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

SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 5260/MUM/2017	**ITA No. 5764/MUM/2017**
(Assessment Year: 2011-12)	**(Assessment Year: 2012-13)**

Concentrix Services India Private Limited,
[Formerly known as Minacs Private Limited, Minacs Limited & Aditya Birla Minacs Wordlwide Limited]
8th Floor, Symphony IT Park,
Chandivali Farm Road, Andheri (East),
Mumbai - 400072 ..... **Appellant**
[PAN: AAACT1567A]

Vs

Deputy Commissioner of Income Tax, 10(2)(2), Mumbai,
C-10, 7th Floor, Pratyakshakar Bhavan,
Bandra Kurla Complex, Bandra (East),
Mumbai – 400051 ..... **Respondent**

&

ITA No. 5280/MUM/2017	**ITA No. 5940/MUM/2017**
(Assessment Year: 2011-12)	**(Assessment Year: 2012-13)**

ITA No. 5823/MUM/2019
(Assessment Year: 2013-14)

Deputy Commissioner of Income Tax 10(2)(2), Mumbai,
Room No. 216-A, 2nd Floor,
Aayakar Bhavan, M.K. Road,
Mumbai - 400020 ..... **Appellant**

Vs

Concentrix Services India Private Limited,
[Formerly known as Minacs Private Limited, Minacs Limited & Aditya Birla Minacs Wordlwide Limited]
9th Floor, Symphony IT Park,
Chandivali Farm Road, Andheri (East),
Mumbai - 400072
[PAN: AAACT1567A] ..... **Respondent**

Appearance

For the Appellant/Assessee	:	Shri Yogesh Thar Ms. Ayushi Modani
For the Respondent/Department	:	Shri Ajit Pal Singh Daia

Date

Conclusion of hearing	:	16.08.2023
Pronouncement of order	:	18.10.2023

O R D E R

Per Bench

1. This is a batch of 5 appeals pertaining to Assessment Years 2011-12, 2012-13 and 2013-14 which were heard together as the same involved identical issues and are, therefore, being disposed off by way of a common order.

Assessment Year 2011-12

2. We would first take up cross-appeals for the Assessment Year 2011-12.

2.1. These cross-appeals arise from the common order, dated 31/03/2017, passed by the CIT(A) whereby the CIT(A) had partly allowed the appeal preferred by the Assessee against the Assessment Order, dated 07/05/2015, for the Assessment Year 2011-12 passed under Section 143(3) read with Section 144C(3) of the Act.

2.2. The Assessee has raised the following grounds of appeal in ITA No. 5260/Mum/2017:

> *GROUND NO. I & II: TREATING CORPORATE GUARANTEE AS AN INTERNATIONAL TRANSACTION AND THEREBY MAKING AN ADDITION OF NOTIONAL CORPORATE GUARANTEE FEES OF RS. 2, 73,48,125/*

1. On the facts and the circumstances of the case and in law, the Ld CIT(A) erred in regarding the guarantee given by Appellant to its AE as an international transaction' under section 92B of the Act and in making an addition on account of notional guarantee fees

2 The Ld Assessing Officer/TPO failed to appreciate and ought to have held that:

(i) The ultimate beneficiary of the loan was the Appellant itself while the AF, a company registered in Canada, AV Transworks Limited ('AVTL) was merely a route for availing the funds and investing in Canada, in pursuit of the Appellant's own objective of business expansion,

(ii) An "international transaction'' would arise only when the foreign subsidiary defaults in making the payment of loan to the bank. Therefore, section 92(1) of the Act would, primarily, not be applicable at all, till the guarantee is invoked,

(iv) Without prejudice to above, the AO/TPO and the Hon'ble CIT(A) erred in not accepting the contention of the Appellant that in no case the amount of guarantee fee commission shall exceed 0.236% as per the Guarantee Benchmarking report of an Independent Chartered Accountant

3. The Appellant prays that the AO/ TPO be directed to accept the benchmarking of guarantee commission of 0.236%

The Appellant prays that the AO/TPO be directed to delete the aforesaid addition amounting to Rs.2,73,48,125/- or be directed to reduce the notional guarantee fee addition appropriately

<u>GROUND III: ADDITION OF NOTIONAL INTEREST ON ACCOUNT OF LOAN GIVEN TO ASSOCIATED ENTERPRISES ("AEs)</u>

1. On the facts and the circumstances of the case and in law, the Ld CIT(A) erred in upholding the addition of LIBOR + 1% on account of notional interest charged on loans advanced to its subsidiaries on the alleged ground that it is not at arm's length price as per the provisions of Chapter X of the Act

2 The Ld CIT(A) failed to appreciate and ought to have held that:

(i) the Appellant had charged interest on the loans advanced to its AE's at the rate that was higher than the London Inter-Bank Borrowing Rate ("LIBOR") and other international benchmarking rates which is used as the international standard for lending and borrowing of funds and considering the direct commercial interest of the Company no addition was justifiable on loan given to its AE

3. The Appellant prays that the AO/TPO be directed to delete the addition on account of notional interest on loans advanced to the AES or be directed to reduce the notional interest addition appropriately

GROUND NO. IV: DISALLOWANCE OF RS. 4.65,200 U/S 35D OF THE ACT IN RESPECT OF STAMPING CHARGES PAID ON FURTHER ISSUE OF SHARES:

1. On the facts and the circumstances of the case and in law, the Ld CIT (A) erred in upholding the disallowance of the claim u's 35D amounting to Rs. 4,65,200/- on the alleged ground that the expenditure is incurred for increase in authorized capital and therefore the entire expenditure is capital in nature

2 The Appellant prays that the AO be directed to delete the aforesaid addition amounting to Rs 4,65,200/-.

GROUND NO. V: DISALLOWANCE OF PREMIUM PAID ARISING ON ACCOUNT OF REPAYMENT OF OPTIONALLY CONVERTIBLE DEBENTURES ISSUED TO ADITYA BIRLA NUVO LIMITED AND THEREBY MAKING AN ADDITION OF INCOME OF RS. 14,37,11,341/-

1. On the facts and the circumstances of the case and in law, the Ld. CIT (A) erred in upholding the addition of Rs. 14,37,11,341 on the ground that the accounting entry for premium has not been passed in the year under consideration

2. On the facts and the circumstances of the case and in law, the Ld CIT (A) erred in upholding the addition on the ground that the transaction details were not verified by the AO since the Appellant had not filed the details

3. The Appellant prays that the AO/TPO be directed to delete the aforesaid addition amounting to Rs. 14,37,11,341-

GROUND NO. VI: GENERAL

The Appellant craves leave to add, to amend, to alter and/ or to

delete all or any of the above grounds of appeal."

2.3. The Revenue has raised the following grounds of appeal in ITA No. 5280/Mum/2017:

"1) On the facts and in law, the Ld.CIT(A) erred in directing the TPO to adopt 0.5% as the ALP of the Guarantee Commission charges provided by the assessee company, without appreciating that the TPO had determined this ALP taking into consideration entity, country specific, currency risk and also considering the leveraged position taken by the company which had an impact on its working capital.

2) On the facts and in law, the Ld.CIT(A) erred in directing the AO to delete the disallowance of interest and other expenses incurred for acquisition of shares of a subsidiary company without appreciating the fact that the acquisition of business by way of investing into shares cannot be considered to be ordinary event of the business and therefore, cannot be termed as expenditure incurred for the purpose of assessee's business.

3) On the facts and in law, the Ld.CIT(A) erred in not appreciating the fact that the claim for ESOP expenses was made for the first time in A.Y. 2010-11 in the return of income, which was disallowed by the assessee in the computation of income suo-motto and the assessee has not made any revised claim of the ESOP expenses u/s. 37(1) either before the AO or before the DRP

3(i) On the facts and in law, the Ld.CIT(A) erred in not appreciating the fact that the A.Y. 2010-11 is the base year in which the assessee has disallowed the capital ESOP expenses itself and the issue has reached its finality in the assesses case.

3(ii) On the facts and in law, the Ld.CIT(A) erred in not appreciating the fact that the capital ESOP expenses are notional in nature as per SEBI guidelines and are not allowed u/s. 37(1) of the I.T.Act.

3(iii) On the facts and in law, the Ld.CIT(A) erred in not appreciating the fact that the facts of the instant case and

Biocon Ltd. are different and the decision of the Special Bench of Bangalore in the case of Biocon Ltd. is not applicable in the instant case.

4) The appellant prays that the order of the CIT(Appeals) on the above grounds be set aside and that of the Assessing Officer be restored.

5) The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.

3. The relevant facts in brief are that the Assessee is a company engaged in the business of Information Technology enabled Services and provides call centre and BPO Services. For the Assessment Year 2011-12, the Assessee filed return of income on 28/11/2011 declaring 'Nil income and claiming carry forward of current year losses of INR 27,00,41,977/-.

3.1. The case of the Assessee was selected for regular scrutiny assessment. During the assessment proceedings, the Assessing Officer noted that the Assessee had entered into international transactions with Associated Enterprises (AEs) and therefore, made a reference to the Transfer Pricing Officer (TPO) for computation of Arm's Length Price (ALP) under Section 92CA(1) of the Act. The TPO vide order dated, 01/01/2015, passed under Section 92CA(3) of the Act proposed upward transfer pricing adjustment of INR 13,25,46,700/- consisting of the following:

SNo.	Transfer Pricing Adjustment	Amount (INR)
1	Adjustment for Interest charged on loan given to AEs	10,51,98,575/-
2	Adjustment on account corporate guarantee	2,73,48,125/-
	Total	13,25,46,700/-

3.2. The Assessing Officer incorporated the above transfer pricing

adjustment in the Draft Assessment Order, dated 16/03/2015, passed under Section 143(3) read with Section 144C(1) of the Act. In the aforesaid Draft Assessment Order, the Assessing Officer computed the income of the Assessee at 'Nil' after making other additions/disallowances. Since the Assessee did not exercise the option of filing objections before the Dispute Resolution Panel, the Assessing Officer passed the Final Assessment Order under Section 143(3) read with Section 144C(3) of the Act on 07/05/2015 assessing the total income of the Assessee at 'Nil' after making, inter alia, following additions/disallowances:

SNo.	Additions/Disallowances	Amount (INR)
1.	Transfer Pricing Addition - Interest on loan given to AEs	10,51,98,575/-
2.	Transfer Pricing Addition - Corporate guarantee	2,73,48,125/-
3.	Disallowance under Section 35D	4,65,200/-
4.	Disallowance of interest and other expenses related to acquisition of share of foreign subsidiary	31,40,45,133/-
5.	Rejection of additional claim raised during assessment proceedings by way of letter dated 27/02/2015 – Deduction for premium paid on repayment of Optionally Convertible Debentures	14,37,11,341/-
6.	Rejection of additional claim raised during assessment proceedings by way of letter dated 27/02/2015 – Deduction for Employees Stock Option Plan (ESOP) Expenses	4,50,38,317/-

3.3. Against the above Assessment Order, dated 07/05/2015, the Assessee preferred appeal before CIT(A). The CIT(A), vide order dated 31/03/2017, partly allowed the appeal of the Assessee. The CIT(A) accepted the additional claim raised by the Assessee during the assessment proceedings pertaining to deduction for ESOP Expenses of INR 4,50,38,317/- and directed the Assessing Officer to allow deduction for the same under Section 37(1) of the Act. The

CIT(A) also accepted Assessee's claim for deduction of INR 31,40,45,133/- under Section 36(1)(iii) of the Act and deleted the disallowance of interest and other expenses related to acquisition of share of foreign subsidiary made by the Assessing Officer. As regards transfer pricing adjustment on account of interest on loans to AEs, the CIT(A) directed the Assessing Officer to re-compute the transfer pricing adjustment by adopting rate of LIBOR + 1%. As regards transfer pricing addition relating to guarantee fee, the CIT(A) directed the Assessing Officer to re-compute the transfer pricing addition by taking guarantee commission fee rate of 0.5% as against 2.5% adopted by the Assessing Officer/TPO. However, the CIT(A) declined to grant any relief in relation to the disallowance of INR 4,65,200/- made under Section 35D of the Act and also confirmed the rejection of the additional claim for deduction of INR 14,37,11,341/- in respect of premium paid on repayment of optionally convertible debentures specified in paragraph 3.2 above.

3.4. Being aggrieved, the Assessee preferred appeal before the Tribunal on the grounds reproduced in paragraph 2.2 above. Ground No. I, II & III pertain to the transfer pricing adjustment. Ground No. IV pertains to disallowance of deduction under Section 35D of the Act. Ground No. V pertains to disallowance of premium paid on repayment of optionally convertible debentures raised as an additional claim during the assessment proceedings. The Revenue has also filed cross appeal on the grounds reproduced in paragraph 2.3 above. Ground No. 1 pertains to the transfer pricing adjustment on account of guarantee commission directed by the CIT(A) to be recomputed at the rate of 0.5%, Ground No. 2 pertains to claim of interest & other expenses allowed by the CIT(A) as per Section

36(1)(iii) of the Act of the Act, Ground No. 3(i), 3(ii) & 3(iii) pertains to allowance of claim of ESOP Expenses.

Appeal by Assessee (ITA No. 5260/Mum/2017, AY 2011-12)

4. We would first take grounds raised by the Assessee in the appeal.

Ground No. I & II

4.1. Ground No. I & II raised by the Assessee are directed against the order of CIT(A) confirming the order passed by the Assessing Officer holding that providing corporate guarantee to AE constitutes an international transaction under Section 92B of the Act. Further, on without prejudice basis, the Assessee as contended that even if it is assumed that providing corporate guarantee to AE constitutes an international transaction, the CIT(A) erred in determining arm's length guarantee fee rate at 0.5% as the same could not have been more than 0.263%, as determined by the independent chartered accountant in the report furnished during the assessment proceedings.

4.2. Both the sides agreed that issues raised in Ground No. I & II have been decided against the Assessee by the Tribunal in the case of the Assessee for the Assessment Years 2008-09 and 2009-10.

4.3. On perusal of record, we find that during the previous year 2006-07, the Assessee had acquired Minacs Worldwide Inc. [hereinafter referred as 'Minacs Canada'], a Canadian entity engaged in BPO operations. According to the Assessee the acquisition was expected to provide significant scale and operational capabilities to the Assessee.

4.4. To execute acquisition of Minacs Worldwide INC by the Assessee

through its subsidiary in Canada i.e. AV Transworks Limited (for short AVTL, Canada), the Assessee provided a corporate guarantee to a third party i.e., DBS Bank Singapore, from whom the AVTL, Canada had availed a loan of amounting USD. 24.5 million details of which are as under:

Lender : DBS Bank, Singapore

Borrower : AVTL, Canada (with Assessee as Guarantor)

Period : 5 years (with 03/11/2006 as start date for Guarantee by the Assessee)

4.5. During the assessment proceedings, the Assessee took a stand that providing corporate guarantee to AE does not constitute an international transaction under Section 92B of the Act. However, the Assessing Officer/TPO rejected the aforesaid contention and made transfer pricing addition of INR 2,73,48,125/- by taking arm's length guarantee fee rate of 2.5%.

4.6. In appeal, the CIT(A) agreed with the Assessing Officer/TPO and concluded that providing corporate guarantee is an international transaction. However, the CIT(A) granted relief to the Assessee by giving directions to determining arm's length guarantee fee at the rate of 0.5% as against 2.5% determined by TPO/Assessing Officer.

4.7. Being aggrieved by the order passed by the CIT(A), the Assessee is in appeal before the Tribunal claiming that arm's length guarantee fee rate of 0.5% is on a higher side on the basis of report of independent chartered accountant wherein the aforesaid rate has been computed at 0.263%. The Revenue has also challenged the order of the CIT(A) reducing the arm's length guarantee fee rate of 2.5% determined by the Assessing Officer/TPO to 0.5%.

4.8. On perusal of the decision of the Mumbai Bench of the Tribunal in

case of the Assessee for the Assessment Years 2008-09 & 2009-10 [ITA No. 610 & 520/Mum/2013 and ITA No. 4276 & 4790/Mum/2015, dated 25/08/2016], we find that the Tribunal has held as under:

> *"14. Ground No. 1 of Assessee's appeal in ITA No. 620/M/13 For A.Y. 2008-09, Grounds Nos: 1, 2 and 3 of Assessee's Appeal No. 4276/M/2015 for A.Y. 2009-10, and Ground No. 1 of Revenue's Appeal No. 4790/M/2015: Issue involved is : Transfer Pricing Addition in respect of Corporate Guarantee.*
>
> *15. The assessee company has given Corporate Guarantee to DBS bank by way of deeds of guarantee for loan taken by AV Transwork Ltd, Canada, (AVTL Canada) amounting to USD 24.5 million. The assessee company has not charged commission to AVTL Canada. The AO/TPO based on the order for A.Y. 2007-08 has held that the appellant company ought to have charged a cost of guarantee of 3.25%. The assessee company has filed an appeal before Ld. CIT (A), Mumbai, who has confirmed the action of AO/TPO. Not being satisfied, with the order of the Ld. CIT (A), the assessee company as well as Revenue are in further appeals before us.*
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> *16. We have carefully considered the rival submissions and gone through the facts and circumstances of the case. The Ld. Departmental Representative for the Revenue has primarily reiterated the stand of the Assessing Officer and CIT (A). On the other hand, the Ld. AR for the assessee company stated that the same identical issue is covered by the Hon'ble Mumbai Tribunal's order in ITA No.7033/Mum/2012, in assessee's own case for A.Y. 2007-08 dated 25/03/2015. The Hon'ble Mumbai Tribunal in para 2.6 of the said order held that guarantee commission at the rate of 0.5% from its Associate Enterprise can be said to be at arms length. Thus, respectfully following the decision of Tribunal in assessee company's own case, whereby issue were decided in favour of the assessee company. Accordingly, we direct the AO/TPO to compute and charge the guarantee commission at the rate of 0.5% from its Associate Enterprise.*
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> *17. In the result, the ground No. 1 of Assessee's appeal in ITA No. 620/M/13 for A.Y. 2008-09, and grounds Nos: 1, 2 and 3 of Assessee's Appeal No. 4276/M/2015 for A.Y. 2009-10 are allowed*

and ground No. 1 of Revenue's Appeal No. 4790/M/2015 for A.Y. 2009-10 is dismissed."

4.9. Thus, for the Assessment Year 2008-09 and 2009-10 the Tribunal had, following the decision of the Tribunal in the case of the Assessee for the Assessment Year 2007-08 [ITA No.7033/Mum/2012, dated 25/03/2015], agreed with the CIT(A) that providing corporate guarantee to an AE constitutes an international transaction and had accepted the guarantee fee rate of 0.5% determined by the CIT(A) as the arm's length rate while rejecting the rate proposed by the Assessee. There is no change in the facts and circumstances of the case. Nothing has been placed before us to persuade us to depart from the view taken by the Tribunal in the case of the Assessee for the preceding assessment years on this issue.

4.10. In view of the above, we do not find any infirmity in the order passed by the CIT(A). Therefore, respectfully following the above decisions of the Tribunal in the case of the Assessee for the Assessment Years 2007-08, 2008-09 and 2009-10, Ground No. I & II raised by the Assessee are dismissed.

Ground No. III

5. Ground No. III raised by the Assessee is directed against the Transfer Pricing Adjustment of INR 10,51,98,575/- on account of interest on loan to Associated Enterprises.

5.1. The Assessee had given a loan in Canadian Dollar (CAD) to AVTL, Canada and a loan in US Dollar (USD) to Aditya Birla Minacs, Philippines. It was contended by the Assessee that the aforesaid loans were granted from own funds, and therefore, no interest was

charged from the AEs. However, at the time of filing return of income, the Assessee voluntary made an adjustment in the computation of total income by computing interest at the rate of 1.53% (i.e. Average US LIBOR + 1%) in case of interest free USD loan to Aditya Birla Minacs Philippines and at the rate of 5.50% in case of interest free CAD loan to AVTL, Canada.

5.2. Further, the Assessee had also given loan to AVTL, Canada in Japanese Yen (JYP), and had charged interest at the rate of 1.02%. The aforesaid loan was advanced out of the loan taken by the Assessee from DBS, Singapore at the rate of LIBOR + 0.5% (JYP Loan). Thus, the Assessee had recovered mark up of 10% on the interest cost paid by the Assessee on the underlying loan.

5.3. The TPO determined arm's length rate of interest (a) at 10.50% for CAD loans given by the Assessee to AVTL, Canda based on the SBI PLR rates, (b) at the rate of 10.50% for USD loan given by the Assessee to Aditya Birla Minacs Philippines based on the SBI PLR rates and (c) at the rate of 8.55% for JPY loan given by the Assessee to AVTL, Canada taking the highest cost of ECB borrowings incurred by the Assessee as the basis. Thus, TPO/Assessing Officer made transfer pricing addition of INR 10,51,98,575/- in respect of interest on loans given by the Assessee to its AEs.

5.4. In appeal, the CIT(A) granted relief to the Assessee by determining arm’s length rate of interest at LIBOR+1% for determining interest on loan given by the Assessee to its AE by placing reliance on the decisions of the Tribunal in the case of the Assessee for the Assessment Years 2007-08, 2008-09 and 2009-10.

5.5. Not being satisfied with the relief granted by the CIT(A), the Assessee is in appeal before the Tribunal seeking deletion of the transfer pricing adjustment to the extent sustained by the CIT(A).

5.6. The contention of the Assessee is that no transfer pricing addition was warranted in the facts and circumstances of the present case. However, we are not inclined to accept the same. While deciding this issue, the CIT(A) has concluded as under:

> *"I have gone through the submissions of the Appellant and the order of the TPO. I find that Hon'ble ITAT in the Appellant's own case in AY 2007-08, AY 2008-09 & AY 2009-10, consistently decided LIBOR @ 1% to be Arm's length price for determining the Interest on loan to its AES. Hence, following the Rule of Consistency and in view of Judicial discipline, I consider it proper and appropriate to direct the AO / TPO to determine the Arm's Length Price of Interest on loan to the AES LIBOR +1%. Accordingly, the Appellant's this ground of Appeal is Partly Allowed."*

5.7. We have perused the orders passed by the Tribunal in the case of the Assessee for the Assessment Year 2007-08 [ITA No. 7033 & 7142/Mum/2012, dated 25/03/2015, and ITA No. 7033 (recalled matter), 16/03/2016] and common order, dated 25/08/2016, passed in ITA No. 610 & 620/Mum/2013 and ITA No. 4276 & 4790/Mum/2015 pertaining to Assessment Years 2008-09 and 2009-10 by following the decision dated 16/03/2016, passed by the Tribunal. Vide order dated 16/03/2016, Co-ordinate Bench of the Tribunal has, in identical facts and circumstances, has accepted LIBOR plus 1% as arm's length rate of interest while holding as under:

> *"After considering the rival submissions and on perusal of the impugned finding and the facts as noted above, the only the issue how before us, is whether the loan advanced by the assessee to its 100% subsidiary AE in Canada on which the assessee had charged*

interest @ LIBOR +1% is at arm's length or not. The Ld. CIT(A) has applied six months LIBOR + 200 basis points based on RBI guidelines and after using external commercial borrowed rates. Whereas, the assessee's case is that the assessee has used internal CUP of LIBOR + 0.65% which was determined on the basis of loan availed by the assessee form DBS bank @ LIBOR+0.45%+ 0.20%, which were for the period of 5 years. Based on this internal CUP, the international transaction providing the loan to the AE has been benchmarked therefore, charging of interest at LIBOR + 1% was at arm's length price. It is an undisputed fact that, the loan has been given to the AE in a foreign currency and it is also not in dispute that, LIBOR rate which is an internationally recognized rate are for benchmarking the loans denominated in foreign currency should be used. Now the Hon'ble Delhi High Court in the case of Cotton Naturals India Pvt. Ltd (supra) after analyzing this issue in detail has observed and held as under:

> *"39. The question whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United States should be applied, for the borrower was a resident and an assessee of the said country, in our considered opinion, must be answered by adopting and applying a commonsensical and pragmatic reasoning. We have no hesitation in holding that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid. Interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. Interest rates applicable to loans and deposits in the national currency of the borrower or the lender would vary and are dependent upon the fiscal policy of the Central bank, mandate of the Government and several other parameters. Interest rates, payable on currency specific loans/ deposits are significantly universal and globally applicable. The currency in which the loan is to be re-paid normally determines the rate of return on the money lent, i.e. the rate of interest".*

8. Thus, the LIBOR BPS point would be the correct method for benchmarking the arm's length price in case of interest is paid in foreign currency. Since assessee's charging interest rate at LIBOR +1% which is based on an internal CUP, therefore, such a benchmarking gives the most appropriate result of arm's length price because internal CUP is always preferable to external CUP, which gives far more accuracy of ALP.

Accordingly, we accept the Ld. Counsel's contention on this score and direct the AO to accept the interest rate charged at LIBOR 1% as on arm's length price. Accordingly, ground no. 2 is treated as allowed."

5.8. Given the admitted position that there is no change in the facts and circumstances of the case in the assessment year before us, and keeping in view the above decisions of the Tribunal in the case of the Assessee, which continue to hold the field, we do not find any merit in the contention advanced by the Assessee that no transfer pricing adjustment was warranted. The decision of CIT(A) to hold LIBOR + 1% as arm's length rate of interest in respect of loan for AEs is in line with the above decisions of the Tribunal in the case of the Assessee. Accordingly, Ground No. III raised by the Assessee is dismissed.

Ground No. IV

6. Ground No. IV raised by the Assessee is directed against the disallowance of INR 4,65,200/- under Section 35D of the Act in respect of stamping charges paid on further issue of shares.

6.1. In view of the statement made by the Ld. Authorised Representative for the Appellant, under instructions, that the Assessee does not wish to pursue this ground on account of insignificant amount involved, Ground No. IV raised by the Assessee is dismissed as not pressed.

Ground No. V

7. Ground No. V raised by the Assessee is directed against the disallowance of claim of proportionate premium paid arising on account of repayment of optionally convertible debentures.

7.1. The relevant facts in brief are that the Assessee had issued

Compulsorily Convertible Debentures ("CCD") of INR 250 Crore vide Agreement, 01/01/2010 to Barclays Bank PLC, Mumbai Branch (For Short 'Barclays') being the initial subscriber. 2,500 Debentures were issued to Barclays bearing face value of INR 10,00,000/- each. The CCDs issued were zero-coupon unsecured debentures mandatorily convertible into shares after 60 months from the date of issue. The number of shares to be issued on conversion was dependent upon conversion factor which was to be determined mutually by the subscriber and the Assessee. Since, the debentures were freely transferable, the Aditya Birla Nuvo Ltd. (ABNL), the parent company of the Assessee, ultimately acquired the CCDs on 07/02/2014 from the then holders of CCDs namely L&T Fincorp Ltd., L&T Infrastructure Finance Co. Ltd. & Tata Capital Financial Services Ltd.

7.2. The contention of the Assessee is that on 28/02/2014, the terms of issue of Debentures were changed and the Debentures were converted from mandatorily convertible debentures to Optionally Convertible Debentures. The holder (i.e. ABNL) did not opt for conversion of debentures and therefore, the same were redeemed on 26/03/2014 for INR 380 Crore (including premium of 130 Crore).

7.3. Out of the total amount of premium of INR 130 Crore, in Assessment Year 2014-15 the Assessee claimed deduction for INR 54,59,43,438/- being premium pertaining to debentures proceeds utilised in business for the entire period of Assessment Year 2010-11 to Assessment Year 2014-15. However, the Assessing Officer rejected the plea of full claim and allowed only pro-rata claim for Assessment Year 2014-15 of INR 12,15,52,414 vide order, dated 21/12/2017, passed under Section 143(3) of the Act.

7.4. Meanwhile, vide letter dated 27/02/2015, the Assessee also filed

claim for deduction of INR 14,37,11,341/- for the proportionate premium paid on redemption of Debentures under Section 37(1) of the Act during the assessment proceedings for the Assessment Year 2011-12 which was rejected by the Assessing Officer vide Assessment Order, dated 07/05/2015, passed under Section 143(3) read with Section 144C(3) of the Act. The Assessing Officer rejected the aforesaid claim, inter alia, on the ground that the same was expenses claimed were capital in nature.

7.5. The CIT(A) also decline to grant any relief on this issue and did not allow the claim for deduction of INR 14,37,11,341/- pertaining to the proportionate premium paid on redemption of Debentures.

7.6. Being aggrieved, the Assessee has carried this issue in appeal before us.

7.7. We have heard the rival submissions and perused the material on record.

7.8. The contentions raised on behalf of the Assessee (including on the issue of nature of premium paid on redemption of debenture and the year of allowance of deduction) can be summarized as under:

(a) The return for the relevant assessment year was filed on 28/11/2011, while the premium on OCD was paid on 24/03/2014. Accordingly, the claim became available to the Assessee only after return was filed and hence, an additional claim was made during the course of assessment proceedings.

(b) CCDs are in the nature of debt and not equity. Until its conversion into equity, the same remains a debt. It does not

carry any voting rights or any right to receive dividend. Hence the same cannot be considered to be equity until its conversion.

Reliance was placed on the following case laws: CAE Flight Training (India) Pvt. Ltd. [IT(TP)A No. 2060/Bang/2016, Bangalore-Trib.]; TE Connectivity Services India (P.) Ltd. v. NFAC (145 taxmann.com 214) (Bangalore - Trib.), IMS Health Analytics Services Private Ltd. v. Dy. CIT (ITA No.1549/Bang/2019), and CWT v. Spencer and Co. Ltd. (88 ITR 429) (SC).

(c) Premium on debenture is an allowable expenditure. Section 2(28A) of the Act defines 'interest' as under:

> "'*interest' means interest payable* ***in any manner*** *in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised." (Emphasis Supplied)*

The use of the words 'in any manner' in the definition of Interest under the Act, supports the case of the Assessee. Therefore, whether it is a case of discount or premium, it would still be allowable as interest expense so long as it is to compensate for use of money.

(d) Discount or Premium on debentures has been held as an allowance expense by the Hon'ble Apex Court in the case of Madras Industrial Investment Corporation Ltd. v. CIT (225 ITR 802). This was a case of 'Discount on issue of Debentures. Further, reliance was placed on the decision of

Hon'ble Madras High Court in the case of CIT Vs. First Leasing Company of India Ltd (Tax Case Appeal No.209 of 2006 & 1099 of 2004 wherein it is held that there is no distinction between 'Premium' and 'Discount' and both of them are entitled to be spread over the period of debentures. In holding so, the Hon'ble High Court relied upon judgment of the Hon'ble Calcutta High Court in the case of National Engg. Industries Ltd. v. CIT

The courts have held that premium on debentures is allowable over the period of debentures. Accordingly, the Assessee has made a claimed deduction for the proportionate amount only for the relevant assessment year.

(e) Premium or interest is indeed recompense for the use of funds. Commercially, when the terms of CCD were converted to OCDs and the OCDs were ultimately redeemed, such recompense was worked out commercially at the compounded rate of approx. 10% p.a. (approx.). This gave an overall premium of 52% on face value. If, however, the rate of return is calculated from the date of conversion to the date of redemption (i.e from 28/02/2014 to 24/03/2014), then the recompense works out to 624% p.a. If it is presumed that the premium runs from the date of conversion, then such presumption would be de-hors of commercial realities as a return of 624% p.a by the issuer company can, by no stretch of imagination, be regarded as a commercially acceptable recompense from the point of view of issuer. Based on the commercial realities, the premium paid should be considered as pertaining to the use of money

for the entire period beginning from the date of issue of CCDs till the date of redemption and not just from the date of conversion.

(f) In the present case, the premium on debentures was debited to securities premium account. This is as per the provisions of Section 78 of the Companies Act, 1956 (for Short 'the Companies Act'). The Companies Act permits application of securities premium account towards various types of expenses, some of which are capital in nature, while some are revenue in nature. For example, expenses on issue of loan/debentures has been held to be an allowable revenue expense by the Hon'ble Supreme Court in the case of India Cements Ltd. v. CIT (60 ITR 52) (SC). Similarly, discount/ premium on issue/redemption of debentures has been held to be allowable expense by the Hon'ble Supreme Court in Madras Industrial Investment Corporation Ltd. Vs. CIT (225 ITR 802) (SC) and other cases as mentioned above. Therefore, merely because an amount is not debited to P&L account, but it is debited to securities premium account, it does not make the amount a capital expenditure under the provisions of the Act. Entries in books of accounts are not determinative of its tax treatment [Kedarnath Jute Manufacturing Co. Ltd. vs. CIT (82 ITR 363)]. Under similar facts, the Mumbai Bench of the Tribunal has, in the case of DCIT v. M/s Bombay Dyeing & Mfg. Co. Limited (ITA No.5059/Mum/2003), held premium paid on redemption of debentures to be allowable under Section 36(1)(iii)/37 of the Act even though the same was debited to share premium reserve in the books of accounts.

(g) Though the order for Assessment Year 2014-15 is under appeal before CIT(A), in order to protect the Appellant from double jeopardy, the Assessee has made an additional claim for pro-rata amount pertaining to the captioned year of INR 14,37,11,341/- vide letter, dated 27/02/2015.

7.9. Per contra, the Learned Departmental Representative placed reliance on the order passed by the CIT(A) and submitted that the expenditure was of capital nature. The CIT(A) had rightly observed that the claim has been made after the expiry of almost 4 years from the end of the relevant assessment year. The amount claimed as deduction by the Assessee did not enter the books of account of the Assessee for the relevant previous year either at the time of closure of books of account or at the time of filing return of income as at that point in time the issue payment of premium of redemption of shares was not there. Therefore, deduction for premium paid on redemption of debentures cannot be allowed to the Assessee as a deduction during the relevant previous year.

7.10. We have given thoughtful consideration to the rival submission. It is admitted position that the Assessee had issued CCDs of INR 250 Crores to Barclays. Since the CCDs were freely transferable the same were eventually purchased by ABNL, the parent company of the Assessee, on 07/02/2014 from the then holders of CCDs namely L&T Fincorp Ltd., L&T Infrastructure Finance Co. Ltd. and Tata Capital Financial Services Ltd. On 28/02/2014, as per mutual agreement between ABNL and the Assessee, CCDs were converted from OCDs. Since, ABNL did not opt for conversion, the OCDs were redeemed on 26/03/2014 at a premium of 130 Crore. The issue raised for consideration before us is whether the Assessee is entitled

to claim deduction for the proportionate premium amount during the relevant assessment year since according to the Assessee the deduction for premium is to be allowed over the term of the debentures.

7.11. We note that when the CCDs were initially issued the Assessee had no obligation to pay premium, interest, or charges in relation to the CCDs as the same were convertible into equity on expiry of 60 months as per the conversion formula which was to be mutually agreed by the Assessee and the subscriber/holder of CCDs.

7.12. Therefore, for the relevant previous year no interest/premium/charges were accounted for or paid by the Assessee during the relevant previous year. Even if it is accepted that CCDs continued to be debt during the relevant previous year, the same would be of no consequence as no interest/premium/charges were either payable or paid in respect of such debt. During the relevant previous year the Assessee neither had any obligation to pay interest as the CCDs were zero-coupon unsecured debenture, nor did the Assessee had any obligation to redeem the debentures as the CCDs were compulsorily convertible into equity shares of the Assessee. Same position prevailed on the date of finalization of accounts and the date of filing of return of income for the relevant previous year. Thus, the Assessee did not have any obligation to redeem the CCDs as at the end of the relevant previous year, or at the date of finalization of account, or even at the date of filing return of income. Therefore, in our view, the Assessee had no liability, whether ascertained or contingent, to redeem the debentures. It is admitted position that no payment towards redemption or premium was made during the relevant

previous year. Therefore, in our view, the Assessee could not be permitted to claim deduction either on accrual or paid basis during the relevant previous year.

7.13. On 28/02/2014, by way of mutual agreement between ABNL and the Assessee, OCDs came into existence for the first time. The issue redemption premium arose only when ABNL opted not to get shares and instead sought redemption of debentures, and thereafter, the OCDs were redeemed by the Assessee at a premium of INR 130 Crores on 26/03/2014. Since the OCDs were not in existence during the relevant previous year, the question of allowing deduction for the proportionate amount of redemption premium as interest during the relevant previous year, in our view, does not arise.

7.14. It has been contended on behalf of the Appellant that premium on redemption of debentures is recompense for the use of funds. It is a matter of the commercial arrangement whether the lender opts for recompense in the form of allotment of equity shares in case of CCDs or premium on redemption in case of OCDs. For the relevant previous year, the borrower had opted for recompense in the form of allotment of equity shares. Therefore, deduction for premium on redemption claimed by the Assessee cannot be allowed.

7.15. It was submitted on behalf of the Assessee that premium, which is recompense for the use of funds, was worked out commercially at the compounded rate of approx. 10% p.a. giving an overall premium of 52% on face value. If, however, the rate of return is calculated from the date of conversion to the date of redemption (i.e from 28/02/2014 to 24/03/2014), then the recompense works out to 624% p.a. which would be de-hors of commercial realities. In our view that the commercial effect of financial arrangement between

the parties cannot form the basis of allowance of claim made by the Assessee. It is admitted position that at the time of modification of terms the CCDs were held by ABNL which was ultimate holding company of the Assessee. It is not the case of the Assessee that the modification of terms on which debentures were issued was occasioned by the circumstances beyond the control of the Assessee. On conversion of CCDs into OCDs, the subscriber/holder diluted their obligation to subscribe for equity shares of the Assessee and got an option to seek redemption of debentures in addition to the right to get shares on conversion. From the perspective of the Assessee, as an alternative to allotment of shares, the Assessee could now be asked to redeem the debt amount at a premium. The capital appreciation in the value of shares of the Assessee from the date of subscription of CCDs till the date of conversion from CCDs to OCDs was not accounted for or recorded while agreeing upon the modified terms by the parties and therefore, there is nothing on record to enable us to examine/determine the impact of the commercial trade-off between the original and modified terms at this stage. Further, it is admitted position that the CCDs were transferred from subscriber to holders and from holder to subsequent holders over a period of time. At the time of conversion the CCDs were held by ABNL, however, during the relevant previous year the CCDs were not held by ABNL. Therefore, the modification of terms as agreed upon between the ABNL and the Assessee, cannot change the terms and conditions which were binding upon the Assessee and the holders of CCDs at the relevant time according to which the debentures were to be compulsorily convertible into equity. Given the facts and circumstances of the present case, we are of the view that the

commercial arrangement entered into by the Assessee subsequent to the filing of return of income for the relevant previous year, cannot be applied retroactively to make additional claim leading to reduction of the income returned by the Assessee.

7.16. Having perused the judicial precedents cited on behalf of the Assessee, we conclude that, in view of the above, none of the judicial precedents cited apply to the factual matrix before us and therefore, the same do not advance the case of the Assessee.

7.17. In view of the paragraph 7.10 to 7.16 above, we confirm the order passed by the CIT(A) rejecting the claim for deduction of INR 14,37,11,341/- in respect of proportionate premium on redemption of OCDs made by the Assessee during the assessment proceedings. Accordingly, Ground No. V raised by the Assessee is dismissed.

Appeal by Revenue (ITA No. 5280/Mum/2017, AY 2011-12)

8. We would now take up grounds raised by the Revenue in the cross appeal.

Ground No. 1

9. Ground No. 1 raised by the Revenue is directed against the order of CIT(A) determining the guarantee fee rate at 0.5% as against 2.5% determined by the TPO/Assessing Officer.

9.1. While dismissing Ground No. I & II raised by the Assessee in its appeal, we have noted that for the Assessment Year 2008-09 and 2009-10 the Tribunal had accepted the rate of 0.5% determined by the CIT(A) as the arm's length rate for corporate guarantee fee. The Revenue had, being aggrieved, preferred appeal before the Hon'ble Bombay High Court against the decisions of the Tribunal in the case

of the Assessee for the Assessment Year 2008-09 and 2009-10. We note that the Hon'ble Bombay High Court has, while dismissing the appeals preferred by the Revenue in the case of the Assessee for the Assessment Year 2008-09 and 2009-10 [Income Tax Appeal No. 778 & 867 of 2017, dated 04/09/2019], has held as under:

> *"4. The Revenue urges the following three identical questions of law in both appeals for our consideration:—*
>
> *1. Whether on facts and in the circumstances of the case and in law, the Tribunal was justified in directing the AO/TPO to adopt 0.5% as the ALP of the guarantee commission charges provided by the Respondent Co.; without appreciating that the TPO had determined the ALP taking into consideration entity, country specific, currency risks and also considering the leveraged position taken by the assessee company which had an impact on its working capital?*
>
> *2. Whether on facts and in the circumstances of the case and in law, the Tribunal was justified in its direction that the money advanced to the AE as share application money is not to be considered as loan, ignoring the fact that this money was being utilized as working capital and not deposited in an escrow account in cases where monies are received in cases of share application?*
>
> *3. Whether on facts and in the circumstances of the case and in law, the was justified in directing the AO to delete the disallowance u/s 36(1)(iii) of the IT Act, 1961 without appreciating the fact that the acquisition of business by way of investing into shares of that company through either Special Purpose Vehicle or directly cannot be considered to be ordinary event of the business and therefore, cannot be termed as expenditure incurred for the purpose of assessee's business, which is providing IteS services?'*
>
> *5. Regarding Question Nos.1 and 2.*
>
> *(a) Mr. Kotangale learned counsel appearing in support of the appeals very fairly states that both these questions stand concluded against Revenue and in favour of Respondent-*

assessee in the Respondent's own case by the order of this Court dated 4 September 2019 in ITXA No.303 of 2006 (Principal Commissioner of Income Tax-10 Mumbai v. Concentrix Services India Pvt. Ltd. [formerly known as Minacs Pvt. Ltd.]). Both these questions on identical facts have been decided in favour of the Respondent-assessee.

(b) It is not the case of the Revenue, that there is any distinction in facts and/or law in the subject Assessment years, which would make order dated 4 September 2019 in ITXA No.303 of 2006 (2016) inapplicable to this case.

(c) In the above view, these two questions do not give rise to any substantial question of law. Thus not entertained."

9.2. On perusal of above, we find that the Hon'ble Bombay High Court had relied upon its earlier judgment, dated 04/09/2018, passed in the case of the Assessee in ITA No. 303 of 2016 pertaining to the Assessment Year 2007-08 wherein relying upon the judgment of the Hon'ble Bombay High Court in the case of Commissioner of Income Tax, Mumbai Vs M/s Everest Kento Cylinders Ltd. : (2015) 378 ITR 57 (Bom.), the Hon'ble Bombay High Court had declined to frame substantial question of law in appeal preferred by the Revenue.

9.3. The above judgment of the Hon'ble Bombay High Court for Assessment Year 2007-08 was followed by the Hon'ble Bombay High Court in appeal preferred by the Revenue for the Assessment Years 2008-09 and 2009-10 after taking note of the fact that there was no change in law or on facts. The position continues to be same for the assessment year before us. There is nothing on record to persuade us to take a view different from the view taken by the Tribunal in the preceding assessment years which has been confirmed by the Hon'ble Bombay High Court. Accordingly, Ground No. 1 raised by the Revenue is dismissed.

Ground No. 2

10. Ground No. 2 raised by the Revenue is directed against the order of CIT(A) deleting the disallowance of INR 31,40,45,133/- made by the Assessing Officer under Section 36(1)(iii) of the Act in respect of the interest and other expenses incurred for acquisition of shares of a subsidiary company.

10.1. Being aggrieved, the Assessee carried the issue in appeal before CIT(A) who allowed the appeal of the Assessee on this issue and deleted the disallowance of INR 31,40,45,133/- made under Section 36(1)(iii) of the Act, inter alia, by following the decision of the Tribunal in the case of the Assessee for the Assessment Year 2008-09 [ITA No. 610 & 520/Mum/2013] and 2009-10 [ITA No. 4276 & 4790/Mum/2015].

10.2. Being aggrieved, the Revenue in now in appeal before us.

10.3. We have considered the rival submissions and perused the material on record.

10.4. We note that the CIT(A) had deleted the disallowance of INR 31,40,45,133/- made by the Assessing Officer under Section 36(1)(iii) of the Act by placing reliance upon the common order, dated 25/08/2016, passed by the Mumbai Bench of the Tribunal in the case of the Assessee disposing of cross appeals for the Assessment Year 2008-09 [ITA No. 610 & 520/Mum/2013] and Assessment Year 2009-10 [ITA No. 4276 & 4790/Mum/2015]. The relevant extract of the aforesaid decision of the Tribunal dealing with the issue under consideration read as under:

> *"25. Ground No.5 of Assessee's appeal in ITA No. 620/M/13 for A.Y. 2008-09 and grounds Nos. 4(a) & 4(b) of Revenue's Appeal*

No.4790/M/2015 for A.Y 2009-10 : Issue involved is: Addition in respect of interest and finance expenses related to acquisition of shares of foreign subsidiary and disallowance of the same under section 36 (1) (iii) of the I.T. Act.

26. For A.Y. 2008-09 the Assessing Officer did the addition in respect of interest and finance expenses related to acquisition of shares of foreign subsidiary. Against the said addition, the assessee filed an appeal before CIT (A)-15, Mumbai, who has confirmed the action of the Assessing Officer, therefore not being satisfied from the order of the CIT(A), the assessee is in further appeal before us on this issue.

27. For A.Y. 2009-10 the Assessing Officer did the addition in respect of interest and finance expenses related to acquisition of shares of foreign subsidiary. Against the said addition, the assessee filed an appeal before CIT (A)-55, Mumbai, who has deleted the addition made by the Assessing Officer, therefore not being satisfied from the order of the CIT(A), the Revenue is in further appeal before us on this issue.

28. The issue involved in this case is that the assessee company has incurred interest expenses of Rs. 18,35,14,582/- and exchange fluctuation loss of Rs. 1,24,01,148/- in connection with the loans taken for DBS Bank for acquisition of Minacs Canada, which was claimed as allowable business expenses by the assessee company. The Ld. Assessing Officer, has held that assessee company is not earning any income under the head business or profession from the said investment and hence, the interest expenses cannot be treated as business expenditure. Therefore, the Assessing Officer has disallowed the interest expenses along with exchange fluctuation loss. Aggrieved from the order of the Assessing Officer, the assessee company has filed an appeal before the CIT (A)- 15, for A.Y. 2008-09, who has confirmed the action of the Assessing officer. Not being satisfied from the order of the Ld. CIT (A), the assessee company is in further appeal before us for A.Y. 2008-09 and for A.Y. 2009-10 the Revenue is in further appeal before us against the order of the CIT (A) who has deleted the addition made by AO.

29. We have carefully considered the rival submissions and gone through the facts and circumstances of the case. The Ld. Departmental Representative for the Revenue has primarily reiterated the stand of the Assessing Officer and CIT (A). On the

other hand, the Ld. AR for the assessee company stated that assessee company wanted to expand its existing business operations in North America and European countries. It had the option to either set up of branch in those countries or form new companies in those countries or acquire some operative company having business activities and presence in those countries. In order to attain the ultimate object of expanding operation in different geographies the assessee decided to acquire Minacs Worldwide Inc, Canada (Minacs Canada), existing operative company which was in similar line of business as that of the assessee i.e. BPO and Call centre activities. Due to regulatory restrictions in Canada and also for having ease of business, the assessee decided to set up a Special Purpose Vehicle (Investment SPV) in Canada which in turn will acquire shares on Minacs Canada from its existing shareholders.

30. The interest bearing funds have been utilized for making investment in SPV, AVTL Canada which has acquired Minacs Canada, on account of which there has been significant rise in the business of the assessee. Further, the same has enabled the assessee to enhance its presence in the world market for its BPO business. Accordingly, the interest expenditure incurred by the assessee is out of commercial exigency of the business and hence should be allowed as business expenditure under section 36 (1) (iii)/37 (1) of the Act. Further, in A.Y. 2007-08 the assessee had net gain of Rs. 5.29 Crores arising from same borrowing of USD 75.4 million, the Assessing Officer taxed the same income arising from the same borrowing when it is positive and offered by the assessee to tax subsequently. If there is expenditure on similar transaction of borrowing the Assessing Officer can not use different yardstick and deny the claim of the expenditure in view of principles of consistency. Further, after considering all the contentions of the Assessee Company, the Ld. CIT (A) in subsequent year i.e. A.Y. 2009-10 has accepted the claim of the assessee and allowed the interest expenditure incurred by the assessee company. The Ld. AR for the assessee company has cited before us the following judgments wherein it has been held that interest expenditure should not be disallowed in relation to loan given to subsidiaries based on commercial expediency:

1. *Bombay steam Navigation Co (P) Ltd. v. CIT [1965] 56 ITR 52 (SC)*

2. India Cements Ltd. v. CIT [1966] 60 ITR 52 (SC)

3. S.A. Builders Ltd. v. CIT [2007] 288 ITR 1/158 Taxman 74 (SC)

31. Further the Ld. AR for the assessee company has also relied on the following judgments wherein it has been held that interest paid on borrowed funds for the purpose of acquiring controlling interest in the company is allowable expenditure:"

1. CIT. Shrishti Securities [2010] 321 ITR 498/2009] 183 Taxman 159 (Bom.)

2 CIT v Rajeev Lochan Kanoria [1994] 208 ITR 616/1995] 80 Taxman 572 (Cal)

Therefore, based on the above cited facts and circumstances and position in case law, the interest expenditure incurred by the assessee is out of commercial exigency of the business and hence should be allowed as business expenditure under section 36 (1) (iii) of the Act, and we accordingly direct the Ld. CIT (A)/AO to delete the addition for A. Y 2008-09. For A. Y. 2009-10 we do not hesitate to confirm the order of the CIT(A).

32. In the result, the ground No. 5 of Assessee's appeal in ITA No. 620/M/13 for A. Y. 2008-09 is allowed and grounds Nos. 4(a) & 4(b) of Revenue's Appeal No.4790/M/2015 for A.Y 2009-10 is dismissed."

10.5. On perusal of above, we find that the Tribunal has allowed deduction for interest and other expenses incurred by the Assessee under Section 36(1)(iii)/37 of the Act on the ground of commercial expediency/exigency as such interest & other expenses were incurred in connection with the loans taken by the Assessee for DBS Bank which has been utilized for making investment in AVTL, Canada which had acquired Minacs Worldwide Inc, Canada, leading to significant rise in the business of the Assessee.

10.6. We note that the appeal preferred by the Assessee against the above order of the Tribunal on the issue of deletion of disallowance

under Section 36(1)(iii) of the Act has been dismissed by the Hon'ble Bombay High Court vide order, dated 04/09/2019, passed in Income Tax Appeal No. 778 & 867 of 2017. Further, the Special Leave Petition [SLP (Civil) Diary No. 13188/2020] preferred by the Revenue against the aforesaid order of the Hon'ble Bombay High Court has also been dismissed on the ground of delay.

10.7. In view of the above, we do not find any infirmity in the order passed by the CIT(A) in allowing the claim for deduction of INR 31,40,45,133/- under Section 36(1)(iii) of the Act by following the binding decision of the Tribunal in the case of the Assessee which has since been confirmed by the Hon'ble Bombay High Court. Accordingly, Ground No. 2 raised by the Revenue is dismissed.

Ground No. 3(i), (ii) & (iii)

11. Ground No. 3(i), (ii) & (iii) raised by the Revenue is directed against the disallowance of Employee Stock Option Scheme (ESOP) expenses.

11.1. During the assessment proceedings, vide letter dated 27/02/2015, the Assessee made a claim for deduction of the aforesaid ESOP Expenses on the basis of the decision of the Special Bench of the Tribunal in the case of Biocon Ltd. Vs. Deputy Commissioner of Income Tax (LTU), Bangalore : [2013] 35 taxmann.com 335 (Bangalore – Special Bench). However, the Assessing Officer rejected the claim holding as under:

> *"9.2 The submissions made by the assessee are carefully considered. However, the same are not acceptable in view of the judgment of the Hon'ble ITAT Delhi in the case of Ranboxy Laboratories Ltd. vs. Addl. CIT, 124 TT3 771 (2009), wherein it was held that "what is loss to the assessee is by way of short receipt of share premium and not by*

way of any expenditure or incurring of any liability. Receipt of share premium is not taxable and hence, any short receipt of such premium would only be a notional loss and not actual loss. SEBI guidelines requiring the assessee to account for short receipt of share premium as employees compensation expenses are relevant only for the purpose of accounting and are not conclusive for the purpose of allowing the same expenditure."

9.3 In view of the above, the notional expenses as per SEBI guidelines are not allowable under section 37(1) of the Act and hence the same is disallowed. Further, the ruling of Madras High Court in case of PVP Ventures Ltd. cannot be considered since the matter is presently subjudice. Hence the ESOP expenses of Rs.4,50,38,317/- incurred by the assessee company are hereby disallowed. However, no addition on this account is being made to the total income of the assessee since no deduction was claimed in the computation of total income."

11.2. Being aggrieved, the Assessee carried the issue in appeal before CIT(A). Following the above decision of the Special Bench of the Tribunal relied upon by the Assessee during the assessment proceedings, the CIT(A) allowed the claim of deduction of INR 4,50,38,317/- in respect of ESOP Expenses under Section 37 of the Act. The relevant extract of the decision of the CIT(A) reads as under:

"9.1. Decision:

I have considered the facts of the case and submission of the Appellant which is extracted as above. Having taken note to the same and also after taking note to the specific observations of the Special Bench in the case of Biocon Limited (144 ITD 215), I consider it proper and appropriate to hold that the appellants claim of deduction of Rs. 4,50,38,317/- u/s 37 of the Act is completely justified and correct in the given facts of the appellants case as detailed above. Hence, I consider it proper and appropriate to direct the AO to allow the claim of the appellant of Rs. 4,50,38,317/- u/s 37 of the Act. Thus, the appellant's this ground of appeal is allowed."

11.3. Being aggrieved by the allowance of claim of ESOP Expenses by the CIT(A), the revenue is now in appeal before us.

11.4. We have heard the rival contention and perused the material on record including the judicial precedents cited during the course of hearing.

11.5. During the course of hearing, the Ld. Authorised Representative for the Appellant had relied upon the judgment of the Hon'ble Karnataka High Court in the case of Commissioner of Income Tax LTU Vs. Biocon Ltd. : [2020] 121 taxmann.com 351 (Karnataka), whereby the decision of the Special Bench of the Tribunal which was followed by the CIT(A) while allowing the deduction for ESOP Expenses has been confirmed. The relevant extract of the aforesaid judgment of the Hon'ble Karnataka High Court read as under:

> *" 4. On the other hand, learned counsel for the assessee submitted that discount on the issue of ESOPs is not a contingent liability but is an ascertained one. It is further submitted that ESOPs vest over a period of 4 years at the rate of 24%, which means that at the end of first year the employee has a definite right of 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. In this connection, our attention has been invited to paragraphs 9.3.1 to 9.3.6 of the order passed by the tribunal and reliance has been placed on decision of the Supreme Court in Bharat Earth Movers v. CIT [2000] 112 Taxman 61/245 ITR 428 (SC), Rotork Controls India (P.) Ltd v. CIT [2009]180 Taxman 422/314 ITR 62 (SC). It is also argued that for the purposes of section 37(1) of the Act, it is sufficient if the expenditure has been incurred and therefore, issuance of shares at a discount were the assessee absorbs the difference between price at which it is issued and the market value of the shares would also be an expenditure incurred for the purpose of section 37 of the Act. Our attention has been invited to the findings recorded by the tribunal in paragraphs 9.2.7 to 9.2.8 of the tribunal and reliance has been placed on decisions in 'Madras Industrial Investment Corpn. Ltd. v. CIT [1997] 91 Taxman 340/225 ITR 802 (SC), CIT v. Woodward Governor (India) (P.) Ltd., [2009] 179 Taxman 326/312 ITR 254 (SC). It is also urged that discount on issue of ESOPs is only a form of compensation paid to the employee*

and if not a short capital receipt. It is also urged that deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of account, which were prepared in Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999. In support of aforesaid submission reliance has been placed on decision in CIT v. UP State Industrial Development Corpn. [1997] 92 Taxman 45/225 ITR 703 (SC), Challapalli Sugars Ltd. v. CIT [1975] 98 ITR 167 (SC). It is also urged that the decision relied on by the revenue does not support its case and the issue with regard to deduction of ESOP has been decided by different High Courts. In this connection, reference has been made to CIT v. PVP Ventures Ltd. [2012] 23 taxmann.com 286/211 Taxman 554 (Mad.), CIT v. Lemon Tree Hotels Ltd. IT Appeal No.107/2015 dated 18-8-2015, Pr. CIT v. Lemon Tree Hotels Ltd., [2019] 104 taxmann.com 26 (Delhi). It is also pointed out that from the Assessment Year 2009-10, the Assessing Officer has accepted the claim of the assessee and has permitted ESOP expenses as deduction. Therefore, the revenue cannot be now permitted to alter its stand.

5. By way of rejoinder reply, learned counsel for the revenue submitted that judgment of the Supreme Court in Bharat Earth Movers is no applicable to the fact situation of the case as in the aforesaid decision the Supreme Court was dealing with statutory liability pending fixation of liability, whereas, in the instant case, the assessee has a liability, therefore, the aforesaid decision of the Supreme Court does not apply. It is also pointed out that in Rotork Controls India, the Supreme Court was dealing with allowability of provision as deduction and it has been held that subject to compliance of certain conditions on matching principle, the deduction is permissible. It has further been held in the aforesaid decision that income from sale of goods is subjected to tax, therefore, the corresponding expenditure is to be allowed in the same year. The aforesaid decision is also of no assistance to the assessee as the assessee has not incurred any expenditure.

6. We have considered the submissions made by learned counsel for the parties and have perused the record. The singular issue, which arises for consideration in this appeal is whether the tribunal is correct in holding that discount on the issue of ESOPs i.e., difference between the grant price and the market price on the shares as on the date of grant of options is allowable as a deduction under section 37

of the Act. Before proceeding further, it is apposite to take note of section 37(1) of the Act, which reads as under:

Section 37(1) says that any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head, "Profits and Gains of Business or Profession".

7. Thus, from perusal of section 37(1) of the Act, it is evident that the aforesaid provision permits deduction for the expenditure laid out or expended and does not contain a requirement that there has to be a pay out. If an expenditure has been incurred, provision of section 37(1) of the Act would be attracted. It is also pertinent to note that section 37 does not envisage incurrence of expenditure in cash.

8. Section 2(15A) of the Companies Act, 1956 defines 'employees stock option' to mean option given to the whole time directors, officers or the employees of the company, which gives such directors, officers or employees, the benefit or right to purchase or subscribe at a future rate the securities offered by a company at a free determined price. In an ESOP a company undertakes to issue shares to its employees at a future date at a price lower than the current market price. The employees are given stock options at discount and the same amount of discount represents the difference between market price of shares at the time of grant of option and the offer price. In order to be eligible for acquiring shares under the scheme, the employees are under an obligation to render their services to the company during the vesting period as provided in the scheme. On completion of the vesting period in the service of the company, the option vest with the employees.

9. In the instant case, the ESOPs vest in an employee over a period of four years i.e., at the rate of 25%, which means at the end of first year, the employee has a definite right to 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. It is well settled in law that if a business liability has arisen in the accounting year, the same is permissible as deduction, even though, liability may have to quantify and discharged at a future date. On exercise of option by an employee, the actual amount of benefit has to be determined is only a quantification of liability, which takes place at a future date. The tribunal has therefore, rightly placed reliance on

decisions of the Supreme Court in Bharat Movers supra and Rotork Controls India P. Ltd., supra and has recorded a finding that discount on issue of ESOPs is not a contingent liability but is an ascertained liability.

10. From perusal of section 37(1), which has been referred to supra, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the expenditure has been incurred. The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of section 37(1) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal therefore, in paragraphs 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under section 37(1) of the Act subject to fulfilment of the condition.

11. The deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of account, which has been prepared in accordance with Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.

12. So far as reliance place by the revenue in the case of Infosys Technologies Ltd.(supra) is concerned, it is noteworthy that in the aforesaid decision, the Supreme Court was dealing with a proceeding under section 201 of the Act for non-deduction of tax at source and it was held that there was no cash inflow to the employees. The aforesaid decision is of no assistance to decide the issue of allowability of expenses in the hands of the employer. It is also pertinent to mention here that in the decision rendered by the Supreme Court in the aforesaid case, the Assessment Years in question was 1997-98 to 1999-2000 and at that time, the Act did not contain any specific provisions to tax the benefits on ESOPs. Section 17(2)(iiia) was inserted by Finance Act, 1999 with effect from 1-4-2000. Therefore, it is evident that law recognizes a real benefit in the hands of the employees. For the aforementioned reasons, the decision rendered in the case of Infosys Technologies is of no assistance to the revenue. The decisions relied upon by the revenue

in A. Gajapathy Naidu,Morvi Industries Ltd. and Keshav Mills Ltd.(supra) support the case of assessee as the assessee has incurred a definite legal liability and on following the mercantile system of accounting, the discount on ESOPs has rightly been debited as expenditure in the books of account. We are in respectful agreement with the view taken in PVP Ventures Ltd. And Lemon Tree Hotels Ltd.'case (supra).

13. It is also pertinent to mention here that for Assessment Year 2009-10 onwards the Assessing Officer has permitted the deduction of ESOP expenses and in view of law laid down by Supreme Court in Radhasoami Satsang v. CIT, [1992] 60 Taxman 248/193 ITR 321, the revenue cannot be permitted to take a different stand with regard to the Assessment Year in question.

In view of preceding analysis, the substantial questions of law framed by a bench of this court are answered against the revenue and in favour of the assessee. In the result, we do not find any merit in this appeal, the same fails and is hereby dismissed."

11.6. In view of the above judgment whereby the decision of the Special Bench of the Tribunal allowed deduction of ESOP expenses under Section 37(1) of the Act stands confirmed by the Hon'ble High Court, we do not find any infirmity in the order passed by the CIT(A) allowing the claim for deduction of ESOP Expenses of INR 4,50,38,317/- under Section 37(1) of the Act. Accordingly, Ground No. 3(i) (ii) & (iii) raised by the Revenue are dismissed.

(Assessment Year 2012-13)

12. We will now take up cross-appeals for the Assessment Year 2012-13.

12.1. These cross-appeals arise from the common order, dated 28/06/2017, passed by the CIT(A) whereby the CIT(A) had partly allowed the appeal preferred by the Assessee against the Assessment Order, dated 28/04/2016, for the Assessment Year 2012-13 passed under Section 143(3) read with Section 144C(3) of

the Act.

12.2. The Assessee has raised the following grounds of appeal in ITA No. 5764/Mum/2017:

GROUND 1: TREATING THE CORPORATE GUARANTEE GIVEN AS AN INTERNATIONAL TRANSACTION UNDER SECTION 92B OF THE ACT.

1 On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in regarding the guarantee given by Appellant to its AE as an international transaction' under section 92B of the Act and in making an addition on account of notional guarantee fees.

2 The Ld CIT(A) failed to appreciate and ought to have held that

(i) The ultimate beneficiary of the loan was the Appellant itself while the AE, a company registered in Canada, AV Transworks Limited ('AVTL') was merely a route for availing the funds and investing in Canada, in pursuit of the Appellant's own objective of business expansion,

(ii) An international transaction would arise only when the foreign subsidiary defaults in making the payment of loan to the bank. Therefore, section 92(1) of the Act would,

primarily, not be applicable at all, till the guarantee is invoked.

(iii) Without prejudice to above, the AO/TPO and the Hon'ble CIT(A) erred in not accepting the contention of the Appellant that in no case the amount of guarantee fee commission shall exceed 0.236% as per the Guarantee Benchmarking report of an Independent Chartered Accountant

The Appellant prays that the AO/TPO be directed to delete the aforesaid addition amounting to Rs 2,73, 48,125/- or be directed to reduce the notional guarantee fee addition appropriately.

<u>GROUND 2: ADDITION ON ACCOUNT OF ARM'S LENGTH ADJUSTMENT TO INCOME FROM INTEREST ON LOANS ADVANCED TO AE'S:</u>

1 On the facts and in the circumstances of the case and in law, the CIT(A) erred in partly upholding the adjustment by AO/ TPO on account of notional interest charged on the loans

advanced to AEs on the alleged ground that it is not at arm's length price

2. *The Ld. CIT(A) failed to appreciate and ought to have held that:*

(i) *the Appellant had charged interest on the loans advanced to its AE's at the rate that was higher than the London Inter-Bank Borrowing Rate (LIBOR") and other international benchmarking rates which is used as the international standard for lending and borrowing of funds and considering the direct commercial interest of the Company no addition was justifiable on loan given to its AE*

(ii) *Benchmarking the loan transaction of JPY to AVTL Canada at LIBOR + 1% without appreciating the fact that it had borrowed loan from the DBS Bank Singapore a sum of loan of JPY 1983 4 Million JPY at Interest @ 0.85% and the same loan as per the standing instructions of the Appellant was transferred to its AE (AVTL Canada) by DBS Bank Singapore Appellant Company has levied a markup of 10% on the interest cost pertaining to JPY Loan for the purpose of voluntary adjustment which is at Arm's Length given the fact that the Appellant has not assumed any additional risk*

(iii) *Not appreciating that the Appellant had a direct commercial interest in the business of its AE and such loan was given with a view to safeguard the Appellant's business interest.*

2 *Therefore, the Appellant prays that Arm's length adjustment made by the TPO and to the extent upheld by CIT(A) be deleted.*

<u>GROUND 3: DISALLOWANCE OF PREMIUM PAID ARISING ON ACCOUNT OF REPAYMENT OF OPTIONALLY CONVERTIBLE DEBENTURES ISSUED TO ADITYA BIRLA NUVO LTD.</u> AMOUNTING TO RS. 12,35,78,287/-,

1 *On the facts and the circumstances of the case and in law, the Ld. CIT (A) erred in upholding the addition of Rs. 12,35,78,287/- on the ground that the accounting entry for premium has not been passed in the year under consideration*

2 *On the facts and the circumstances of the case and in law, the Ld. CIT (A) erred in upholding the addition on the ground that the transaction details were not verified by the AO since the Appellant had not filed the details.*

3 The Appellant prays that the AO/TPO be directed to delete the aforesaid addition amounting to Rs 14,37,11,341/

GROUND 4: TDS Credit

On the facts and circumstances of the case and in law, the AO, erred in granting the full credit of TDS. The AO may be directed to allow full credit as claimed by the Appellant in return of Income

GROUND 5: Penalty Proceedings

On the facts and circumstances of the case and in law, the AO erred in initiating the penalty proceedings.

GROUND 6: General

The Appellant craves leave to add, alter, amend, vary, omit substitute or withdraw the ground(s) of appeal at the time or before the hearing of this appeal.

12.3. The Revenue has raised the following grounds of appeal in ITA No. 5940/Mum/2017:

"1 Whether in law and on the facts of the instant case, was the CIT(A) justified in directing the AO/TPO to adopt 0.5% as the ALP of the guarantee commission charges provided by the assessee company without appreciating that the TPO had determine this ALP taking into consideration entity, country specific, currency risk and also considering the leveraged position taken by the company which had an impact on its working capital?

2. On the facts and in law the Ld. CIT(A) erred in directing the AO to delete the disallowance of interest and other expenses incurred for acquisition of share of a subsidiary company without appreciating the facts that acquisition of business by way of investing in to shares cannot be considered to be ordinary event of business and therefore, cannot be turned as expenditure incurred for the purpose of assessee's business.

3. a. On the facts and in the circumstances of the case, the Ld CIT(A), erred in not appreciating the fact that, the claim for

ESOP expenses was made for the first time in A.Y. 2010-11 in the return of income, which was disallowed by the assessee in the computation of income sou- moto, and the assessee has not made any revised claim of the ESOP expenses u/s 37(1), either before the AO or before the DRP. Hence, the issue was settled and agreed upon both by the assessee as well as the department in A.Y. 2010-11, itself that the assessee was not entitled to claim the said expenditure.

3b. On the facts, and in the circumstances of the case, the Ld CIT(A) erred in not appreciating the fact that, the assessee has adopted a colorable method to claim the ESOP expenses, by raising the claim of expenses before the AO and not through the return of income filed by it.

4. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in holding that 'Mark to Market' loss of Rs 7,15,92,175/- is not a notional loss, and therefore allowable.

5. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in allowing the delayed payments of employees' contribution to ESIC, amounting to Rs 23,30,594/-, relying upon the decision in CIT vs Hindustan Organics Chemicals Ltd. [2014] 366 ITR 1 (Bombay), without appreciating that the said decision has not been accepted by Revenue and SLP has been filed against the same

The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the AO be restored".

13. Both the sides agreed that the grounds raised in the above cross-appeals for the Assessment Year 2012-13 as well as the applicable facts are identical to the Assessment Year 2011-12. Therefore, our findings and adjudication in respect of grounds of appeal raised by the Assessee/Revenue for the Assessment Year 2011-12 shall apply mutatis mutandis to the corresponding grounds raised in the cross-appeals for the Assessment Year 2012-13.

Appeal by Assessee (ITA No. 5764/Mum/2017, AY 2012-13)

14. Keeping in view paragraph 13 above, we would first take grounds raised by the Assessee in the appeal.

Ground No. 1

15. Ground No. 1 raised by the Assessee is directed against the order of the CIT(A) confirming the order passed by the Assessing Officer holding that the providing corporate guarantee to AE constitutes an international transaction under Section 92B of the Act. On a without prejudice basis, the Assessee has further contended that even if it is assumed that providing corporate guarantee to AE constitutes an international transaction, the CIT(A) erred in determining guarantee fee rate at 0.5% as the same could not have been more than 0.263% as determined by the independent chartered accountant in the report furnished during the assessment proceedings.

15.1. Ground No. 1 raised in appeal for the Assessment Year 2012-13 by the Assessee is identical to Ground No. I & II raised in appeal by the Assessee for the Assessment Year 2011-12 which has been dismissed hereinabove. Accordingly, in view of our finding/adjudication in paragraph 4 to 4.10 above, Ground No. 1 raised by the Assessee is also dismissed.

Ground No. 2

16. Ground No. 2 raised by the Assessee is directed against the Transfer Pricing Adjustment of account of interest on loan to Associated Enterprises to the extent sustained by the CIT(A).

16.1. Ground No. 2 raised in appeal for the Assessment Year 2012-13 by the Assessee is identical to Ground No. III raised in appeal by the Assessee for the Assessment Year 2011-12 which has been dismissed hereinabove. Both sides agreed that the there is no

change in the facts and circumstances of the case. Accordingly, in view of our finding/adjudication in paragraph 5 to 5.8 above, Ground No. 2 raised by the Assessee is also dismissed.

Ground No. 3

17. Ground No. 3 raised by the Assessee for the Assessment Year 2012-13 is directed against the order of CIT(A) confirming the disallowance of deduction for proportionate premium of INR 12,35,78,287/- on redemption of optionally convertible debentures.

17.1. Ground No. 3 raised in appeal for the Assessment Year 2012-13 by the Assessee is identical to Ground No. V raised in appeal by the Assessee for the Assessment Year 2011-12 which has been dismissed hereinabove. Accordingly, in view of our finding/adjudication in paragraph 7 to 7.17 above, Ground No. 3 raised by the Assessee is also dismissed.

Ground No. 4

18. Ground No. 4 raised by the Assessee pertains to TDS Credit claimed by the Assessee in the return of income.

18.1. On perusal of order impugned, we find that the CIT(A) had directed the Assessing Officer to allow credit for tax deducted at source as per the provisions of the Act holding as under:

> *"13.1. I have considered the above, the contention raised by the Appellant through this ground of appeal is that of allowing credit of TDS, the AO is directed to allow credit of TDS in accordance with the provisions of the Income tax Act. …"*

18.2. In view of the above, Ground No. 4 raised by the Assessee is disposed off with the directions to the Assessing Officer to given effect of the order passed by the CIT(A) and grant credit of tax

deducted at source as per the provisions of the Act. Further, the Assessing Officer is directed to confront the Assessee and seek explanation before denying credit of tax deducted at source. In terms of the aforesaid, Ground No. 4 raised by the Assessee is allowed for statistical purposes.

Ground No. 5

19. Ground No. 5 raised by the Assessee is directed against the initiating the penalty proceedings. Penalty proceedings are separate and distinct from the assessment proceedings. In any case, the ground raised by the Assessee is premature, and is, therefore, dismissed.

Ground No. 6

20. Ground No. 6, being general in nature, does not required adjudication and is, therefore, dismissed.

Appeal by Revenue (ITA No. 5940/Mum/2017, AY 2012-13)

21. We would now take grounds raised by the Revenue in the appeal.

Ground No. 1

22. Ground No. 1 raised by the Revenue is directed against the order of CIT(A) adopting he arm's length rate of guarantee fee at the rate of 05% as against 2.5% adopted by the TPO/Assessing Officer.

22.1. Ground No.1 raised by the Revenue in appeal for the Assessment Year 2012-13 is identical to Ground No. 1 raised in appeal by the Revenue for the Assessment Year 2011-12 which has been dismissed hereinabove. Accordingly, in view of our finding/adjudication in paragraph 9 to 9.3 above, Ground No. 1

raised by the Revenue is dismissed.

Ground No. 2

23. Ground No. 2 raised by the Revenue is directed against the order of CIT(A) deleting the disallowance of INR 11,79,22,003/- made by the Assessing Officer under Section 36(1)(iii) of the Act in respect of the interest and other expenses incurred for acquisition of shares of a subsidiary company.

23.1. Ground No. 2 raised by the Revenue in appeal for the Assessment Year 2012-13 is identical to Ground No. 2 raised in appeal for the Assessment Year 2011-12 which has been dismissed hereinabove. Accordingly, in view of our finding/adjudication in paragraph 10 to 10.7 above, Ground No. 2 raised by the Revenue is dismissed.

Ground No. 3(a) & 3(b)

24. Ground No. 3(a) & 3(b) raised by the Revenue is directed against the order of CIT(A) accepting the claim of the Assessee pertaining deduction of Employee Stock Option Scheme (ESOP) expenses of INR 1,24,67,729/- which was rejected by the Assessing Officer.

24.1. Ground No. 3(a) & 3(b) raised by the Revenue in appeal for the Assessment Year 2012-13 by the Revenue is identical to Ground No. 3(i), 3(ii) & 3(iii) raised in appeal by the Revenue for the Assessment Year 2011-12 which have been dismissed hereinabove. Accordingly, in view of our finding/adjudication in paragraph 11 to 11.6 above, Ground No. 3(a) & 3(b) raised by the Revenue are dismissed.

Ground No. 4

25. Ground No. 4 raised by the Revenue is pertain to 'Mark to Market' loss of INR 7,15,92,175/-

25.1. The relevant facts in brief are that the Assessee had claimed deduction for foreign exchange loss of INR 7,15,92,175/- booked by the Assessee as 'Mark to Market' loss pertaining to forward contracts entered into by the Assessee for hedging the foreign exchange of risk in the course of export business. The Assessing Officer disallowed the same holding the same to be notional loss by placing reliance upon the Instruction No. 3 of 2010 dated 23/03/2010 issued by Central Board of Direct Taxes (CBDT).

25.2. In appeal preferred by the Assessee, the CIT(A) overturned the decision of the Assessing Officer and allowed the deduction for the above 'Mark to Market' loss of INR 7,15,92,175/- by placing reliance upon the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Woodward Governor India Private Limited: [SC] 312 ITR 254, decision of Special Bench of the Tribunal in the case of DCIT Vs. Bank of Bahrain & Kuwait : 41 SOT 290 (Mumbai Tribunal) (SB) and the decision of Mumbai Bench of the Tribunal in the case of ACIT-16(3) Vs. M/s Venus Jewel [ITA Nos. 7328 & 7239/Mum/2013, dated 31/07/2015].

25.3. Being aggrieved by the above relief granted by the CIT(A), the Revenue is now in appeal before us on this issue.

25.4. Both the sides reiterated the stands taken before the authorities below. The Ld. Departmental Representative placed reliance on paragraph 8.4 to 8.11 of the Assessment Order. Per contra, the Ld. Authorised Representative for the Assessee supported the order passed by the CIT(A) and, inter alia, submitted that the Assessing Officer has disallowed the loss claimed by the Assessee solely on the ground that it is 'notional' in nature by placing reliance upon CBDT Instruction No. 03/2010, dated 23/03/2010. The Assessing Officer

has not disputed the fact that the foreign exchange difference is on account of hedging of exposure to forex losses on account of exports, and in the absence of the Assessing Officer even alleging that the loss is speculative in nature, the loss cannot be disallowed as a normal business loss. Further, there is no allegation that the loss is on capital account. Therefore, the Assessing Officer was not justified in disallowance deduction for 'Mark to Market' loss a legitimate debit to the Profit & Loss Account as per the mercantile system of accounting regularly followed by the Assessee. Reliance was also placed on the judgments cited by the CIT(A) while allowing the claim of the Assessee and other judicial precedents including the decision of the Tribunal in the case of Deputy Commissioner of Income Tax, Circle 3(2), Hyderabad Vs. M/s Suven Life Sciences Ltd. [ITA No. 1222/Hyd/2016, dated 27/09/2017].

25.5. We have considered the rival submissions and perused the material on record. It is admitted position that for hedging the exposure against the risks of foreign exchange losses that may arise in the course of its export activities, the Assessee entered into forward contracts with bankers from time to time. The Assessee had claimed deduction for foreign exchange loss of INR 7,15,92,175/- booked by the Assessee as 'Mark to Market' loss. However, the Assessing Officer disallowed deduction for the same concluding as under:

> *"8.6 In the case of Badridas Gauridu Pvt. Ltd. 261 ITR 256, the Hon'ble Bombay High Court had decided this issue in the favour of the assessee, however, the said judgement of the Hon'ble Bombay High Court was delivered on 22.01.2003. It was in the year 2010, the CBDT came with Instruction No.3 of 2010 dated 23.03.2010. In the said circular, CBDT has held as under:*
>
> *"Marked to Market Losses'*

2. "Marked to Market" is in substance a methodology of assigning value to a position held in a financial instrument based on its market price on the closing day of the accounting or reporting record. Essentially, 'Marked to Market' is a concept under which financial instruments are valued at market rate so as to report their actual value on the reporting date. This is required from the point of view of transparent accounting practices for the benefit of the shareholders of the company and its other stakeholders. Where companies make such an adjustment through their Trading or Profit/Loss Account, they book a corresponding loss (i.e., the difference between the purchase price and the value as on the valuation date) in their accounts. This loss is a notional loss as no sale/conclusion/settlement of contract has taken place and the asset continues to be owned by the company.

A Marked to Market' loss may be given different accounting treatment by different assessees. Some may reflect such loss as a balance sheet item without making any corresponding adjustment in the Profit and Loss Account. Other may book the loss in the Profit and Loss Account which may result in the reduction of book profit. In cases where no sale or settlement has actually taken place and the loss on Marked to Market basis has resulted in reduction of book profits, such a notional loss would be contingent in nature and cannot be allowed to be set off against the taxable income. The same should therefore be added back for the purpose of computing the taxable income of an assessee."

25.6. On perusal of paragraph 8.6 of the Assessment Order reproduced hereinabove it becomes clear that the Assessing Officer was of the view that the issue under consideration was decided in favour of the Assessee by the judgment of the Hon'ble Bombay High Court in the case of Commissioner of Income-tax Vs. Badridas Gauridu Pvt. Ltd. : [2003] 261 ITR 256 (Bombay). However, in view of the Instruction No. 3 of 2010, dated 23/03/2010, issued by CBDT, the Assessing Officer concluded that the aforesaid judgment could not be followed and therefore, on the basis of Instruction No. 3 of 2010, the Assessing Officer disallowed the deduction for mark to market loss of INR 7,15,92,175/-. In our view, while Instruction No. 3 of 2010,

dated 23/03/2010, was binding upon the Assessing Officer, the same was not binding on the courts or this Tribunal. In this regard, it could be pertinent to the refer to the judgment of the Hyderabad Bench of the Tribunal in the case of M/s Suven Life Sciences Ltd. (supra) wherein the Tribunal had rejected the identical reasoning given by the Assessing Officer and allowed the claim of the Assessee for deduction of 'Mark to Market' losses holding as under:

> *"7. As regards Grounds of appeal 3 & 4, we find that this issue had arisen in the assessee's own case in the earlier A.Ys 2006-07 to 2009-10 and the Tribunal has considered the issue at length at Paras 21 to 28 and has held as under:*
>
> > *"21. According to the Revenue the 'marked to market loss' is only notional or contingent loss until the contract is settled and as per the ground of appeal raised by the Revenue, such derivative loss is not be allowed as it is against the CBDT Instruction No.3 of2010.*
> >
> > *22. The brief facts of the case relating to this issue are that the assessee had debited a derivative loss of Rs.50.35 lakhs under the head 'Finance Charges' to its profit and loss account. The assessee's explanation with regard to its above claim was called for. The assessee, vide its reply dated 12/9/2011, explained that the assessee had entered into Forward Currency exchange derivative Contracts to hedge the risk against foreign currency exchange fluctuations. Although the forward derivative contracts have not matured during the year 2008-09, the assessee company has recognized the 'mark to market loss' of Rs.50.35 lakhs on account of currency fluctuation as on 31.3.2009 and the same has been debited to the profit and loss account. The AO, thereafter considered the CBDT Instruction No.3 of 2010, wherein a clarification was issued regarding allowing or otherwise of the losses on forex derivatives. He observed that vide this instruction, it. was clarified that a 'mark to market loss' is only a notional loss until the contract is settled or matured and if in a particular year, a contract does not mature, then the derivatives loss has to be treated as a contingent liability and has to be added back to the book profit. He further observed that such a loss cannot be allowed to be set off against the taxable income under the normal provisions of the Act also and accordingly disallowed the same under both the*

normal provisions of the Act as well as book profits returned under clause (c) of Explanation 1 of section 115JB of the Income-tax Act.

23. *Aggrieved, the assessee preferred an appeal before the CIT(A) reiterating the submissions made before the AO. The CIT(A), taking - note of the decision of the Special Bench of the Tribunal in the case of DCIT V s. Bank of Bahrain and Kuwait in ITA No.4404 and 1883/Mum/2004 dated 19/8/2010 reported in [2010] 132 TTJ (Mum) (SB) 505,] [(2010) 41 SOT .290 (Mum) (SB)] held that the 'marked to market loss' debited by the assessee is not a contingent liability but is an 'accrued liability' and is, therefore, allowable as an expense.*

24. *Aggrieved by the relief given by the CIT (A), the Revenue is in appeal before us.*

25. *The learned DR placed reliance upon the order of the AO as well as the CBDT Instruction No.3 of 2010 dated 23.3.2010. The learned counsel for the assessee, on the other hand, supported the order of the CIT(A).*

26. *Having heard both the parties and having considered their rival contentions, we find that undisputedly, the assessee had entered into foreign exchange forward contract to hedge against risks of foreign exchange fluctuations and though the contract has not matured during the relevant financial year, in order to arrive at actual profits or loss to the assessee, it followed the Accounting Standard 11 and 31 issued by ICAI as notified by sec. 211(3C) of me Companies Act and had debited the loss on account of 'mark to market losses' as on the closing day of the accounts and claimed it as allowable as business loss. We find that Instruction No.3 of 2010 of CBDT has been reproduced by the CIT (A) at Para 7.4 of his order. As per this instruction, where no sale or settlement has actually taken place and the loss oil, contract has not matured, the loss on 'marked to market' basis has resulted in reduction of book profits, such a notional loss would be contingent in nature and cannot be allowed to be set off against the taxable income and should, therefore, be added back for the purpose of computing the taxable income of an assessee. No doubt, this instruction is clearly on the point and is binding on the assessing authority. However as rightly pointed out by the CIT(A) and as held by the Hon'ble Supreme Court in the case of Hero Cycle Pvt. Ltd., (cited Supra), such instructions are not binding on the*

assessees nor on the appellate authority, who are entitled to examine the issue on merits and arrive at their own conclusions. The Hon'ble Supreme Court in the case of Woodward Governor of India Pvt. Ltd., reported in 312 ITR 254, has held that the loss suffered by the assessee on account of fluctuation in the rate of foreign exchange as on the date of the balance sheet is an item of expenditure u/s 37(1) of the I.T. Act, 1961.

27. The decision of the Supreme Court has been followed by the Special Bench of ITAT in the case of Bank of Bahrain and Kuwait (cited Supra), a foreign bank carrying on business in India, which entered into forward contracts with its clients to buy or sell foreign exchange at an agreed price on a future date and in respect of contracts. Where the date of maturity fell beyond accounting period, the assessee valued the forward contracts on the last day of the accounting period on the basis of rate of foreign exchange prevailing on the date and accounted for the loss or profit as the case may be. The Special Bench has considered the question as to whether the loss was notional or contingent or whether it was accrued loss. After considering the commercial principles of policy of prudence, the Special Bench has held that the loss which is incurred on account of forward contract to sell currency at an agreed price at a future date falling beyond the last date of accounting period is a loss incurred by the assessee on account of the valuation of the contract on the last date of the accounting period and before the date of the maturity of the forward contract and hence is not a contingent liability but an accrued liability and is allowable as an expenditure. We find that the facts of the case before us are similar to the facts of the case before the Special Bench in the case of Bank of Bahrain and Kuwait (cited Supra) and the CIT(A) has only followed the decision of the Special Bench.

28. The learned DR had not been able to bring to our notice any other decision to the contrary. In view of the same, we do not see any reason to interfere with the order" of the CIT(A) and the Revenue's appeal for the assessment year 2009- 10 is also dismissed". (Emphasis Supplied)

8. Since the CIT(A) has only followed the precedent on the issue in the assessee's own case, we do not see any reason to interfere with her order. Thus, grounds of appeal Nos. 3 & 4 are rejected."

25.7. Same view has been taken by the Ahmadabad Bench of the Tribunal

in the case of Tribunal DCIT Vs Suzlon Energy Limited (ITA No. 2179/AHD/2013) which has been affirmed by the Hon'ble Gujarat High Court in PCIT Vs. Suzlon Energy Ltd. [reported in 120 Taxmann.com 459]. The relevant extract of the decision of the Tribunal in the aforesaid case reads as under:

"16. In ground no.2, the Assessing Officer has raised the following grievance :-

> *"2). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in allowing notional loss on account of foreign exchange fluctuation loss amounting to Rs.1,26,42,63,740/- claimed on account of Mark to Market basis."*

17. Learned Representatives fairly agree that this issue is squarely covered by a decision of the co-ordinate bench in assessee's own case for the assessment year 2008-09, and that the learned CIT(A) has also simply followed his order for the assessment year 2008-09 which stands reversed by the co-ordinate bench. While doing so, the co-ordinate bench has observed as follows:

> *"3. Briefly stated, the relevant material facts are like this. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has claimed foreign exchange loss of Rs 22,15,55,371. It was explained by the assessee that the assessee, with an export sale of Rs 2,796 crores in the said year and raw material imports of Rs 2,516.08 crores, was exposed to considerable foreign exchange fluctuation risk, and that the assessee, with a view to manage and control such risks, takes various steps such as use of derivatives, entering into foreign exchange contracts with bankers etc. It was also explained that in the case of forward contracts, the difference between the forward rate and the current rate, being premium or discount-as the case may be, is recognized as a revenue item over the life of the contact period, and any gains or losses on cancellation of such forward exchange contracts are also recognized on the same basis. It was then explained that as on the date of the*

closing of books, the assessee had some of these contacts, remaining to be settled in future by delivery of foreign exchange, and that the assessee had computed the loss, on the basis of foreign exchange rates as at the end of the year, on discharging these obligations. The amount so computed came to Rs 22,15,55,371. It was also explained that the assessee was maintaining its books on mercantile basis, and, therefore, even though the loss had not crystallized inasmuch as delivery was to take place in future and there may be variation in foreign exchange rates at that point of time, the loss was deductible under section 37(1). The assessee had also furnished the details of contracts and corresponding exports and imports obligations. It was also explained that the actual loss was Rs 119.65 crore, and not simply Rs 22.15 as was computed on the basis of foreign exchange rates as at the end of the year. Reliance was also placed on Hon'ble Supreme Court's judgment in the case of CIT Vs Woodward Governor India Pvt Ltd [(2009) 312 ITR 254 (SC)] in support of deductibility of this foreign exchange loss. None of these submissions, however, impressed the Assessing Officer. Relying upon CBDT Instruction No. 3 of 2010, the Assessing Officer proceeded to disallow this claim on the ground that the loss had not crystallized and the loss was only notional. Aggrieved, assessee carried the matter in appeal before the CIT(A) who deleted the said disallowance. While doing so, in a very well reasoned and analytical order, learned CIT(A) observed as follows:

> *I have carefully perused the assessment order and the submissions given by the appellant. It is to be seen as to whether the Appellant has satisfied the test laid down by the Supreme Court of India in the case of CIT Vs. Woodward Governor India (P) Ltd. [312 ITR 254 (SC)] to know whether the foreign exchange loss incurred during the year under consideration is allowable to the Appellant or not. Each of such condition laid down by the Apex Court is discussed hereunder:*
>
> > *Condition No.1 Whether the system of accounting followed by the assessee is mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due,*

immediately it becomes due and before it is actually received;

The Appellant is following mercantile system of accounting and that is in fact not denied by the Id. AO as per facts contained in assessment order.

Condition No.2 Whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bonafide;

As per facts on record, the appellant is following mercantile system of accounting from the beginning and there is no change in it.

Condition No.3 Whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it;

Yes. In fact in the year under consideration itself, the Appellant has earned foreign exchange income of Rs.27,95,89,730/- and incurred loss of Rs.50,11,45,101/-, and accordingly, the same treatment has been given both to the income as well as the expenditure. The detailed information about each of such transaction contained in paper book has been examined.

Condition No. 4 Whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains As per details on record, the Appellant has declared foreign exchange gain in the same year under appeal. The Appellant is consistent in making entries in the books in respect of losses as well as gains.

Condition No. 5 Whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards; The answer is affirmative as the Appellant is following Accounting Standard AS-II issued by the Institute of Chartered Accountants of India.

Condition No. 6 Whether- the system adopted by the assessee is fair and reasonable or is adopted only

with a view to reducing the incidence of taxation.

The system adopted by the Appellant is fair and reasonable and is not adopted with a view to reduce the incidence of taxation. In fact the Rule 115 of the Income Tax Rules provides that that all the assessee should; convert their foreign exchange assets into Indian Rupees on the last day of the previous year. In CIT vs. R. B. Construction 202 ITR 222 (AP)(FB), it has been held that if rule is not considered, the decision becomes per incuram. In as much as the Appellant has followed the accounting treatment which is in conformity with Accounting Standard 11 issued by the ICAI. Various authorities have held that while determining allowability of an expenditure, accounting standard has a great persuasive value: Challapalli Sugars Ltd. Vs. CIT (1975) [98 I.T.R. 167 (SC)]. Further following authorities have held that foreign exchange fluctuation loss suffered on account of circulating capital or revenue account should be treated as revenue expenditure in the year in which the devaluation takes place when the method of accounting followed is mercantile.

- *116 ITR 1 (SC)*
- *154 ITR 460 (Cal)*
- *90 ITR 323 (Ker)*
- *97 ITD 125 (Ahd) (TM) @ 151 para 8.28*

Accordingly, this itself establishes that the Appellant has adopted the system of accounting which is fair and reasonable and supported by the Accounting Standard AS -11, Rule 115 and various authorities and not adopted to avoid incidence of income tax. And in any case, as submitted by the Appellant, in the same assessment year under appeal before Your Honour, the Appellant has earned foreign exchange gain which has been offered for taxation, which itself shows that the system adopted by the Appellant is consistent, fair and reasonable. In view of the above facts and the fact the issue is covered by the decision of Supreme Court in the case of Woodward Governor India (P) Ltd. reported in 312 ITR 254, the ground of appeal is allowed."

4. The Assessing Officer is aggrieved of the relief so

granted by the CIT(A) and is in appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

6. It is one of the most fundamental principles of accounting that while all anticipated losses are taken into account in computing the profits and losses of business, even though such losses may not have crystallized, as long as these losses can be reasonably quantified. This approach can be contrasted with the anticipated profits being ignored, in the computation of profits and losses of an enterprise, unless the profits are actually realized. To that extent, there is a dichotomy in accounting approach but then this is what is the sound accounting policy and it has the sanction of law. As a matter of fact, it is this principle, as recognized by Hon'ble Supreme Court in the case of Chainrup Sampatram Vs CIT [(1953) 24 ITR 481 (SC)], which explains the valuation of closing stock on market price or cost price whichever is less. There is thus, in principle, no difficulty is seeking a deduction in respect of a reasonably anticipated loss, even though it may not have actually fructified, in computation of profits and gains of business. To this extent, the Assessing Officer was clearly in error in treating the loss on foreign exchange as a notional loss not deductible in computation of business income. On the facts of the present case, however, not only anticipated losses have been claimed as deduction but anticipated profits have been offered to tax. The gains have been offered to tax on the basis of assessee's following mandatory accounting standards, and on the basis of same accounting standards losses on forward contracts have been recognized too. The claim of deduction of Rs 22.15 crores represents the difference between total foreign exchange loss of Rs 50.11 crores as at the year end date and foreign exchange gains of Rs 27.95 crore as at the year end date. What has been done by the Assessing Officer to take into account gains on such contracts but ignore the cases in which losses are computed in respect of the forward contracts. It is against this approach that the assessee had raised the grievance.

7. In the case of Woodward Governor (supra), the issue regarding deductibility of foreign exchange loss came up for consideration before Hon'ble Supreme Court and there was similar inconsistency in treatment to losses and gains on the forward contracts. Their Lordships, dealing with this issue and holding that such a loss will be deductible in computation of business profits, observed as follows:

> *"[xx*
>
> *13. As stated above, one of the main arguments advanced by the learned Addl. Solicitor General on behalf of the Department before us was that the word "expenditure" in s. 37(1) connotes "what is paid out" and that which has gone irretrievably. In this connection, heavy reliance was placed on the judgment of this Court in the case of Indian Molasses Company (supra). Relying on the said judgment, it was sought to be argued that the increase in liability at any point of time prior to the date of payment cannot be said to have gone irretrievably as it can always come back. According to the learned counsel, in the case of increase in liability due to foreign exchange fluctuations, if there is a revaluation of the rupee vis-à-vis foreign exchange at or prior to the point of payment, then there would be no question of money having gone irretrievably and consequently, the requirement of "expenditure" is not met. Consequently, the additional liability arising on account of fluctuation in the rate of foreign exchange was merely a contingent/notional liability which does not crystallize till payment. In that case, the Supreme Court was considering the meaning of the expression "expenditure incurred" while dealing with the question as to whether there was a distinction between the actual liability in praesenti and a liability de futuro. The word "expenditure" is not defined in the 1961 Act. The word "expenditure" is, therefore, required to be understood in the context in which it is used. Sec. 37 enjoins that any expenditure not being expenditure of the nature described in ss. 30 to 36 laid out or expended wholly and exclusively for the purposes of the business should be allowed in computing the income chargeable under the head "Profits and gains of business". In ss. 30 to 36, the expressions*

"expenses incurred" as well as "allowances and depreciation" has also been used. For example, depreciation and allowances are dealt with in s. 32. Therefore, Parliament has used the expression "any expenditure" in s. 37 to cover both. Therefore, the expression "expenditure" as used in s. 37 may, in the circumstances of a particular case, cover an amount which is really a "loss" even though the said amount has not gone out from the pocket of the assessee.

14. xx xx

15. For the reasons given hereinabove, we hold that, in the present case, the "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure under s. 37(1) of the 1961 Act]

16…….it is clear that profits and gains of the previous year are required to be computed in accordance with the relevant Accounting Standard. It is important to bear in mind that the basis on which stock-in-trade is valued is part of the method of accounting. It is well established, that, on general principles of commercial accounting, in the P&L account, the values of the stock-in-trade at the beginning and at the end of the accounting year should be entered at cost or market value, whichever is lower- the market value being ascertained as on the last date of the accounting year and not as on any intermediate date between the commencement and the closing of the year, failing which it would not be possible to ascertain the true and correct state of affairs. No gain or profit can arise until a balance is struck between the cost of acquisition and the proceeds of sale. The word "profit" implies a comparison between the state of business at two specific dates, usually separated by an interval of twelve months. Stock-in-trade is an asset. It is a trading asset. Therefore, the concept of profit and gains made by business during the year can only materialize when a comparison of the assets of the business at two different dates is taken into account. Sec. 145(1) enacts that for the purpose of s. 28 and s. 56 alone, income, profits and gains must be computed in accordance with the method of accounting regularly employed by the assessee. In

this case, we are concerned with s. 28. Therefore, s. 145(1) is attracted to the facts of the present case. Under the mercantile system of accounting, what is due is brought into credit before it is actually received; it brings into debit an expenditure for which a legal liability has been incurred before it is actually disbursed. (See judgment of this Court in the case of United Commercial Bank vs. CIT (1999) 156 CTR (SC) 380 : (1999) 240 ITR 355 (SC). Therefore, the accounting method followed by an assessee continuously for a given period of time needs to be presumed to be correct till the AO comes to the conclusion for reasons to be given that the system does not reflect true and correct profits. As stated, there is no finding given by the AO on the correctness of the Accounting Standard followed by the assessee(s) in this batch of civil appeals.

17. Having come to the conclusion that valuation is a part of the accounting system and having come to the conclusion that business losses are deductible under s. 37(1) on the basis of ordinary principles of commercial accounting and having come to the conclusion that the Central Government has made Accounting Standard-11 mandatory, we are now required to examine the said Accounting Standard ("AS").

18. AS-11 deals with giving of accounting treatment for the effects of changes in foreign exchange rates. AS-11 deals with effects of exchange differences. Under para 2, reporting currency is defined to mean the currency used in presenting the financial statements. Similarly, the words "monetary items" are defined to mean money held and assets and liabilities to be received or paid in fixed amounts, e.g., cash, receivables and payables. The word "paid" is defined under s. 43(2). This has been discussed earlier. Similarly, it is important to note that foreign currency notes, balance in bank accounts denominated in a foreign currency, and receivables/payables and loans denominated in a foreign currency as well as sundry creditors are all monetary items which have to be valued at the closing rate under AS-11. Under para 5, a transaction in a foreign currency has to be recorded in the reporting currency by applying to the foreign currency

amount the exchange rate between the reporting currency and the foreign currency at the date of the transaction. This is known as recording of transaction on initial recognition. Para 7 of AS-11 deals with reporting of the effects of changes in exchange rates subsequent to initial recognition. Para 7(a) inter alia states that on each balance sheet date monetary items, enumerated above, denominated in a foreign currency should be reported using the closing rate. In case of revenue items falling under s. 37(1), para 9 of AS-11 which deals with recognition of exchange differences, needs to be considered. Under that para, exchange differences arising on foreign currency transactions have to be recognized as income or as expense in the period in which they arise, except as stated in para 10 and para 11 which deals with exchange differences arising on repayment of liabilities incurred for the purpose of acquiring fixed assets, which topic falls under s. 43A of the 1961 Act. At this stage, we are concerned only with para 9 which deals with revenue items. Para 9 of AS-11 recognises exchange differences as income or expense. In cases where, e.g., the rate of dollar rises vis-a-vis the Indian rupee, there is an expense during that period. The important point to be noted is that AS-11 stipulates effect of changes in exchange rate vis-a-vis monetary items denominated in a foreign currency to be taken into account for giving accounting treatment on the balance sheet date. Therefore, an enterprise has to report the outstanding liability relating to import of raw materials using closing rate of exchange. Any difference, loss or gain, arising on conversion of the said liability at the closing rate, should be recognized in the P&L account for the reporting period."

8. In the present case also, the assessee is consistently following the mercantile method of accounting, the same accounting treatment for the foreign exchange losses and gains has been given by the assessee all along, the assessee is making entries in respect of such losses and gains, and the treatment is consistent with the Accounting Standards. As a matter of fact, the Assessing Officer has not even raised any issues with respect to the above. His case is confined to the loss being notional in nature and contrary to the CBDT guidelines. As for the CBDT instructions, it is only elementary that any instructions issued by the CBDT cannot

bind the assessee even though the assessee is entitled to, and can legitimately ask for, any benefits granted to the assessee by such instructions or circulars. Nothing, therefore, turns on the CBDT instruction even if it is actually contrary to the claim of the assessee.

9. We have also noted that, as per the details filed by the assessee, the foreign exchange contracts have been entered into for genuinely restricting its bonafide risk exposure of the assessee in respect of its exports and imports transactions. These contracts cannot, therefore, be viewed on a standalone basis as speculative transactions. These transactions are integral part of the business transactions and any loss or gains arising from these transactions, for the detailed reasons set out above, are deductible in computation of profits and gains of business.

10. In view of the above discussions, we uphold the action of the CIT(A) so far as this relief in respect of deleting the disallowance of Rs 22,15,55,371 on account of loss, at the end of the year, on foreign exchange contracts. We confirm the same and decline to interfere in the matter.

11. Ground no.1 is thus dismissed."

18. Respectfully following the views so expressed by the co-ordinate bench, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

19. Ground no.2 is thus dismissed." (Emphasis Supplied)

25.8. Further in the case of PCIT Vs. International Gold Company Ltd.: Income Tax Appeal No. 1827 of 2016) the Hon'ble Bombay High Court has declined to frame substantial question of law in the appeal preferred by Revenue holding as under:

"2 The Revenue urges the following question of law for our consideration:

"Whether on the facts and in the circumstance of the case and in law, the Tribunal failed to appreciate that

loss due to revaluation of forward exchange contracts being mark to market loss was only notional and contingent in nature, and therefore, cannot be set off against taxable income as per CBDT instruction 03/2010 dated 23.03.2010?"

3. It is an agreed position between the parties that the issue raised herein stands concluded against the Appellant-Revenue by the decision of this Court in CIT v/s. M/s. D. Chetan & Co., (ITXA No. 278 of 2014) dated 1st October, 2016.

4. *However, …….learned Counsel for the Revenue states that in view of the Instruction No.3 of 2010 dated 23rd March, 2010, the issued by the CBDT contend that, loss in such case is notional and contingent in nature and same should be added but for the purpose of computing taxable income. The aforesaid submission was the basis of the order of the Assessing Officer and not accepted by this Court in M/s. D. Chetan & Co., (supra). Therefore, the above Circular/ Instruction would not have any application in the face of the decision of this Court in M/s. D.Chetan &Co., (supra).*

5. *In the above view, the question as proposed, does not give rise to any substantial question of law. Thus, not entertained.*

6. *Accordingly, Appeal dismissed. No order as to costs."*

25.9. In view of the above judicial precedents, we do not find any infirmity in the order passed by the CIT(A) allowing deduction of mark to market losses of INR 7,15,92,175/-. Ground No. 4 raised by the Revenue is, therefore, dismissed.

Ground No. 5

26. Ground No. 5 raised by the Revenue is directed against the order of CIT(A) allowing deduction for delayed payments of employees' contribution to ESIC made after the expiry of the time specified in the applicable statute but before the filing of tax return under Section 139(1) of the Act.

26.1. This issue is no longer res integra and stands decided against the Assessee and in favour of the Revenue by the judgment of the

Hon'ble Supreme Court in the case Checkmate Services Private Ltd. v. CIT-1:[2022] 448 ITR 518 (SC)[12-10-2022], wherein the Hon'ble Supreme Court has held that where an assessee failed to deposit Employees' Contribution towards Provident Fund and Employees' State Insurance within due date prescribed in respective statutes, deduction under Section 36(1)(va) of the Act was not allowable. The non-obstante clause contained in Section 43B of the Act would not apply in the case of employees' contribution held in trust by assessee-employer. Therefore, such assessee-employer would not be absolved from the liability to deposit employees' contribution on or before the due date specified in the respective statutes as a pre-condition for claiming deduction under Section 36(1)(va) of the Act.

26.2. In view of the above, order of CIT(A) is overturned and the disallowance of INR 23,30,594/- made by the Assessing Officer is restored. Ground No. 5 raised by the Revenue is allowed.

Assessment Year 2013-14

27. We will now take up appeals preferred by the Revenue for the Assessment Year 2013-14 which arises from the common order, dated 28/06/2019, passed by the CIT(A) whereby the CIT(A) had partly allowed the appeal preferred by the Assessee against the Assessment Order, dated 30/12/2016, for the Assessment Year 2013-14 passed under Section 143(3) of the Act.

27.1. The Revenue has raised the following grounds of appeal in ITA No. 5283/Mum/2019:

1. *"On the facts and circumstances of the case and in law, whether the Ld. CIT(A) has erred in holding that 'Mark to*

Market' loss of Rs. 89,59,018/- is not a notional loss, and therefore allowable?

2. *On the facts and circumstances of the case and in law, whether the Ld. CIT(A) has erred in allowing MTM losses of Rs. 4,06,80,762/- pertaining to AY 2012-13*

3. *On the facts and in the circumstances of the case, whether the Ld. CIT(A) has erred in not appreciating the fact that the claim for ESOP expenses was made for the first time in AY 2010-11 in the return of income which was disallowed by the assessee in the computation of income suo-motto, and the assessee has not made any revised claim of the ESOP expense u/s. 37(1), either before the AO or before the DRP. Hence, the issue was settled and agreed upon both by the assessee as well as the Department in AY 2010-11 itself that the assessee was not entitled to claim the said expenditure.*

4. *On the facts, and in the circumstances of the case, whether the Ld. CIT (A) has erred in not appreciating the fact that, the assessee has adopted a colorable method to claim the ESOP expenses, by raising the claim of expenses before the AO and not through the return of income filed by it?*

5 *On the facts and circumstances of the case and in law whether the Ld. CIT(A) has erred in allowing the claim of deduction of the appellant u/s. 37 of the Act to the tune of Rs. 12,32,40,642/- without appreciating the same issue was decided in the favour of Revenue for AY 2012-13 in appellant's own case?*

6 *On the facts and circumstances of the case and in law whether the Ld. CIT(A) has erred by ignoring the decision of the Hon'ble Apex Court in the case of Goetze (India) Ltd. Vs. CIT(2006) 284 ITR 323 (SC) wherein the Apex Court has held that the new claim cannot be accepted in the course of assessment proceedings?*"

28. For the Assessment Year 2013-14 also, both the sides agreed that the grounds raised by the Revenue in the above appeal for the Assessment Year 2013-14 as well as the applicable facts are identical to the appeal preferred by the Revenue for the Assessment

Year 2011-12. Therefore, our findings and adjudication in respect of grounds of appeal raised by the Revenue for the Assessment Year 2011-12 shall apply mutatis mutandis to the corresponding grounds raised in the Revenue in appeal for the Assessment Year 2013-14.

29. Keeping in view paragraph 25 above, the grounds raised by the Revenue in the appeal are taken up hereinafter in seriatim.

Ground No. 1

29.1. Ground No. 1 raised by the Revenue is directed against the CIT(A) holding that 'Mark to Market' loss of INR 89,59,018/-.

29.2. Ground No. 1 raised in appeal for the Assessment Year 2013-14 by the Revenue is identical to Ground No. 4 raised in appeal by the Revenue for the Assessment Year 2012-13 which has been dismissed herein above. Accordingly, in view of our finding/adjudication in paragraph 25 to 25.9 above. Ground No. 1 raised by the Revenue is dismissed.

Ground No. 2

30. Ground No. 2 raised by the Revenue pertains to 'Mark to Market' losses of INR 4,06,80,762/- pertaining to Assessment Year 2012-13 which was reversed during the Assessment Year 2013-14.

31. During the assessment proceedings, the Assessee had claimed that since deduction for Mark to Market Loss was not allowed during the Assessment Year 2012-13, the reversal of Mark to Market Loss of INR 4,06,80,762/- should not be excluded from the income of the Assessee. However, the Assessing Officer denied the claim of the Assessee on the ground that the issue of disallowance of Mark to Market Losses for the Assessment Year 2012-13 was pending

adjudication before the CIT(A) and had not attained finality.

31.1. In appeal preferred by the Assessee, the CIT(A) directed the Assessing Officer to reduce the amount of Mark to Market Losses pertaining to Assessment Year 2012-13 recording as under:

> *"11. Decision*
>
> *I have gone through the appellant's submission. The appellant has contended that though CIT(A) has allowed the appellant's appeal in 2012-13 but as the department has gone in appeal before ITAT and if ITAT gives the decision in favour of appellant then the amount of MTM loss written back in current year should be excluded from the taxable income. I find the appellant's contention is correct. Hence AO is directed to allow the MTM loss. This ground of appeal is allowed subject to above observation."*

31.2. The Revenue is now in appeal before us.

31.3. We have heard the rival contention and perused the material on record. In appeal for the Assessment Year 2012-13, we have confirmed the order of the CIT(A) allowing deduction for Mark to Market Loss claimed by the Assessee, therefore, the reversal of such Mark to Market Losses or part thereof during the Assessment Year 2013-14, is to be treated as income of the Assessee and therefore, the same is not required to be excluded. Accordingly, the order passed by the CIT(A) is overturned and the Assessing Officer is directed not to exclude right back up Mark to Market Losses of INR 4,06,80,762/- made by the Assessee during the Assessment Year 2013-14. Accordingly, Ground No. 2 raised by the Revenue is allowed.

Ground No. 3 & 4

32. Ground No. 3 & 4 raised by the Revenue are directed against the

order of CIT(A) accepting the claim of the Assessee pertaining deduction of Employee Stock Option Scheme (ESOP) expenses of INR 2,38,24,000/- which was rejected by the Assessing Officer.

32.1. Ground No. 3 & 4 raised by the Revenue in appeal for the Assessment Year 2013-14 by the Revenue are identical to Ground No. 3(i), 3(ii) & 3(iii) raised in appeal by the Revenue for the Assessment Year 2011-12 which have been dismissed hereinabove. Accordingly, in view of our finding/adjudication in paragraph 11 to 11.6 above, Ground No. 3 & 4 raised by the Revenue are dismissed.

Ground No. 5 & 6

33. Ground No. 5 & 6 raised by the Revenue in appeal for the Assessment Year 2013-14 is directed against the order of CIT(A) allowing. deduction for proportionate premium of INR 12,32,40,462/- on redemption of optionally convertible debentures.

33.1. Ground No. 5 raised by the Revenue is in appeal for the Assessment Year 2013-14 deals with identical issue raised by the Assessee in Ground No. V of the appeal for the Assessment Year 2011-12 and Ground No. 3 raised in appeal for the Assessment Year 2012-13. For Assessment Year 2011-12 and 2012-13, the CIT(A) had confirmed the order of the Assessing Officer whereby the Assessing Officer had disallowed deduction for proportionate premium on redemption of optionally convertible debentures, whereas for the Assessment Year 2013-14, the CIT(A) has allowed Assessee's claim for deduction for proportionate premium of INR 12,32,40,462/- on redemption of optionally convertible debentures. While adjudicating Ground No. V and Ground No. 3 in the appeals preferred by the Assessee for the Assessment Year 2011-12 and 2012-13, we have decided this issue

against the Assessee and in favour of the Revenue. Admittedly, there is no change in the facts and circumstances of the case, accordingly for the Assessment Year 2013-14 also we decide the issue in favour of the Revenue and against the Assessee. Accordingly, in view of the paragraph 7 to 7.17 above, the order passed by the CIT(A) allowing Assessee's claim for deduction for proportionate premium of INR 12,32,40,462/- on redemption of optionally convertible debentures is overturned the claim of the Assessee is rejected. Thus, Ground No. 5 raised by the Revenue is allowed.

33.2. As regards Ground No. 6 raised by the Revenue is concerned we find that the CIT(A) had admitted the additional claim of the Assessee by placing reliance upon the judgment of the Hon'ble Bombay High Court in the case of CIT Vs. Pruthvi Brokers & Shareholders Pvt. Ltd. : 349 ITR 366 wherein after considering the judgment of the Hon'ble Supreme Court in the case of Goetze India Ltd. Vs. CIT [2006] 284 ITR 323 (SC) it was, inter alia, held that the first appellate authorities was entitled to entertain and adjudicate even a new claim raised by the Assessee for the first time before the first appellate authority. Accordingly, we do not find any infirmity in the order passed by the CIT(A). Therefore, Ground No. 6 raised by the Revenue is dismissed.

34. Thus, in result (a) For Assessment Year 2011-12 - the Appeal by the Assessee (ITA No. 5260/Mum/2017) is dismissed, while cross appeal preferred by Revenue (ITA No. 5280/Mum/2017) is dismissed; (b) For Assessment Year 2012-13 - the Appeal by the Assessee (ITA No. 5764/Mum/2017) is partly allowed while cross appeal preferred by Revenue (ITA No. 5940/Mum/2017) is partly

allowed and (c) For Assessment Year 2013-14 - the appeal by the Revenue (ITA No. 5823/Mum/2019) is partly allowed.

Order pronounced on 18.10.2023.

Sd/-	***Sd/-***
(S. Rifaur Rahman)	**(Rahul Chaudhary)**
Accountant Member	**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 18.10.2023
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai