid such amount may be allowed as a deduction. The AO vide order dated 15/05/2015 passed under section 144C (3) r/w section 143 (3) of the Act did not agree with the submissions of the assessee and held that since no amount was debited to the profit and loss account, such expense cannot be claimed as deduction. The AO further held that no TDS on such expense was deducted and hence such an amount cannot be allowed as a deduction under section 40 (a)(i) of the Act. Accordingly, the AO made an addition of INR 45,30,80,094 to the total income of the assessee.

13. The learned CIT(A) vide impugned order allowed the appeal filed by the assessee on this issue by following the decision of the coordinate bench of the Tribunal in assessee's own case for the preceding assessment year. Being aggrieved, the Revenue is in appeal before us.

14. During the hearing, learned DR vehemently relied upon the order passed by the AO.

15. On the other hand, learned AR placed reliance upon the decision of the coordinate bench of the Tribunal on this issue.

16. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee's own case for assessment years 2009–10 and 2010–11 cited supra, decided similar issue in favour of the assessee by observing as under:

"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 ITR 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:*
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>> *"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 l/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?"*
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>> *Facts*
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>> *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 assesses 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.*
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>> *Arguments*
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>> *3. None appears for respondent though served.*
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>> *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.*
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> *The AR submitted that FCCB were a form of borrowing thai 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."

17. The learned DR could not show us any reason to deviate from the aforesaid decision and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the order passed by the coordinate bench of the Tribunal in assessee's own case cited supra, we find no infirmity in the impugned order passed by the learned CIT(A) on this issue. As a result, ground No. 2 raised in Revenue's appeal is dismissed.

18. The issue arising in ground No. 3, raised in Revenue's appeal, is pertaining to disallowance under section 14 A of the Act.

19. The brief facts of the case pertaining to this issue are: The assessee in its return of income made disallowance of an amount of INR 51,68,657 under section 14A(1). The assessee provided the basis of working of disallowance out of actual expenses incurred and also identified the other expenses which were incurred to earn the exempt income. The assessee also provided details of interest expenditure and corresponding income for which such interest

expenses were incurred. During the course of assessment proceedings, the assessee was asked to explain why the disallowance should not be made under section 14A read with Rule 8D of the Income Tax Rules, 1962. The AO vide order passed under section 144C (3) r/w section 143 (3) of the Act did not agree with the submissions of the assessee and computed the disallowance of INR 3,53,99,792 under section 14A read with Rule 8D after considering the disallowance suo moto made by the assessee under section 14A of the Act.

20. The learned CIT(A) vide impugned order allowed the appeal filed by the assessee on this issue by following the decision of the coordinate bench of the Tribunal in assessee's own case for the preceding assessment year. Being aggrieved, the Revenue is in appeal before us.

21. During the hearing, learned DR vehemently relied upon the order passed by the AO.

22. On the other hand, learned AR placed reliance upon the decision of the coordinate bench of the Tribunal on this issue.

23. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee's own case for assessment years 2009–10 and 2010–11 cited supra, decided similar issue in favour of assessee by observing as under:

> *"27. We note that assessee has given the reasons for expenditure, which as per the assessee is disallowable u/s.14A. Assesee 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.*
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> *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 nonsatisfaction having regard to the sou 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 nonsatisfaction as recorded by the Assessing Officer for rejecting the sou 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."

24. The satisfaction as required to be recorded under the provisions of section 14A of the Act is not limited to merely disagreeing with the submission of the assessee and requires that the AO should also provide the basis for reaching such conclusion, after having regard to the accounts of the assessee. However, it is evident from the record that in the present case the AO merely disagreed with the suo moto disallowance offered by the assessee under section 14A of the Act and straightaway computed the impugned disallowance by applying the provisions of Rule 8D. Thus, respectfully following the order passed by the coordinate bench of the Tribunal in assessee's own case cited supra, we find no infirmity in the impugned order passed by the learned CIT(A)

on this issue. As a result, ground No. 3 raised in Revenue's appeal is dismissed.

25. In the result, the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 21/11/2022

Sd/- **PRASHANT MAHARISHI** **ACCOUNTANT MEMBER**	**Sd/-** **SANDEEP SINGH KARHAIL** **JUDICIAL MEMBER**

MUMBAI, DATED: 21/11/2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai