IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.4926/Mum./2017
(Assessment Year : 2010–11)

Asstt. Commissioner of Income Tax
Central Circle–4(4), Mumbai ……. Appellant

v/s

M/s. Prime Focus Ltd.
2, Anand Kunj, North Avenue
Linking Road, Santacruz (West)
Mumbai 400 054 PAN – AFZPM5859F .....Respondent

ITA no.4936/Mum./2017
(Assessment Year : 2011–12)

Asstt. Commissioner of Income Tax
Central Circle–4(4), Mumbai ……. Appellant

v/s

M/s. Prime Focus Ltd.
2, Anand Kunj, North Avenue
Linking Road, Santacruz (West)
Mumbai 400 054 PAN – AFZPM5859F .....Respondent

ITA no.4952/Mum./2017
(Assessment Year : 2011–12)

M/s. Prime Focus Ltd.
Prime Focus House, Opp. Citibank
Linking Road, Khar (W), Mumbai 400 052
PAN – AFZPM5859F ……. Appellant

v/s

Asstt. Commissioner of Income Tax (OSD–1)
Central Range–7, Mumbai .....Respondent

Assessee by : None
Revenue by : Shri Samuel Pitta

Date of Hearing – 07/09/2022	Date of Order – 05/12/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present batch of 3 appeals has been filed by the assessee and the Revenue against the separate impugned order of even date 29/03/2017, passed under section 250 of the Income Tax Act, 1961 (*'the Act'*) by the learned Commissioner of Income Tax (Appeals)–57, Mumbai [*'learned CIT(A)'*], for the assessment years 2010–11 and 2011–12.

2. When the present appeals were called for hearing, neither anyone appeared on behalf of the assessee nor was any application seeking adjournment filed. On perusal of the record, it is observed that on previous occasions also no one appeared on behalf of the assessee, despite service of notice. Therefore, in view of the above, we proceed to dispose off the present appeals ex–parte, qua the assessee after hearing the learned Departmental Representative (*'learned DR'*) and based on the material available on record.

ITA No. 4926/Mum/2017
Revenue's Appeal – A.Y – 2010–11

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

"1. On the facts and circumstances of the case and in law, the Learned CIT(A) erred in allowing the assessee's claim for depreciation on the additions to plant and machinery made during the year totaling to Rs. 43,32,961/- without appreciating the fact that the AO was completely justified in disallowing the assessee's claim u/s the spirit of Section 32 of the Income Tax Act, 1961?

2. On the facts and circumstances of the case and ion law, the Learned CIT(A) erred in allowing assessee's claim for depreciation @ 60% in respect of Opening Written Down Value as on 01.04.2009 to the extent of directions given by CIT(A), Mumbai and ITAT, Mumbai for earlier assessment years 2004-05 to 2009-10, without appreciating the fact that the verification of the data of machinery could not be carried out for the lack of details of the

corresponding usage of machinery, which was deliberately not submitted by the assessee to mislead the tax authorities."

3. On the facts and circumstances of the case and in law, the Learned CIT(A) erred in holding the AO's decision of charging a markup of 3% as not reasonable without giving any justifiable reason before arriving at this mark up of 1% instead of 3% as decided by the TPO in his order, with proper justification of the same given therein.

The appellant craves to leave, add, amend and / or to alter any of the ground of appeal, if need be."

4. The issue arising in grounds No. 1 and 2, raised in Revenue's appeal, is pertaining to the deletion of disallowance of depreciation on editing equipment.

5. The brief facts of the case as emanating from the record are: The assessee is engaged in the business of postproduction of films, editing graphics, scanning and recording etc., and shooting equipment rental. For the year under consideration, the assessee filed its return of income on 14/10/2010 declaring a total income of Rs. 18,20,45,521 under normal provisions of the Act. During the assessment proceedings upon perusal of details filed by the assessee, it was observed that the assessee has claimed depreciation on computer-based plant and machinery at 60%. The Assessing Officer ('*AO*') following the approach adopted in preceding years restricted the depreciation at 15% and accordingly, added the excess depreciation claimed at Rs. 4,02,35,696 to the total income of the assessee. The learned CIT(A) vide impugned order allowed the appeal filed by the assessee on this issue, by observing as under:

"<u>Decision</u>:
2.3 I have gone through the assessment order and the submissions made by the assessee. I have also gone through the appellate order of the CIT(A)

dated 30.12.2014 for AY 2009-10 in the assessee's own case. It is noticed that the CIT(A) has relied upon his own order in the assessee's own case in AY 2005-06 and being identical issue covered in the assessee's favour, he has allowed the issue and delete the addition made on account of depreciation. The relevant paragraphs of the said order of the CIT(A) for AY 2009-10 are reproduced hereunder-

> *"9. From the very nature of these assets, it is quite clear that they are either in nature of computer server or computer software or application system, and a person with basic knowledge of computes will understand that these assets are apparently in nature of computer hardware or computer software The Chartered Engineer, Shri Kumar Subramaniam, has clearly certified that these assets as computers, vide his report dated 22.12.2014 Similarly, the inhouse expert, Shn Parminder Singh Chadda, has also certified that these assets to be computers it appears that the leamed AO never tried to look into the nature of these assets, even though he had made a visit to the premises of the assessee, in the previous years. Computer does not mean only a personal computer or a laptop or a mainframe computer. In fact, only microprocessor based device may be termed as computer.*
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> *12. Identical issue had come up for consideration before me in the assessee's own case for AY 2004-05, and after considering the facts of the case and submissions of the appellant, I had, vide order dated 1/7/2014, disallowed the claim of the appellant and deleted the disallowance made by the AO.*
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> *.....*
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> *Identical issue is involved in the present year also Therefore, for the details reasons discussed by me in my order dated 1/7/2014 in the case of the appellant for AY 2005-06, I direct the AO to allow depreciation at the rate of 60% on the assets in question and delete the addition of Rs 3,15,95,793/- made in this year. These grounds are accordingly, allowed."*

2.4 The assessee's disputed claim for depreciation of Rs 4,02,35,696/-u/s, 32 of the IT Act 1951, read with Rule 5 of the IT. Rules, 1962 and the Appendix-1 falls in two categories, depreciation rate of 60% first on opening written down value of editing equipment classified as computer based equipments and second one on additions to editing equipments classified as computer based equipments. As regards, the claim for depreciation on "opening Written Down Value of computer based editing and recording equipments" @ 60% under item 5 of part A-III (5) of New Appendix-1 of Rs 5,36,47,595 for AY 2010-11 concerned, it falls outside the purview of this order since the issue/ issues were part and parcel of the addition made to fixed assets during earlier assessment years from AY 2004-05 to AY 2009-10 and are pending adjudication and/or have already been adjudicated by my predecessors and hence question of adjudication the allowability of depreciation at the rate of 60% under item part A-III(5) of new Appendix I to Rule 5 of IT Rules, 1962 read with section 32 of the IT Act 1961 falls beyond the limit of the jurisdiction of this appeal and hence that part of the issue has to be considered of allowability of depreciation claim u/s. 32 of the IT Act 1961 on the opening Written Down Value as on 1/4/2009 should be considered and allowed by the AO on the basis of decisions of CIT(A) Mumbai and ITAT, Mumbai for AY 2004-05 to AY 2009-10 till date after due verification and also after ensuring that a double claim for depreciation does not get allowed on this count. The assessee will work out the depreciation allowable as per the latest appellate orders of

CIT(A), Mumbai and ITAT, Mumbai as per its records and furnish the chart of depreciation allowable u/s. 32 of the IT Act 1961, without prejudice to its claims, to the AO and the AO will verify the same and allow the same as per law and as per directions given in this order. Second part of the claim relates to allowance of depreciation @ 60% on additions of Plant & Machinery totaling Rs 43,32,961/- for AY 2010-11 made during the previous year relevant to AY 2010-11. Prima facie it appears from the records that the AO has not made any discussions and merely based his decision on the basis of his predecessor's decisions and disallowed the claim for depreciation @60% without application of mind and without referring to the invoices. It looks like a stereo typed assessment order without any application of mind to the facts of the case and to the nature of additions to fixed assets totaling Rs. 43,32,961/- made during the previous year relevant to AY 2010-11. Perusal of the various bills and invoices furnished by the assessee in respect of the additions of Rs. 97,56,566/- for AY 2010-11 to the block of assets on which depreciation @ 60% is claimed, indicates that these additions of Rs. 97,56,566/- mainly consist of processors, hard discs and hard drives, software, workstation platforms, drivers, monitors, servers, display and control panels with different types of software which are classifiable as "Computer and Computer Software within the meaning of the same under Item A-III (5) of new appendix I to rule 5 of IT Rules, 1962 Even otherwise these items are classifiable as "Computers within its meaning under the Information Technology Act, 2008 as opined by chartered engineer Mr. Kumar Subramanian in his opinion dated 21/2/2014 Even otherwise, prima facie it appears from the perusal of these items of plant and machinery that these are classifiable as "computers within the general meaning of it as well as under the IT Act, 1961 and Information Technology Act, 2008. It may be mentioned here that there are different uses for different items which are generally classifiable as 'computers. For example a hard disc or compact disc or pen drive can be used for data storage and Data Storage can consist of typed pages or sound recordings, of video recordings or pictures, however, the item is classifiable as "computer hardware" and if it is a "coded program" in any of the computer languages, it remains and is classifiable as "computer software". Uses for the "computer hard ware or computer software may be different and may form part of the accessory/accessories, however, these items of plant and machinery are clearly classifiable as "computer hardware and computer software" only within the general meaning of the term "computers" as per the IT Act, 1961 unless a specific definition for an item of plant and machinery is given under the IT Act, 1961 and I.T. Rules, 1962. In nutshell, the items of additions of Rs. 97,56,566/- for AY 2010-11 are classifiable as "computers" within the meaning of it under item Alll (5) of new appendix I to rule 5 of IT Rules, 1962 and hence depreciation @ of 60% is allowable under section 32 of the IT Act, 1961 on it This appellate order is based on the facts of the case, that is, nature of additions to plant and machinery on the basis of perusal and analysis of items of Plant & Machinery added during the previous year relevant to AY 2010-11 only. In nutshell, assessee's appeal to the extent of claim for depreciation on the additions to Plant & Machinery made during the year totaling Rs. 43,32.961/- for AY 2010-11 is allowed and its claim for depreciation @ 60% in respect of Opening Written Down Value as on 1/4/2009 is allowed to the extent of directions given by CIT(A), Mumbai and ITAT. Mumbai for earlier assessment years 2004-05 to 2009-10 In nutshell, assessee's appeal on Ground Nos. 1 to 4 of the appeal is partly allowed."

Being aggrieved, the Revenue is in appeal before us.

6. Having considered the submissions of the learned DR and perused the material available on record, we find that this issue is recurring in nature since the assessment year 2004–05. We further find that assessee is claiming depreciation on computer-based editing equipment, part of which was acquired in preceding years and part was purchased during the year under consideration. As noted on page 5 of the impugned order, addition during the year mainly consist of processors, hard disk and hard drives, software, workstation platforms, drivers, monitors, servers, display, and control panels with different types of software. We further find that the coordinate bench of the Tribunal in assessee's own case in the immediately preceding assessment year, in DCIT vs Prime Focus Ltd., in ITA No. 1470/Mum./2015, vide order dated 12/04/2017, following the judicial precedent in assessee's own case decided a similar issue in favour of the assessee. The relevant findings of the coordinate bench of the Tribunal are as under:

> *"4. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the assessee has divided these assets under three different heads in the schedule of assets i.e. the editing equipments computer based, editing equipments recorder based and editing equipments others. In respect to editing equipments which are computer based, the assessee has claimed depreciation at the rate of 60%, whereas in respect to other two categories depreciation has been claimed at the rate of 25%. We find that the relevant assets are either computer or computer software as certified by charter engineer vide his report dated 12-11-2014 certifying these assets as computers.*
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> *We find that this issue is also covered by Tribunal decision in ITA No. 6203/Mum./2014 for AY 2005-06, although the issue was on reopening but Tribunal has given a finding on merits also in Para 6 and the relevant portion of the Para 6 reads as under:-*
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> > *"……In the present case, apart from the fact that we observe no lapse on the part of the assessee to disclose fully and truly all the*

material facts necessary for the computation of its income, and neither has any been pointed to us, the claim has been subject to verification by the A.O. in the original proceedings. Further, though there is no discussion by him in the assessment order, he can only be considered as conscious and alive to this claim as the assessee had clearly bifurcated the editing equipments into two components, i.e., recorder based/others and computer based, claiming depreciation at the general and the enhanced rate (of 60%) thereon respectively, filing details in their respect, called for separately. This then is a case of review, impermissible under the Act. The ld. CIT(A) has allowed the reopening on the basis that there is no evidence to show that the assessee has furnished all the necessary details, including bills and vouchers for purchase of the equipments or their specification or technical expert reports, etc. during the course of the original assessment proceedings, so that the A.O. forming a view that the assets under reference may not qualify to be computers, cannot be entirely faulted. We cannot agree. There is, as afore-stated, firstly, no sound reason with the A.O., but merely a reason to suspect that the assessee's claim may not be correct. Two, the assessee had furnished all the details as were called for during the original proceedings, including details of computer based equipments. There is nothing to show that these details were not true or correct in any respect, much less material. Thirdly, the assessing authority forming a view on the basis of the material not found incorrect or untrue, is nevertheless a view, so that it becomes a case of review. Rather, as it appears, the A.O.'s action is guided by the consideration of being consistent in-as-much as like claim was not accepted by the Revenue for the immediately preceding year, i.e., A.Y. 2004-05. That by itself cannot be a ground for reopening."

5. As the issue is covered in assessee's own case for AY 2005-06 also and in the given facts and circumstances of the case, we confirm the order of CIT(A) allowing depreciation on computers at the rate of 60%. The appeal of Revenue is dismissed."

7. We further find that the coordinate bench of the Tribunal in assessee's own case in ACIT vs Prime Focus Ltd., in ITA No. 6133/Mum./2019, for the assessment year 2012–13, vide order dated 30/08/2021 rendered similar findings.

8. This issue is recurring in nature and has been decided in favour of the assessee by the decisions of the coordinate bench of the Tribunal in other assessment years. 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 the 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, grounds No.1 and 2 raised in Revenue's appeal are dismissed.

9. The issue arising in ground No. 3, raised in Revenue's appeal, is pertaining to transfer pricing adjustment.

10. The brief facts of the case as emanating from the record are: The AO made a reference under section 92CA(1) of the Act to the Transfer Pricing Officer ('*TPO*') to determine the arm's length price of the international transactions entered into by the assessee during the year under consideration. During the transfer pricing assessment proceedings, it was observed that the assessee had advanced Rs. 23 crore to Prime Focus London PLC (its AE) on 31/03/2009. Accordingly, the assessee was asked as to why this share application money should not be treated as deemed loan and notional interest should not be charged. In its response, the assessee submitted that this amount was shown under loans and advances but in fact, this was paid as share application money to its AE. Due to certain business and commercial decisions considered by the management, the same amount could not be converted into share capital in the same or the next year and it was subsequently advanced as a loan. The assessee also submitted that for the year under consideration, it was a mere share application and not a loan transaction. Further, interest has been duly charged on such an amount when the same is treated as a loan in the subsequent year. Without prejudice, the

assessee submitted that even if interest is to be levied on a deemed loan advanced to the associated enterprise, LIBOR must be considered while determining the arm's length interest rate as the recipient is located outside India and it would borrow money based on the LIBOR. The TPO vide order dated 27/01/2014 passed under section 92CA(3) of the Act did not agree with the submissions of the assessee and held that the primary intention of the assessee was to help its AE at its initial and trying years and advance money free of interest under the garb of share application. The TPO also noticed that this amount of Rs. 23 crore (equivalent to USD 45,00,000) was remitted out of Foreign Currency Convertible Bond (FCCB) funds of USD 5,50,00,000 raised by the assessee in the UK at the compound rate of 7.375% during December 2007. The TPO determined the arm's length interest rate of 11.56% by adopting the weighted cost of borrowed capital of 8.56% + markup of 3% for the currency, entity, and country-specific risks. Accordingly, the TPO proposed transfer pricing adjustment of Rs. 2,70,55,543. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue and treated the transaction as a loan and determine the arm's length interest rate of 8.375% by adopting the FCCB rate of 7.375 percent +1% for other lending risks. The relevant findings of learned CIT(A) in this regard are as under:

> *"Decision-*
>
> *3.3 I have gone through the assessment order and the submissions made by the assessee. The moot point for is whether the amount of USD 45,00,000 equivalent to Rs.23 Crores advanced by the assessee to its AE Prime Focus plc. UK (PFPUK) constituted an interest free loan or not and if so, whether interest should have been charged by the assessee from its AE-PFPUK and if so, what should be the rate of interest on it during the period of loan. Prima facie it appears from the records and it is admitted by the assessee in its*

submissions before the AO and in appellate proceedings that "it had advanced a sum of USD 45,00,000 to its AE-PFPUK out of foreign currency convertible bonds (FCCB) funds of USD 5,50,00,000 raised in UK at the compound rate of 7.375% during December, 2007 as share application moneys, however the shares could not be allotted to the assessee and hence it remained in the books of the assessee as share application moneys. However, it also appears from the records that assessee has subsequently treated this amount of USD 45,00,000 as loan to its AE-PFPUK and charged interest at the LIBOR rate of interest from its AE from AY 2012-13 onwards. Thus it is crystal clear that the amount of advance of USD 45,00,000 which came out of the borrowed funds of USD 55,00,0000 was nothing but a loan camouflaged as share application money right from the beginning to escape the rigors of transfer pricing regulations under section 92C to 92CA of the IT Act, 1961. Thus it is clearly established beyond doubt and also by statements of the assessee and its subsequent actions that the amount of USD 45,00,000 advanced to its AE-PFPUK was a loan and interest was chargeable thereon right from the beginning. Only question now remains is what should be the rate of interest that should be charged on the loan of USD 45,00,000 from the AE-PFPUK. There are three contentions in this regard-AO has charged interest rate of 11.56% by adopting the weighted cost of borrowed capital- WACB of 8.56% plus 3% for the currency, entity and country specific risks. Assessee has submitted that if interest is chargeable it should be charged at the rate of 2.57%, the rate of interest paid by BOI on its fixed deposits with BOI in London or at the LIBOR rate of interest, that is London Inter Bank Borrowing Rate prevailing during the relevant period of time on which interest is held to be chargeable. It is already established beyond doubt and admitted by the assessee that the amount advanced as share application money of USD 45,00,000 to the AE-PFPUK came out of the FCCB of USD 5,50,00,000 raised at the rate of 7.375% from the market and the interest payable @ 7,35% is claimed by the assessee as a revenue deduction in its books of account and appears to have been allowed as a revenue deduction by the AO. Therefore, the assessee should have at least charged interest @ 7.35% on its advances of USD 45,00,000 from its AE-PFPUK. The assessee's contention that it had earned interest rate of 2.57% o its fixed deposit with BOI London is prima facie not relevant since the reasons and circumstances in which assessee was forced to park its surplus funds in London, UK with BOI, London @ 2.67% is not known and even if it were not known, when the funds were being advanced as loan, interest rate of 7.375% should have been charged by the assessee from the AE PFPUK Secondly the assessee's contention to charge interest @LIBOR rate of interest is also not much relevant since LIBOR rate of interest is the rate of interest charged by the banks between itself while barrowing and for lending funds from the member banks and not from third party transactions where the rate of interest is usually LIBOR plus 3% to cover various risks like exchange, currency and lending and hence charging interest at LIBOR rate, though accepted by the TPO/AO in later assessment years is patently erroneous since the assessee had borrowed US Dollar funds by way of FCCB @ 7.375% from the market. Similarly charging of interest rate of 11.56%, that is WACCB (weighted average rate of capital borrowed) of 8.56% plus 3% for various risks of currency and exchange and lending risks is equally erroneous since FCCB funds were raised at the rate of 7.35% in London markets and since the funds were borrowed in US Dollars and advanced in US Dollars, the question of currency and exchange risks were minimized and only risk to be factored in was the lending risks by the

assessee to its AE-PFPUK. Therefore it is fair. reasonable and appropriate if rate of interest of 8.375%, that is, rate of FCCB borrowings of 7.375% plus 1% for other lending risks, is adopted for the purposes of charging interest on the US Dollars of 45,00,000 advanced to its subsidiary for the period of subsistence of the loan during the previous year relevant to AY 2010-11 In nutshell, the assessee's appeal is partly allowed on Ground Nos. 5 to 7."

Being aggrieved with the reduction in markup percentage, the Revenue is in appeal before us.

11. Having considered the submissions of the learned DR and perused the material available on record, we find that the assessee raised an amount of USD 5,50,00,000 in the UK via FCCB in December 2007 at a compound rate of 7.375%. Out of this fund, the assessee advanced an amount of Rs. 23 crores (equivalent to USD 45,00,000) as share application money to its UK-based AE. However, the shares could not be allotted to the assessee. The learned CIT(A) after noting the fact that the assessee subsequently treated this amount of USD 45,00,000 as a loan to its AE charged interest at the LIBOR rate from its AE from the assessment year 2012–13 onwards. Accordingly, the learned CIT(A) came to the conclusion that the amount of advance of USD 45,00,000 which came to be borrowed out of the FCCB fund of USD 5,50,00,000 was nothing but a loan that was camouflaged as share application money right from the beginning to escape the rigours of the transfer pricing regulation under 92C to 92CA of the Act. Accordingly, the learned CIT(A) proceeded to compute the arm's length interest rate on the loan granted to the AE. The learned CIT(A) rejected the plea of the assessee to charge interest at the rate of 2.57% equivalent to interest earned by the assessee on its fixed deposit with BOI London as the reasons and circumstances in which the assessee was forced to park its surplus funds in

London with BOI was not known. Further, the learned CIT(A) also rejected the plea of the assessee to charge interest at the LIBOR rate as LIBOR rate of interest is the rate of interest charged by the banks between itself while borrowing and/or lending funds from the member banks and not from the 3rd party transactions where the rate of interest is usually LIBOR +3% to cover various risks like exchange, currency, and lending. The learned CIT(A) considered the FCCB rate of 7.375%. Since the funds are borrowed in USD and advanced in USD the learned CIT(A) came to the conclusion that the question of currency and exchange risks is minimal and therefore, only risk that needs to be factored in was the lending risks by the assessee to its AE. Accordingly, the learned CIT(A) computed the arm's length rate of interest on loan granted to AE at 8.375% i.e. rate of FCCB borrowings of 7.375% + markup of 1% for other lending rates. Since it is undisputed that advance was made by the assessee to its AE out of the funds generated from FCCB, therefore, we are of the considered view that the learned CIT(A) was right in considering the FCCB compound rate of 7.375% as the base rate. Further, since the funds have been borrowed in USD and also advanced in USD, the currency and exchange risks are minimised and the only risk to be considered is the lending risk for determining the markup. The learned CIT(A) considered 1% markup as an appropriate markup in the above circumstances. In view of the above, we find no infirmity in the impugned order in treating 7.375% plus markup of 1% as the arm's length rate of interest in respect of loan advanced by the assessee to its AE. Accordingly, ground No. 3 raised in Revenue's appeal is dismissed.

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

ITAs No. 4936 and 4952/Mum./2017
Revenue and Assessee's appeal – A.Y – 2011-12

13. In its appeal, the Revenue has raised the following grounds:

"1. On the facts and circumstances of the case and in law, the Learned CIT(A) erred in allowing the assessee's claim for depreciation on the additions to plant and machinery made during the year totaling to Rs. 14,77,35,013/ without appreciating the fact that the AO was completely justified in disallowing the assessee's claim u/s the spirit of Section 32 of the Income Tax Act, 1961?

2. On the facts and circumstances of the case and lon law, the Learned CIT(A) erred in allowing assessee's claim for depreciation @ 60% in respect of Opening Written Down Value as on 01.04.2010 to the extent of directions given by CIT(A), Mumbai and ITAT, Mumbai for earlier assessment years 2004-05 to 2010-11, without appreciating the fact that the verification of the data of machinery could not be verified for the lack of details of the corresponding usage of machinery, which was deliberately not submitted by the assessee to mislead the tax authorities.

3. Whether on the facts and circumstances of the case and in law, the Learned CIT(A) was justified in holding the AO's decision of charging a mark up of 3% as not reasonable without giving any justifiable reason before arriving at this mark up of 1% instead of 3% as decided by the TPO in his order, with proper justification of the same given therein.

The appellant craves to leave, add, amend and / or to alter any of the ground of appeal, if need be."

14. While, the assessee has raised the following grounds of appeal:

"1. The Ld. CIT(A) has erred in adding Rs 2,69,51,835/- as notional interest on share application money without appreciating the fact that the amount advanced to the associated enterprise was on account of share application monies and shall not be construed as deemed loan and on the basis of interest rate difference.

2. The Ld. CIT(A) has erred in applying the FCCB rate of the appellant for determining the Arm's Length rate of interest on deemed loan/ instead of International borrowing rate or LIBOR."

15. The issue arising in grounds No. 1 and 2 raised in Revenue's appeal is pertaining to deletion of disallowance of depreciation on editing equipment. Since a similar issue has already been decided in the Revenue's appeal being ITA No. 4926/Mum./2017, therefore, our findings/conclusion rendered in said appeal shall apply *mutatis mutandis*. Accordingly, grounds No. 1 and 2 raised in Revenue's appeal are dismissed.

16. The issue arising in ground No. 3, raised in Revenue's appeal, and grounds No. 1 and 2, raised in assessee's appeal, is pertaining to addition on account of transfer pricing adjustment.

17. The brief facts of the case as emanating from the record are: The AO made a reference under section 92CA(1) of the Act to the TPO to determine the arm's length price of the international transactions entered into by the assessee during the year under consideration. During the transfer pricing assessment proceedings, it was observed that the assessee has granted loan to its UK-based AE and has charged interest at the rate of 7.4% per annum. The assessee was asked to show cause as to why weighted cost of borrowed capital +3% should not be charged on loan transaction instead of 7.4% as charged by the assessee. In response thereto, the assessee submitted that it has advanced loans of USD 10.75 million during the concern year, and out of the above, loan amounting to USD 7.75 million is given out of the bank account maintained by the assessee in foreign currency in the UK. The balance loan of USD 3 million is funded out of the proceeds from the issuance of equity shares by the company under the private placement. The assessee further submitted that it has raised FCCB of USD 55 million for the purpose of

making strategic acquisitions/investment outside India and as such the FCCB proceeds were kept in a bank account maintained in foreign currency (i.e. USD) outside India. Therefore the aforesaid share application money amounting to USD 4.6 million and loans amounting to USD 7.75 million have been given out of the aforesaid ofshore bank account maintained in foreign currency. The assessee further submitted that there is no conversion risk as the assessee has used FCCB proceeds which were received in USD and loans were advanced to its AE in USD. The TPO vide order dated 31/12/2014 passed under section 92CA(3) of the Act noted that the assessee has granted loans to its AE at 7.4% per annum which was slightly less than the rate at which FCCB was raised. However, in third-party scenario, no third-party would operate on the basis of no profit no loss. Accordingly, the TPO determined the arm's length interest rate of 7.5% per annum plus a markup of 3% on account of administrative and processing cost along with various risk factors. As a result, the TPO determined the arm's length rate of interest at 10.51% per annum and proposed an upward adjustment of Rs. 16,73,699.

18. In respect of the loan amount of USD 3 million, the TPO noted that the assessee has paid interest to the extent of 8.05% per annum to 3rd parties but has charged only 7.4%. The TPO further noted that the assessee converted Indian Rupee into USD and then gave the loan to its AE. Thus, there are currency risks, entity risks, and country-specific risks, which the assessee had not factored in by lending money. Accordingly, the TPO by adopting weighted cost of borrowed capital of 8.05% per annum +3% markup due to risk factors, computed the arm's length interest rate of 11.05%. As a result, the TPO proposed an adjustment of Rs. 18,96,129.

19. Further, the TPO noted that the assessee had an opening share application money pending allotment of earlier years of Rs. 23,40,44,490 for which no equity shares were allotted during the relevant assessment year. The TPO also noted that no interest has been charged on the above amount and no separate transfer pricing analysis has been done in respect of this transaction. Following the approach adopted in the preceding year, the TPO treated the transaction as granting of interest-free loan to the AE and computed the arm's length interest rate of 11.05% per annum. Accordingly, TPO made a transfer pricing adjustment of Rs. 2,33,82,007.

20. The learned CIT(A) vide impugned order, in respect of the amount advanced to the subsidiary as share application money treated the transaction to be in the nature of loan on the basis similar to the preceding assessment year. The learned CIT(A), in line with preceding assessment year, computed the arm's length interest rate of 8.375% by considering the rate of FCCB borrowings of 7.375% +1% for other lending risks. In respect of the loan transaction of USD 7.75 million to its AE, the learned CIT(A) held that the assessee is not correct in contesting that the rate of interest charged by it at 7.4% is adequate for the reason that there has to be some markup to be added to arrive at the ALP in a transaction between the assessee and the AE. The learned CIT(A) further held that the TPO's decision of charging markup of 3% is also not reasonable. Accordingly, the learned CIT(A) considered the arm's length interest at 8.51% (i.e. 7.51% +1%). As regards the loan transaction of USD 3 million granted to the AE, the learned CIT(A) directed to consider arm's length interest of 9.05% (i.e. 8.05% +1%). Being aggrieved

with the reduction in arm's length rate of interest, the Revenue is in appeal before us. On the other hand, the assessee is aggrieved against treating the transaction of share application money as a loan to the AE.

21. Having considered the submissions of the learned DR and perused the material available on record, we find that the learned CIT(A) noted the fact that the assessee had advanced a sum of USD 45,00,000 as share application money to its UK-based AE out of FCCB funds of USD 5,50,00,000 raised in the UK at the compound rate of 7.375% during December 2007. The learned CIT(A) in para 3.3 of its order further noted that the shares could not be allotted to the assessee and hence it remained in the books of the assessee as share application money. Further, from the perusal of record, the learned CIT(A) noted that the assessee has subsequently treated this amount of USD 45,00,000 as a loan to its UK-based AE and charged interest at the LIBOR rate of interest from its AE from the assessment year 2012–13 onwards. Accordingly, the learned CIT(A) came to the conclusion that the amount of advance of USD 45,00,000 which came out of the borrowed funds of USD 5,50,00,000 was nothing but a loan camouflaged as share application money right from the beginning to escape the rigours of transfer pricing regulation. In absence of any material contrary to the aforesaid facts recorded by the learned CIT(A), we find no infirmity in the impugned order in treating the advancement of share application money as a loan to the AE.

22. As regards the determination of arm's length rate of interest in respect of the aforesaid transaction, we find that a similar issue has already been decided in the Revenue's appeal being ITA No. 4926/Mum./2017, therefore,

our findings/conclusion rendered in said appeal shall apply *mutatis mutandis*. As a result, grounds No. 1 and 2 raised in assessee's appeal are dismissed.

23. Insofar as the loan of USD 7.75 million and USD 3 million granted to the AE, we find that the Revenue is only aggrieved with the reduction in the markup percentage by the learned CIT(A). We find that the learned CIT(A) after considering the facts of the present case deemed it appropriate to reduce the markup to 1%. In absence of any details being brought on record to controvert the computation of markup by the learned CIT(A), we find no infirmity in the impugned order on this issue. As a result, ground No. 3 raised in Revenue's appeal is dismissed.

24. In the result, the cross-appeals for the assessment year 2011–12 are dismissed.

25. To sum up, the appeal by the Revenue for the assessment year 2010–11 and the cross-appeals for assessment and 2011–12 are dismissed.

Order pronounced in the open Court on 05/12/2022

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

MUMBAI, DATED: 05/12/2022

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