IN THE INCOME-TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER
&
SMT. RENU JAUHRI, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No. 6715/MUM/2024**

(निर्धारण वर्ष / Assessment Year :2009-10)

DCIT-1(3)(1), Mumbai Room No. 540, 5th Floor, Aayakar Bhavan, M. K. Road, Churchgate, Mumbai-400020	v/s. बनाम	Diebold Nixdorf India Pvt. Ltd. 17th Floor, Romell Tech Park, North Side, IT Building No. 2, Nirlon Compound, Village Pahadi, Goregaon East, Maharashtra-400063
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACD3206C		
Appellant/अपीलार्थी	··	**Respondent/प्रतिवादी**

निर्धारिती **की ओर से** /Assessee by:	Shri Nikhil Tiwari
राजस्व **की ओर से** /Revenue by:	Shri R. R. Makwana

सुनवाई की तारीख / **Date of Hearing**	12.02.2025
घोषणा की तारीख/**Date of Pronouncement**	10.03.2025

आदेश / O R D E R

PER RENU JAUHRI [A.M.] :-

This appeal is filed by the assessee against the order of the Learned Commissioner of Income-tax (Appeals), Mumbai-56/ [hereinafter referred to as "CIT(A)"] dated 24.09.2024 passed u/s. 250 of the Income-tax Act, 1961 [hereinafter referred to as "Act"] for Assessment Year [A.Y.] 2009-10.

2. The assessee has raised the following grounds of appeal:

> *"(1) Whether on the facts and circumstances of the case & in law, the learned CIT(A) has erred in allowing Foreign Exchange Loss amounting to Rs. 17,28,23,000/- under section 37(1) read with section 93 of the Income Tax Act, 1961.*
> *(ii) Whether on the facts and circumstances of the case & in law, the learned CIT(A) has erred in allowing a sum of Rs. 19,11,951/- towards interest on delayed payments of Sales Tax and Service Tax."*

3. Ground No. 1 relates to allowing the claim of Foreign Exchange Loss u/s 37(1) r.w.s. 93 of the Act – Rs. 17,28,23,000/-

3.1 Brief facts of the case are that the assessee is a company engaged in the business of supply and installation of ATMs. Return for AY 2009-10 was filed on 29.09.2009 declaring a total income of Rs. 15,56,06,400/-. The case was selected for scrutiny and reference u/s 92(CA)(1) of the Act was made to the Transfer Pricing Officer [TPO] for determination of the Arm's Length Price [ALP] in respect of the international transactions entered into by the assessee with its Associate Enterprises [AE]. Vide order dated 31.12.2012, Ld. TPO held that no adjustment was required to the value of international transactions entered by the assessee. Thereafter, the assessment was completed u/s 143(3) of the Act under which a disallowance of foreign exchange loss of the tune of Rs. 17,28,23,000/- u/s 37(1) was made by the Ld. AO.

3.2 Aggrieved with the order of Ld. AO, the assessee preferred an appeal before Ld. CIT(A). Vide order dated 24.09.2024, Ld. CIT(A) allowed the assessee's appeal.

Aggrieved with the order of Ld. CIT(A), the revenue is in appeal before the Tribunal.

3.3 Before us, Ld. DR heavily relied on the order of Ld. AO and has pointed out that the outstanding balance to M/s Diebold Inc. (US) remained unpaid since FY 2003-04, and therefore, it lost its character as a credit and attained the character of a loan. Accordingly, the loss on account of change in forex rates is capital in nature and cannot be allowed as a revenue loss. It was submitted that the assessee held back the funds and did not repay the trading debt in time, as a result of which the outstanding debt rose to Rs. 1,06,86,08,000/- due to the escalation of the value of USD vis-a-vis INR. Ld. DR has further pointed out that under the RBI policy, such payment cannot be held back beyond a maximum period of 3 years without the permission of the governing body of RBI. However, the assessee has not obtained any such permission from the RBI, and therefore, the expenditure incurred is in contravention of legal provisions and is, therefore, not allowable as per the explanation to section 37(1) of the Act.

3.4 On the other hand, Ld. AR has strongly relied on the order of Ld. CIT(A). It has been argued that the decision of the Ld. CIT(A) is well reasoned with due appreciation of the facts of the case. He arrived at the conclusion after taking into consideration all aspects of the matter. Ld. CIT(A)'s observations in this regard are reproduced below:

"6.1.1 The Appellant's transactions with Diebold Inc indicate a pattern of ongoing business interactions, which supports the claim that the liabilities were for legitimate trade activities. The losses reflect bona fide business activity and meet the legal criteria for deductions as the underlying business expense is itself allowed as deduction.

6.1.2 During the year under consideration, the Appellant has followed the Accounting Standards (AS) 11, which stipulates that the effect of changes in exchange rates of items denominated in a foreign currency is to be taken into account for giving accounting treatment on the balance sheet date. AS 11 has been consistently followed by the Appellant while preparing its financial statements for each year. The conditions for realization and repatriation of import proceeds under the Master Direction - Import of Goods and Services do not prohibit payments for import beyond three years and the same has been allowed to the Appellant by the AD bank. The outstanding amount to Diebold Inc, where payment is delayed beyond the timelines prescribed under FEMA, does not represent an 'offence' or is not 'prohibited". Consequently, the foreign exchange loss on restatement of liability payable to Diebold Inc is not related to a any transaction that constitutes an offence, is prohibited, or is in itself an offence or prohibited.

6.1.3 Further. The Reserve Bank of India's guidelines under FEMAregarding payment of trading liability within the timelines have no applicability for construing the provisions of the Act and do not override the provisions of the Act. The Appellant has remitted funds through The Royal Bank of Scotland to Diebold Inc during subsequent period solely as trade credits, without any reclassification made to External Commercial Borrowings (ECB) by the banker. Hence, the AO's recharacterization of these obligations as loans is not sustainable. Section 37(1) does not mandate the expense to be actually paid to be allowed as a deduction. The Appellant employs the mercantile system of accounting and has rightfully recognized losses when they occur. The contention of the AO that such foreign exchange loss should be allowed as a deduction at the time of payment of the underlying expense (purchase of goods from Diebold Inc) is incorrect and in clear violation of the accrual method of accounting. Any unrealized foreign exchange fluctuation gain earned in previous years has been duly offered to tax by the Appellant. Accordingly, the unrealized foreign exchange fluctuation loss should also be allowed as a deduction under Section 37(1) of the Act, as per the Hon'ble Supreme Court ruling in the case of Woodward Governor.

6.1.4 The Appellant had both outstanding trade payables due to and trade receivables due from Diebold Inc during the year. The Appellant submits that any unrealized foreign exchange gain on such trade receivables have been offered to tax. The Appellant submits that income earned by Diebold Inc from sale of ATM and other goods is not taxable in India as per India-US tax treaty. Hence, the effect of unrealized foreign exchange loss is restricted to the financial statements of the Appellant as the primary transaction (sales to Appellant by Diebold Inc) and consequent foreign exchange treatment is not taxable in hands of Diebold Inc in India. The reference and observations made by the AO under Sections 92 and 93 of the Act are unwarranted given that a clean order has been passed by the TPO. The balance outstanding to Diebold Inc towards unpaid trade payables cannot be considered as a loan for the purpose of Section 93(1)(b) of the Act as there is no transfer of asset to non-resident. Therefore, the provisions of Section 93 of the Act are not applicable in the present case.

6.1.5 Not the entire balance of trade payables outstanding to Diebold Inc during the current year was due for more than 3 years. There have been consistent purchases made from Diebold Inc on a year-on-year basis. Hence, contention of AO that the Appellant has withheld payments for more than a decade is an incorrect fact. In light of the above findings and in accordance with the judicial precedents, the entire amount of unrealized foreign exchange fluctuation loss on restatement of outstanding liabilities to Diebold Inc is an allowable deduction under Section 37(1) of the Act. Accordingly, this ground of the appeal is allowed."

Ld. AR further pointed out that in some of the earlier years, the assessee has earned income on account of foreign exchange fluctuation gain which had been offered for tax. In fact, for AY 2010-11, this issue was considered by the co-ordinate bench in ITA No. 6135/Mum/2024 wherein the issue of taxability of unrealised foreign exchange fluctuation gain amounting to Rs. 9,67,06,326/- was considered. In the return of income filed for AY 2010-11, the assessee had offered this amount as income and the assessment was completed after accepting income offered by the assessee. However, for AYs 2009-10, 2014-15 & 2016-17, the assessee incurred a loss on account of fluctuation in the rate of foreign exchange in respect of similar payments to be made to the overseas AE, but the loss claimed by the assessee was not accepted by the AO. Accordingly in the appeal for AY 2010-11 before Ld. CIT(A), the assessee raised an additional ground claiming that in case the department does not allow the loss on account of fluctuation in foreign exchange rate for these years, then the gain on similar transactions should be treated as income. Accordingly, the foreign exchange fluctuation gain offered as income in AY 2010-11 was sought to be withdrawn at

the stage of first appellate authority. In the appeal before the co-ordinate bench, the following observations were made on the issue:

> *"12. Having considered rival submissions, we find, the assessee has consistently followed a Revenue recognition method, under which the gain/loss arising on account of foreign exchange fluctuation has been treated as 'revenue in nature'. Therefore, wherever gain arose, the assessee offered it as 'income' and wherever there was loss, the assessee has claimed the loss. Following such revenue recognition principle, the assessee has offered the gain as 'income' in the impugned assessment year. Therefore, in our view, since the offer of gain as income is consistent with the accounting principle regularly followed by the assessee, claim of withdrawal of such income cannot be accepted. If assessee's claim of foreign exchange fluctuation loss has not been accepted by the Revenue in some other assessment years, the issue has to be thrashed out in those assessment years and not here. However, we must observe, rule of consistency applies not only to the assessee, but also to the Revenue. In case, the gain derived is treated to be in the character of revenue, the loss arising in similar account also has to be treated to be on revenue account. The department has to take a consistent stand on this issue. With the afore-said observations, this ground is dismissed.*
>
> *12.1 In the result, the appeal is dismissed."*

Ld. AR has also furnished a chart showing gain/loss arising out of foreign exchange fluctuation for different years which is reproduced below:

Particulars	***AY 2003-04***	***AY 2004-05***	***AY 2005-06***	***AY 2006-07***	***AY 2007-08***	***AY 2008-09***	***AY 2009-10***	***AY 2010-11***
Exchange Fluctuation Loss/(Gain) net reported in Financial Statements	*(1.10)*	*(2.95)*	*(0.44)*	*(0.67)*	*(2.20)*	*(5.86)*	*17.28*	*(9.67)*
Tax treatment adopted in return of income	*Offered to tax as business income*						*Claimed as business deduction*	*Offered to tax as business income*

It has further been pointed out that no action has been taken by the RBI or by the Enforcement Directorate (ED) for FEMA violations on account of delayed payments against the assessee and the impugned amount has been paid in 2013 through the banking channels.

3.5 We have heard the rival submissions and considered the material placed before us. Admittedly, the assessee has been declaring gain on account of foreign exchange fluctuation and offered the same for the tax in -several years as is evident from the chart furnished by the Ld. AR. The assessee has consistently followed the Accounting Standard (AS) 11 and there is no change in facts and circumstances over the years. Accordingly, as has rightly been held by the co-ordinate bench in ITA No. 6135/Mum/2024, the rule of consistency has to be applied by the assessee as well as the revenue. Since the gain derived in some of the years has been treated as revenue, loss arising on similar transactions also has to be allowed as a deduction in respective years. We, therefore, hold that the Ld. CIT(A) has rightly allowed the appeal of the assessee on this issue and we see no justification to interfere with the order of Ld. CIT(A).

3.6 Accordingly, the appeal of the revenue on this issue is dismissed.

4. Ground No. 2 relates to the claim of interest of delayed payment of sales tax and service tax - Rs. 19,11,951/-

12.1 Brief facts are that the assessee had paid interest on delayed payment of sales tax and service tax amounting to Rs. 19,11,951/- which was disallowed by

the Ld. AO on the ground that this constituted a penalty or fine for the violation of the law. In this regard, the assessee submitted before Ld. CIT(A) that the amount of interest on delayed payment of sales tax and service tax is compensatory in nature and is not in connection with any penalty/fine for violation of law. Ld. CIT(A) allowed the appeal of the assessee on this ground relying on the settled position as per the decisions of the Hon'ble Supreme Court.

Aggrieved with the order of Ld. CIT(A), the revenue is in appeal before us.

4.2 Ld. AR has pointed out that on exactly similar fact, the issue is covered in favour of the assessee by the decision of the co-ordinate bench in the case of *Nil Kamal Realtors Sub-urban Pvt. Ltd. v/s ACIT CC in ITA No. 86/Mum/2021*. The relevant portion of the order is reproduced below:

> *"09 We have carefully considered the rival conditions. We find that identical issue has been decided by the co-ordinate Bench in case of Emdee Digitronics Pvt. Ltd Vs. PCIT in ITA No. 361/Kol/2019 dated 28th June, 2019, wherein the co-ordinate Bench in Para No.12 relying on the decision of M/s Naaraayani Sons Pvt. Limited, in ITA No. 1796-1798/Kol/2017, order dated 21.08.2018 held that interest expense on late deposit of VAT, service tax, TDS etc are allowable expenditure under section 37(1) of the Act. In view of the above fact, respectfully following the decision of Kolkata Bench of ITAT, we hold that such expenses are not disallowable under section 37(1) of the Act. Further, VAT laws, provident laws and service tax laws clearly provide for payment of interest if there is a delay in payment of fees. Therefore, it is apparent that those respective laws allowed the belated payment along with interest. Therefore, those are not affected by explanation-1 to section 37(1) of the Act. In view of this ground no. 2 of the appeal is allowed."*

4.3 In view of the facts narrated hereinbefore and in the light of the judicial pronouncements on this issue, we hold that Ld. CIT(A) was justified in deleting

the addition made by the Ld. AO on account of interest on delayed payment of sales tax and service tax.

4.4 Accordingly, the revenue's appeal on this issue is dismissed.

5. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 10.03.2025.

Sd/-	**Sd/-**
RAHUL CHAUDHARY	**RENU JAUHRI**
(न्यायिक सदस्य/JUDICIAL MEMBER)	**(लेखाकार सदस्य/ACCOUNTANT MEMBER**

Place: मुंबई/Mumbai
दिनांक /Date 10.03.2025
अनिकेत सिंह राजपूत/ स्टेनो

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

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

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

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