

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'D' BENCH, CHENNAI**

श्री चंद्र पूजारी, लेखा सदस्य एवं श्रीजी. पवन कुमार, न्यायिक सदस्यकेसमक्ष

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. Nos.2825, 2826 & 2827/Mds/2014

निर्धारण वर्ष /Assessment years : 2005-06, 2006-07 & 2007-2008.

The Deputy Commissioner of  
Income Tax,  
Large Taxpayer Unit -II,  
Chennai 600 101.

**Vs.** M/s. Ashok Leyland Ltd,  
No.1, Sardar Patel Road,  
Guindy,  
Chennai 600 032.

(Department)

**[PAN AAACA 4651L]  
(Assessee )**

आयकर अपील सं./I.T.A. Nos.2834, 2835, 2836, 2837, 2838 & 2839/Mds/2014

निर्धारण वर्ष /Assessment years : 1995-96, 2004-05, 2005-06, 2006-07,  
2007-08 & 2008-2009.

M/s. Ashok Leyland Ltd,  
No.1, Sardar Patel Road,  
Guindy,  
Chennai 600 032.

**Vs.** The Deputy Commissioner of  
Income Tax,  
Large Taxpayer Unit (Appeals),  
Chennai 600 101.

**[PAN AAACA 4651L]  
(Assessee )**

**(Department)**

Department by : Shri. Arun C. Bharath, IRS, CIT.  
Assessee by : Shri. Vikram Vijayaraghavan, Advocate

सुनवाई की तारीख/Date of Hearing : 04-08-2016

घोषणा की तारीख /Date of Pronouncement : 23-09-2016

**आदेश / ORDER****PER CHANDRA POOJARI ACCOUNTANT MEMBER:-**

These appeals filed by the Department and Assessee are directed against different orders of the Commissioner of Income-tax (Appeals)-Large Taxpayer Unit, Chennai for the above assessment years. Since the issue involved in these appeals are common in nature, these appeals are combined, heard together, and disposed of by this order for the sake of convenience. First, we take up assessee appeal in ITA No.2834/Mds/2014 of assessment year 1995-1996 for adjudication:-

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

*“2. The Commissioner of Income tax (Appeals), LTU erred in confirming the restriction of 1.25% of issue proceeds to 50% under the head fee paid to lead managers in connection with GDR and disallowing selling commission and 1.75% of issue proceeds.*

*2.1 The Commissioner of Income tax (Appeals), LTU ought to have appreciated that the selling commission and fee paid to the lead managers is at par with the underwriting commission/brokerage paid for the issuance of equity shares. Hence eligible for deduction u/s 35D(2)(c)(iv).*

*2.2 The basis to arrive at the disallowance amount as 50% of the 'Management and underwriting fees' is arbitrary and unjustified”.*

3. The Brief facts of the case are that during the year relevant to the assessment year under consideration the assessee company claimed a sum of ₹14.21 crore being Euro issue expenditure as revenue in nature. The Assessing Officer disallowed the share issue expenses against which the assessee filed an appeal before the first appellate authority. The Commissioner of Income Tax (Appeals) also partly confirmed the order of the Assessing Officer on this issue and certain expenses were allowed. Subsequently, the assessee as well as the department filed appeal against the order of the Commissioner of Income Tax (Appeals) before this Tribunal. This Tribunal vide its order dated 4.2.2005 remanded back the issue to the record of the Assessing Officer with a direction to compute the deduction in accordance with the provisions of the Act and in view of the decision of the Jurisdictional High Court in the case of *CIT vs. Ennar Steel and Alloy (P) Ltd. (261 ITR 347)*. Consequently the Assessing Officer passed a giving effect order dated 10.5.2005 whereby out of the total expenses claimed by the assessee, only ₹16,60,762/- were treated as allowable as per ITAT order. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

3.1 The Commissioner (A) held that the entire expenditure incurred in connection with the Euro issue expense as claimed by the assessee is allowable under section 35D(2) (c) of the Act. Against this the Revenue filed an appeal before Tribunal.

3.2 The Tribunal after hearing both the parties and going through the record observed as under in its orders dated 21.11.2008:-

*'We note that in the original order dated 4.2.2005, this Tribunal has mentioned that the appeal of the Revenue stands dismissed. However, later on, on a Miscellaneous Petition filed by the Revenue this Tribunal rectified the error and amended the order by remanding the appeal of the Revenue to the record of the Assessing Officer. We further note that the issue is settled by the Jurisdictional High Court in the case of CIT vs. Ennar Steel and Alloy (P) Ltd (supra) but the Assessing Officer has not given any details and reasons for disallowing a particular item. We set aside the orders of the lower authorities and again remand the issue to the file of the Id. Assessing Officer to pass a fresh order in terms of the directions of this Tribunal in its order dated 4.2.2005 giving details and reasons for disallowing the items of expenditure. Accordingly, the appeal of the Revenue is allowed for statistical purpose''*

3.3 Consequent to this, the Assessing Officer in his order dt. 29.12.2009, giving effect to the order of the ITAT dated 21.11.08,

stated that the ITAT has directed the Assessing Officer to examine the issue and pass fresh order in terms of the directions of the Tribunal in its earlier order dated 4.2.2005 and also based on the decision of Hon'ble Madras High Court's decision in the case of *CIT Vs. Ennar Steel Alloy Private Limited. (261 ITR 347)*. After hearing the appellant, the Assessing Officer has come to the conclusion that out of the claim of ₹14,21,52,904 u/s 35D made by the assessee, the Id. Assessing Officer observed that only the following amounts are eligible for amortisation u/s 35D(2)(c)(iv) of the Act

(i)	Legal Fee	₹ 9,55,000/-
(ii)	Printing & Advertisement of offering circular/ prospectus	₹ 7,04,762/-
(iii)	Listing fee	₹ 100/-
(iv)	Underwriting Commission	₹2,71,54,138/-
		-----
	Total	₹2,88,14,900/-
		-----

1/10 of ₹2,88,14,900/- = ₹28,81,490/-

The AO has worked out the above amount by following the directions of the ITAT, Chennai, which has in turn followed the decision of Hon'ble Madras High Court in the case of *CIT v. Ennar Steel & Alloy P Ltd (261 ITR 347)*. While arriving at the Underwriting commission of ₹2,71,54,138 (supra), the Assessing Officer has verified para 6 of the copy of the agreement of GDR issue which

states as under:-

*"The company agrees to pay to the managers on each closing date a management commission' and underwriting commission of 1.25% of the aggregate issue price to the GDRs issued on that closing date, which commission will, together with selling commission specified in clause 1 (AJ and the amount of the expenses reimbursable under clause 14(A), be deducted from the subscription moneys to be paid by the managers as provided in clause 8."*

It was noticed by the Id. Assessing Officer that the agreement was for the payment of 'management commission' and 'underwriting commission' of 1.25% of the aggregate issue price of ₹430 crores to the GDRs. Since the agreement is for payment of 1.25% for both 'management commission' and 'underwriting commission' since Act provides only for underwriting commission, the Assessing Officer has considered 50% of 1.25% of aggregate issue of GDR of ₹430 crores for amortization u/s.35D(2)(c) (iv) towards 'underwriting commission'. Thus in the result, the claim of the assessee towards fee paid to Lead Managers of ₹13,03,39,866/- was allowed by the Assessing Officer only to the extent of ₹2,71,54,138/- besides allowing legal fee and parking and advertisement expenditure. Aggrieved by the order, the assessee filed an appeal before CIT(A).

3.3 In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) observed that in view of the judgement of Madras

High Court in assessee's own case reported in 349 ITR 663, the assessee is entitled for deduction u/s. 35D(2)(c)(iv) of the Act in respect of following expenditure only:-

- (a) Underwriting Commission.
- (b) Brokerage and
- (c) Charges for drafting, typing, printing and advertisement of the prospectus.

However, the assessee is not entitled for management commission paid by the assessee since the assessee paid both management commission and underwriting commission at 1.25% of aggregate issue of GDR for the purpose of selling of GDR's to the lead managers, the only 50% of the 1.25% of aggregate issue of GDR paid as per agreement with Jardine Fleming International Inc. dated 10.03.1995 is only allowable. Aggrieved by the Commissioner of Income Tax (Appeals) order, the assessee filed an appeal before Tribunal.

3.4 Before us, the Id. AR relied on the judgement of assessee's own case reported in 349 ITR 663 (Mad) T.C. (Appeals) Nos. 1253, 1254 & 1256 of 2005, dated 20<sup>th</sup> June, 2012, where the meaning of the "expansion" and "extension" was answered in favour of the

assessee. The question raised before the High Court in the above case is as under :

*"Whether, on the facts and in the circumstances of the case, the Tribunal was right in equating a proposal to 'expand' the capacity of production with 'extension' of industrial undertaking under section 35D of the Income-tax Act ?"*

The High Court has decided that "expansion" and "extension" mean the same. According to the Commissioner of Income-tax (Appeals), in the instant case, taking of business activity of TGSL is considered as extension of business by the assessee within the meaning of section 35D(1)(ii) of the Act and also relied on the judgment of Madhya Pradesh High Court in the case of *Shree Synthetics Ltd vs. CIT 303 ITR 451* wherein held that expenditure incurred towards issue of debentures was in the nature of preliminary expenses falling u/s. 35D(1)(ii) and 35D(1) (ii) (c) and it is allowable as deduction in a manner provided u/s.35D of the Act.

3.5 On the other hand, the Id. Departmental Representative relied on the orders of the Commissioner of Income Tax.

3.6 We have heard both the parties and perused the material on record. We have carefully gone through the judgment of

Jurisdictional High Court in assessee's own case (cited supra) wherein held as under :-

The High Court of Madras in its T.C.(Appeal) No.1253, 1254 and 1256 of 2005 dated 20.6.2012 has answered the questions of the revenue against it and in favour of the appellant. However, the question raised by the appellant was answered against the appellant and in favour of revenue. The net result of the appeal decided by the High Court is that the appellant is entitled to claim Euro Issue expenses u/s 35D(1)(ii) for expansion of its capacity holding that the 'expansion' and 'extension' means the same. However, it was held in the judgment that the expenses should be allowed only as per the wordings mentioned in the Act and the word "being" used should not be taken as "illustrative". Only those expenses which are specified in the 'statute could be allowed and nothing else. The observations of the High Court are as under:

*"20. In the light of the law thus declared as the meaning of the phrase "being", we have no hesitation in holding that the expenditure that qualified for consideration under Section 35D is restricted by reason of use of the phrase "being". Thus expenditure incurred in connection with the issue of shares and debentures of the company to public subscription, which qualify for consideration under Section 35D, are underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus and nothing more. There is a residual clause to sub clause D, which shows such other items of expenditure not being expenditure eligible for any allowance or deduction under any other provisions of the Act as may be prescribed. Thus, other than what is contemplated under Sub Clause D, if there are still other expenditure in connection with the commence of business or in connection with the expansion of the industrial undertaking after the commencement of the business or in connection with the set up of a new industrial unit, the same would also qualify for amortization under Section 35D. In, the light of the above discussion, we hold that the rates of expenditure which would go for amortization under Section 350,*

*particularly with reference to sub clause (c)(iv) of sub section (2) of Section 35D, would be only those expenditure which are specifically mentioned therein and nothing beyond. In the light of the decision of this Court referred to above, we reject the reliance placed on the decision of the Madhya Pradesh High Court by the assessee, reported in [1986] 162 ITR 819 (Commissioner of Income Tax vs. Shree Synthetics Ltd).*

*4.2.1 From the chronology of events, it was noticed that the appellant has filed this appeal on 29.1.2010 much before the decision of the Madras High Court (supra) in appellant's own case which has pronounced its order on 20.6.2012. After the pronouncement of this order, most of the arguments raised before me have been squarely covered and were answered by the Hon'ble Madras High Court. Now the issue to be answered by me is to see how far the claim of the expenses made by the appellant with regard to Euro Issue are fitting within the ambit of s.35D(2)(c)(iv). To answer this question, the provisions of the Act u/s 35D(2)(c)(iv) vis-a-vis the claim of expenditure of the appellant are reproduced as under:*

<i>Expenditure</i>	<i>heads</i>	<i>used</i>	<i>Sec.35D(2)(c)(iv)</i>
<i>(i) Underwriting commission,</i>			
<i>(ii) Brokerage and</i>			
<i>(iii) Charges for drafting, Typing, Printing, and Advertisement of the prospectus</i>			

*Expenditure heads used by the appellant*

- 1. Stay, travel and food expenses*
- 2. Telephone*
- 3. Local Audit Fees*
- 4. Gifts*
- 5. Stay, car expenses and fees*
- 6. Listing fees*
- 7. Management fees*
- 8. Out of pocket expenses*
- 9. Legal fees*
- 10. Fee paid to Lead Managers*
- 11. Printing and Advertisement of offering circular/prospects etc.*

*Out of the heads of expenses used by the appellant, Legal fee, Listing fee, printing and advertisement were allowed fully by the Id. Assessing Officer. With regard to fee paid to Lead Managers, even though the AO is in agreement' with the appellant to take this head of expenditure as Underwriting commission, he has restricted 1.25% of issue proceeds of Rs.430 crores to 50% in view of the agreement of GDR issue which provides for management commission and underwriting commission, In my considered opinion, AO is justified to allow legal fee, listing fee, and printing & advertisement expenses fully and 50% of 1.25% claimed under the head Fee paid to Lead Managers. The interpretation of the appellant that selling commission, management commission and underwriting commission are all one and the same as that of Fee paid to Lead 'Managers is not acceptable in view of the, clear cut finding given by the Hon'ble Madras High Court in appellant's own case in its order in Tax Case (Appeal) Nos.1253, 1254 and 1256 of 2005 dated 20.6.2012. In view of the above discussion, the ground raised is dismissed".*

Hence, in our opinion the lower authorities taken a correct view of the fact of the assessee's case and disallowed management fees paid to the lead managers. It does not fall under the provisions of Sec. 35D(2)(c) (iv) of the Act. Accordingly, the ground of the assessee is dismissed.

3.7 In the result, the appeal of the assessee in ITA No.2834/Mds/2014 of assessment year 1995-1996 is dismissed.

4. **ITA No.2835/Mds/2014 of assessment year 2004-2005:-**

The sole substantive ground raised by the assessee is that while applying the provisions of clause (baa) to the explanations in Sec. 80HHC of the Act while excluding 90% of the gross interest and rent of the profits for allowing deduction u/s.80HHC of the Act. This factor to be considered after netting not the gross of the 90%. For this purpose he relied on the judgment of Supreme Court in the case of *ACG Associated Capsules (P) Ltd vs. CIT 343 ITR 89*.

4.1 On the other hand, the Id. Departmental Representative submitted that the only expenditure incurred to earn these income to be reduced from the gross rent or interest not the rent or interest have no nexus with this income.

4.2 We have heard both the parties, perused the material on record and judicial decision cited. The Supreme Court in the case of *ACG Associated Capsules (P) Ltd (cited supra)* wherein held that ninety per cent of not the gross rent or gross interest but only the interest or net rent, which had been included in the profits of business of the assessee as computed under the head "Profits and gains of business or profession", was to be deducted under clause

(1) of Explanation (baa) to Sec. 80HHC for determining the profits of the business.' In view of the above judgment 90% of the net interest which have been included in the profits of the business of the assessee under the head income from business to be excluded for the purpose of applying clause (1) to Explanation (baa) to Sec. 80HHC of the Act. The same is applicable in the case of rent if the rent payment is included as business expenditure of the assessee. With these observations, we remit the issue to the file of the Id. Assessing Officer for re-computation after giving an opportunity to the assessee. This ground of the assessee is partly allowed for statistical purpose.

4.3 In the result, the appeal of the assessee in ITA No.2835/Mds/2014 of assessment year 2004-05 is partly allowed for statistical purpose.

5 **ITA No. 2836/Mds/2014 of assessment year 2005-2006:-**

The first ground raised by the assessee is that the Commissioner of Income Tax (Appeals) erred in confirming the ALP determined by the Transfer Pricing Officer (TPO)/Assessing Officer at ₹2,57,13,271/- in respect of transactions entered into with the associated enterprises based on the data annexed to the form 3CEB filed on 31.10.2005

5.1 In the assessment proceeding the Id. Assessing Officer made a reference to Transfer Pricing Officer (TPO) u/s 92CA (1) of the Act for determining the Arm's Length Price in respect of transaction reported in Form No.3CEB filed by the assessee . The assessee filed a revised form 3CEB before the TPO. The TPO determined the variation in Arm's Length Price, in relation to International Transaction in accordance with sub-sec 1 & 2 of sec 92C at ₹2,57, 13,271/-. On the basis of the order of the TPO u/s 92CA(3), the Assessing Officer added the sum of ₹2,57,13,271/- to the total income of the assessee. While doing so, the tolerable limit of 5% variation was taken with regard to each transaction. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals). The Id. Authorised Representative contended that the AO has disallowed the difference in the price, charged to AE and Non-AE in pursuant to the Transfer Pricing Officer's order u/s 92CA(3). The Id. AR argued that the 5% of the price variation as mentioned in the CBDT's circular No.12/2001 dated 23.08.2001, is to be applied for the wholesome transactions with the Associated Enterprise (AE) and not on each transaction with the AE. The Id.AR has further contended that the TPO ought to have appreciated that sec 139(5) will apply only for filing of revised return of income and cannot

extend the same to filing of revised working submitted before the completion of TP assessment. The TPO should have determined the difference in Arm's length price only to the extent of the difference in excess of 5% and not the full difference. The Id. AR relied on the case law in the case of *Development Consultants (P) Ltd v. DCIT[2008] 23 SOT 455*. The Id. AR further submitted that the view taken by the Id. TPO and Assessing Officer that view taken by the TPO and AO that transaction means each transaction only and not transactions with AE as a whole has not been supported by any decisions and as such it has no legal sanction. If the assessee discovers any omission or any wrong statement filed along with the Form 3CEB he may furnish, a revised working at any time before the completion of TP assessment and revision does not tantamount to non-filing of original form 3CEB. For this, Id. AR relied on the decisions of *A.M. Tod Co. India (P) Ltd vs. ITO in ITA No.492/Mum/2006 dated 24.06.2009* and *DCIT vs. Quark Systems (P) Ltd (2010) 1 taxmann.com (Chd-ITAT) (SB)*. In the remand report, regarding this issue, the AO stated that the submission filed by the assessee before the Id.CIT(A) has been carefully considered and cannot be accepted as the submissions were considered by the AO and the TPO also. The Assessing Officer stated that totally agree with the order passed by the TPO-I and therefore the submissions of the assessee cannot

be accepted. In reply to the remand report, the Id. Authorised Representative submitted that in arriving the difference in Arm's length price, the TPO has not considered the revised workings filed by the assessee. The TPO has not dealt with the assessee's contention that transactions should be looked in wholesome and not invoice wise. The Id. AR further stated that assessee stick to their grounds of appeal. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

5.2 In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) carefully considered the facts of the case, submissions of the Id. AR and decisions relied on by the Id.AR. Similar issue has been decided by 'his predecessor in assessee's own case for A.Y: 04-05 in ITA No.419/11-12 dated 31.10.12 by confirming the decision of the AO who found that the price variation with regard to each transaction was more than tolerable limit of 5%. Since the facts and circumstances for both the years being the same, by following the decision of the Id. Predecessor, the Commissioner of Income Tax (Appeals) dismissed the appeal of the assessee. Aggrieved by the order, the assessee assailed an appeal before Tribunal.

5.3. We heard the rival submission, perused the material on record and judicial decisions cited. Similar issue came for consideration before this Tribunal in assessee's own case for assessment year 2006-2007 in ITA No.2086/Mds/2010 vide order dated 16.02.2016 wherein held at para 10.4 as under:-

*'10.4 We heard rival submissions, perused the material on record and judicial decisions cited. The argument of the Id. Authorised Representative that the TPO erred in not considering the revised working of Arms Length Price (ALP) submitted by the assessee on 06.01.2009 very much before passing of order by TPO on 24.07.2009. The TPO has distinguished the time limit of completion of assessment and concluded that Revised form 3CEB is barred by limitation. The Id. Authorised Representative also drew attention to provisions of Sec. 92CA(3) of the Act and there is no specific time limit specified for filing revised form. The statutory form 3CEB is a report of Chartered Accountant furnished u/s.92E relating to international transactions and specific domestic transactions based on the documents prescribed and maintained by the assessee in respect of international transactions. The Chartered Accountant report is based on the Audited books of accounts maintained by the assessee where the international transaction have been incorporated and are authenticated. The report of the Chartered Accountant cannot be ruled out and also factual position has to be considered to correct any mistake in calculating of Arms Length Price(ALP) for valuation, and it is evident that the revised form 3CEB includes the proper comparables in respect of vehicles, parts which are integral product of commercial vehicles. Though Id. Departmental Representative vehemently argued against filing of revised form 3CEB and limitation period, we consider the apparent facts, provisions of law, evidence and the action of TPO in rejecting the revised form 3CEB is not proper as factual comparables certified by the Chartered Accountant in Revised form 3CEB cannot be ignored and we in the interest of justice, remit the disputed issue to the file of the Assessing Officer and to*

*consider Revised form 3CEB filed by the assessee for assessment and calculation of Arms Length Price. Further the Id. Assessing Officer should provide adequate opportunity of hearing to the assessee and pass the order. We set aside the order of the Assessing Officer and partly allow the grounds of assessee for statistical purpose”.*

In view of the above order of the Tribunal, we are inclined to remit the issue to the file of the Id. Assessing Officer on similar direction. The ground of the assessee is partly allowed for statistical purpose.

6 The second ground raised by the assessee is that the Commissioner of Income Tax (Appeals) erred in forming the disallowance by wrongly assuming that the claim is the balance of 50% of additional depreciation u/s.32(iia) of the Act in the current year in respect of the assets acquired in the 2<sup>nd</sup> half of preceding year of ₹47,96,475/-

6.1 After hearing both the parties, we are of the opinion that similar issue was considered by the Tribunal in assessee's own case for the assessment year 2006-2007 in ITA No.2086/Mds/2010, dated 16.02.2016 wherein it was held as under:-

*'6.4 We heard the rival submissions and perused the material on record and judicial decisions cited. Prime facie the assessee is in the business of manufacture of commercial vehicles and engines and additional depreciation is claimed on leased asset of windmills. During the previous year the assessee has*

*purchased windmills leased out to others and claimed additional depreciation on such leased assets. On perusal of provisions u/s.32(1)(iia) of the Act and the decisions relied by the assessee which are in leasing business and cannot be brought into category of manufacture of commercial vehicles. The provisions are very clear on this issue. The claim of additional depreciation is in violation of provisions u/s.32 of the Act where depreciation is allowed. We are of the opinion that the decisions relied by the assessee are not directly on the issue and distinguishable and additional depreciation on leased asset does not fit into the provisions of the Act and we uphold the findings and order of the Assessing Officer on this ground and allow the ground in favour of the Revenue”.*

In view of the above order of the Tribunal, the ground raised by the assessee is dismissed.

7 The third ground raised by the assessee is that the Commissioner of Income Tax (Appeals) erred in confirming the disallowance of depreciation restricted to 5% on residential buildings.

7.1 After hearing both the parties, this issue was considered by the Tribunal for the assessment year 2000-01 in ITA No.2445/Mds/2005, vide order dated 27.09.2007 wherein it was held as under:-

*“6. We have heard the parties at length. The short controversy before us is that if the assessee has*

*provided residential flats to its employees, then at what rate depreciation is to be allowed. The CIT(Appeals) has tried to interpret the circular by stating that the Board might have issued the said circular in the context of the employees' quarters built in the factory premises and not to the residential flats which are away from the Factory. On the perusal of the CSDT Instructions/letter, we find that no such distinction is made. In our opinion, the Circular/letter issued ambiguous language and no second interpretation is required. We, therefore, hold that the AO was not justified in restricting the depreciation to 5% in respect of the five residential flats which are used by the employees of the assessee company. We, therefore, allow ground no.2 in favour of the assessee and on this issue set aside the order of Commissioner of Income Tax (Appeals) .*

Accordingly, this ground is decided in favour of the assessee. The ground of the assessee is allowed.

8. The fourth ground raised by the assessee is that the Commissioner of Income Tax (Appeals) erred in confirming the disallowance of foreign currency convertible notes issue expenses of ₹11,07,13,647/- as it goes to increase the capital base of the company.

8.1 The Brief facts of the case are that the Assessing

Officer in the assessment order, stated the assessee company issued foreign currency convertible notes to investors in the overseas market. The notes bear interest and convertible interest in GDR's and thereafter convertible in to shares of face value of ₹1/- each. The issue expenses amounting to ₹ 11,07,13,647/- is claimed as deduction. The Issue expenses are directly related to capital base of the company. Hence relying in the Supreme Court decision reported in *225 ITR 792 Punjab State Industrial Development Corporation Limited* wherein it was held that the capital expenditure although would help in the business of the company and may also help in the profit making, it still retains the character of capital expenditure since the expenditure was directly related to the expansion of the capital base of the company. Hence following the Apex Court decision, the Id. Assessing Officer disallowed the claim. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

8.2 In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) considered the facts of the case and the submissions of the Id.AR. and gone through the decisions relied on by the Id.AR and the Assessing Officer. From the facts of the case, it

was gathered that the foreign currency loans in the form of Convertible Notes is going to expand the capital base of the company in the form of purchase of plant and machinery in India in the course of time. This, being the case, any expenditure related to the raising of such loans should take the form of capital expenditure. The decision of the Supreme Court relied on by the AO in the. Case of Punjab State Industrial Development Corpn. Ltd (supra) answers the question appropriately. In the above case, the Supreme Court has held that the expenditure paid to the ROC as filing fee for enhancement of capital base of company is capital in nature. In view of the above decision, the Commissioner of Income Tax (Appeals) uphold the disallowance made by the Assessing Officer. Aggrieved by the Commissioner of Income Tax (Appeals) order, the assessee assailed an appeal before Tribunal.

8.3 We heard both sides, perused the material on record and judicial decision cited. This issue came for consideration in following cases:-

- (i) *CIT vs. South India Corpn. (Agencies) Ltd 290 ITR 217.*
- (ii) *CIT vs. First Leasing Co. of India Ltd 304 ITR 67.*
- (iii) *CIT vs. Secure Meters Ltd 321 ITR 611.*

In all these judgments wherein held that expenditure incurred on issue of debentures whether convertible or non convertible is allowable as Revenue expenditure. Being so, even foreign currency loan is subject to conversion into equity also, the issue expenses will be Revenue expenditure only in view of the above judgments. This ground raised by the assessee is allowed.

9. The fifth ground raised by the assessee is that the Commissioner of Income Tax (Appeals) erred in treating the exchange gain on FCNN as Revenue Receipts ₹10,91,36,405/-.

9.1 The Brief facts of the case are that the assessee company issued foreign currency convertible notes (FCCN). The Id. Assessing Officer in the assessment order stated that the proceeds of these notes were retained outside India. This public deposits is intended to meet the capital expenditure like purchase of plant and machinery etc., in India. However the company paid interest in respect of the, debts raised at every half-year ending, i. e" 3rd June and 3d<sup>h</sup> April each year. The interest payment is treated as Revenue expenditure in. the accounts of the assessee U/s.43A of the Act, if there is gain or loss owing to fluctuation in exchange rate in respect of purchase consideration payable to the seller of capital assets like

plant and machinery etc. The gains or loss should be adjusted against the cost or WDV of the assets. However the deposits out of the proceeds of notes, debt notes issued by the assessee has no direct nexus with the capital asset acquired by the company. The mere intention of the assessee to utilize the proceeds to future purchase of plant and machinery will not make the deposit a capital asset. The assessee has relied on the Supreme Court decision in the case of *CIT vs. Tata Locomotive & Engineering Co. Ltd* 60 ITR 405. However in another decision of the Supreme Court in the case of *CIT vs Canara Bank* 63 ITR 328, the Apex Court has held that foreign exchange gains are assessable as revenue receipt. Both the decisions of the Apex Court are delivered before the insertion of Section 43A of the I. T. Act. The Jurisdictional Madras High Court discussed the import of both the above decisions of the Apex Court in its decision in the case of *M/s.Universal Spices reported in* 120 ITR 906. In this decision, the Hon'ble Court has considered the principle enunciated by the Supreme Court as follows:-

*"the law may, therefore now to be taken to be well settled that whether profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as a part of circulating capital embarked in the business. But if on the other hand the foreign currency is held as capital asset or as a fixed capital such profit or loss would be of capital nature".*

In this case, the foreign currency held is not directly linked with the plant and machinery. The mere intention to use the deposit for the purchase of capital asset in future will not make the deposits a capital asset. Moreover, the interest paid by the assessee on the deposit amount is taken on revenue account. Hence, the entire gains on exchange fluctuation which has no nexus with the capital assets representing plant and machinery already existing, section 43A is not applicable and the entire gain should be treated as revenue receipt and added to the total income. Against this, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

9.2 In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) considered the facts of the case and the submissions of the Id.AR. and gone through the decisions relied on by the Id.AR and the *Assessing Officer*. *The assessee* has reaped the gains out of the exchange fluctuation for the amount unutilized during the year. The Id. Commissioner of Income Tax (Appeals) in his considered opinion, any gain out of foreign exchange needs to be offered to taxation and if there is any loss the same can be claimed by following the specified accounting standards. The Supreme Court in the case of *CIT v. Canara Bank Ltd* reported in 63 ITR 328 relied on

by the AO, has taken similar view holding that foreign exchange gains are assessable as revenue receipts. The head note of the decision is reproduced as under:

*Section 4 of the Income-tax Act, 1961 (Corresponding to section 3 of the Indian Income-tax Act, 1922) - Income - Chargeable as - Assessment year 1954-55 - Assessee-bank had opened one branch in Karachi on 15-11-1946 - After partition i.e., on 18-9-1949, when there was devaluation of Indian rupee, Karachi branch of assessee-bank had with it a sum of Rs. 3,97,221 - Said amount was however lying as 'blocked' or 'sterilised' balance as it was not being utilised for internal banking operations within Pakistan - On 1-1-1953, when State Bank of Pakistan permitted its remittance to India, in terms of Indian currency its value became equivalent to Rs.5,71,038 - Whether, on facts, exchange difference of RS:'1,10,746 received by assessee could be regarded as capital gains which was not assessable to income- tax - Held, yes*

Similar view was also taken by the Hon'ble Supreme Court in the case of Universal Radiators reported in 120 ITR 906. The head note of the decision is reproduced as under:

*"Section 28 of the income-tax act, 1961-Business income-Assessee's goods in transit from USA to India seized by Pakistan during hostilities in September 1965- Assessee received us \$ 45,825 as compensation from insurance company in . October 1966-Indian currency meanwhile devalued on 6-6-1966-Assessee earned a surplus of Rs. 1,43,392 representing difference between pre-devaluation and post- devaluation rupee equivalents of \$ 45,825- Whether devaluation surplus arose in normal course of business-Held, on facts, yes-Whether taxable as a revenue receipt-Held, on facts, yes "*

From the facts of the case, it is gathered that the amount raised through FCCN was meant for purchase of plant & machinery and no

such machinery was purchased during the relevant asst.year. Due to exchange fluctuation, the assessee has gained from above deposits. The AO has made his point very clear in his assessment order stating that *"The mere intention of the assessee to utilize the proceeds to future purchase of plant and machinery will not make the deposit a capital asset."* From this point of view, the Id. Commissioner of Income Tax (Appeals) observed that the Id. Assessing Officer is right in bringing to tax the exchange gain treating it as revenue receipt. The Id. Commissioner of Income Tax (Appeals) is of the view that until the amounts are used for purchase of any capital asset, the nature Of the amount will remain as revenue only. The decision in the case of EID Parry Ltd (supra) relied on by the assessee is distinguishable in facts. In the case of EID Parry Ltd, the funds raised in UK where in fact utilized for the purchase of plant and machinery and only the balance amount was repatriated to India for a specific purpose at Ennore Unit, Tamilnadu for which the funds were raised. The decision therefore will not 'come to the rescue of the assessee. Even the decision of CIT vs.Woodward Governor India P Ltd (312 ITR 254) relied on by the assessee is also of no help to him. In this decision, the Supreme Court has allowed the loss arisen out of exchange fluctuation to be claimed as expenditure u/s.37(1) treating it as revenue. It amounts to say that when the loss out of exchange

fluctuation was allowed as expenditure the gain should be offered as income for taxation. The Id. Commissioner of Income Tax (Appeals) uphold decision taken by the AO is in order and uphold the addition and dismissed the ground of the assessee. Aggrieved by the order, the assessee filed an appeal before Tribunal.

9.3 We heard the rival submissions, perused the material on record and judicial decisions cited. The issue was covered by the judgment of Supreme Court in the case of *CIT vs. Woodward Governor India P. Ltd* 312 ITR 254 where it was held that increase or decrease in liability for repayment of foreign loan in respect of acquisition of an asset has to be taken into account to modify the figure of the actual cost in the year in which the increase or decrease in liability arises on account of fluctuation of foreign exchange rates, irrespective of the date of actual payment in foreign currency. This is as per pre-amended provisions of Sec 43A of the Act before 1<sup>st</sup> April, 2003. However, after amendment the aforesaid increase or decrease only to be considered only at the time of making the actual payments. However, even the amendment would not change the character of the receipt. In other words, the income arises out of the transaction relating to the capital assets then it is only a capital receipt not to be treated in Revenue field so, as to tax the same as income of the

assessee. In view of this, we are inclined to hold that the income from exchange fluctuation on FCCN to be treated as capital receipts. This ground raised by the assessee is allowed.

10. In the result, the appeal of the assessee in ITA No.2836/Mds/2014 of assessment year 2005-2006 is partly allowed.

11. **ITA No.2837/Mds/2014 of assessment year 2006-2007:-**

The first ground raised by the assessee is that the Commissioner of Income Tax (Appeals) erred in confirming the disallowance of Additional depreciation on electrical installations and equipments ₹32,76,740/-.

11.1 After hearing both the sides, we are of the opinion that similar issue was considered in assessee's own case in ITA No.2086/Mds/2010 for the assessment year 2006-2007, vide order dated 16.02.2015 which was followed by us for the assessment year 2005-06 hereinabove in earlier para 6.1. Accordingly, this ground of the assessee is dismissed.

12. The next ground raised by the assessee is that the Commissioner of Income Tax (Appeals) erred in confirming the levy

of interest u/s.220(2) of the Act ₹27,39,108/-.

12.1 The Id. AR submitted that the assessee filed stay petition before Assessing Officer as such interest u/s.220(2) of the Act cannot be charged.

12.2. On the other hand, the Id. Departmental Representative relied on the orders of Commissioner of Income Tax (Appeals).

12.3 We heard both the parties and perused the material on record. In our opinion filing of stay petition cannot disentitle the Department from charging interest u/s.220(2) of the Act. Accordingly, we do not finding any merit in the argument of the Id. Authorised Representative. This ground of the assessee is dismissed.

13. In the result, the appeal of the assessee in ITA No.2837/Mds/2014 of assessment year 2006-2007 is dismissed.

14. **ITA No.2838/Mds/2014 of assessment year 2007-2008**:- The first ground raised by the assessee is that the Commissioner of Income Tax (Appeals) erred in confirming the disallowance of balance 50% of additional depreciation in the current year in respect

of the assets acquired in the 2<sup>nd</sup> half of preceding year ₹3,34,33,504/-.

14.1 As discussed in assessment year 2005-2006 in ITA No.2836/Mds/2014 at para 6.1, this ground of the assessee is allowed.

15. The second ground raised by the assessee is that the Commissioner of Income Tax (Appeals) erred in confirming the disallowance of additional depreciation on leased assets ₹2,61,84,817/-.

15.1 This issue is covered in favour of the Revenue in assessee own case by order of the Tribunal in assessment year 2006-07 in ITA No.2086/Mds/2010, vide order dated 16.02.2016 at para no.6.4 as under:-

*'6.4 We heard the rival submissions and perused the material on record and judicial decisions cited. Prime facie the assessee is in the business of manufacture of commercial vehicles and engines and additional depreciation is claimed on leased asset of windmills. During the previous year the assessee has purchased windmills leased out to others and claimed additional depreciation on such leased assets. On perusal of provisions u/s.32(1)(iia) of the Act and the decisions relied by the assessee which are in leasing business and cannot be brought into category of*

*manufacture of commercial vehicles. The provisions are very clear on this issue. The claim of additional depreciation is in violation of provisions u/s.32 of the Act where depreciation is allowed. We are of the opinion that the decisions relied by the assessee are not directly on the issue and distinguishable and additional depreciation on leased asset does not fit into the provisions of the Act and we uphold the findings and order of the Assessing Officer on this ground and allow the ground in favour of the Revenue”.*

Accordingly, this ground of the assessee is dismissed.

16. The next ground raised by the assessee is that Commissioner of Income Tax (Appeals) erred in confirming the disallowance of additional depreciation on assets eligible for 100% depreciation and put to use for less than 180 days.

16.1 Similar issue came for consideration before this Tribunal in assessee's own case for assessment year 2006-2007 in ITA No.2086/Mds/2010 vide order dated 16.02.2016 wherein held at para 4.4 as under:-

*'4.4We heard the rival submissions, perused the material on record and judicial decisions cited. The Id. Authorised Representative drew attention to the provisions u/s.32(1)(ia) of the Act for claim of additional depreciation and also provisions of law on carry forward. Since the asset was purchased during the second half of financial year 2004-05 and only 50% of depreciation was allowed and pleaded for carry forward of balance 50% to be claimed in the*

*assessment year 2006-07. On perusal of the judicial decisions and objections of Finance Minister speech Additional depreciation has to be allowed only in the case of new plant and machinery and not WDV value on subsequent years. The assessee also relied on the decision Cosmos Films Ltd (supra) where the Tribunal has allowed the claim of assessee for 50% of additional depreciation u/s.32(i)(iia) in respect of new Plant & Machinery installed at the new eligible industrial undertaking where Plant & Machinery were put to use for less than 180 days in the year of installation and the assessee had claimed only 50% of the additional depreciation and the balance amount was claimed in the next year. Respectfully following the Tribunal decisions, we direct the Assessing Officer to allow additional depreciation claimed by the assessee. This ground of the assessee is allowed".*

Accordingly, the ground of the assessee is allowed.

17. The fourth ground raised by the assessee is that the Commissioner of Income Tax (Appeals) erred in confirming the disallowance of depreciation on Aircraft of ₹21,70,15,709/-.

17.1 The Id. Assessing Officer observed that during the current year, the assessee had claimed depreciation to the tune of ₹.21,70,15,709/- towards the capitalization of Aircraft. In order to ascertain its usage wholly and exclusively for the purpose of assessee's business activity, the assessee was asked to substantiate its claim of depreciation by way of proving that the above aircraft has been used wholly and exclusively for the purpose of its business activity. In response to the same, the assessee replied that it has business in various states of India as well as its business activities

has been expanded in the international arena. Further, it has stated that during the current year the sale by way of domestic and international marketing has increased substantially. Since the business activities are being located at the various places of the country and also to promote its business activities outside India, possession of an aircraft is essential for the assessee. In the assessment order, the Id. Assessing Officer has incorporated the relevant submissions of the assessee vide letter dated 13.12.2010 which is as under:-

*"The purchase of aircraft has been made for the purpose of following reasons:-*

*To improve its business  
To increase its volume  
To increase its global presence  
To increase its exports  
To increase its customer base and  
To increase its customer service.*

*The above are evidenced by the*

- i. Steep increase in export sales volume from year in year*
- ii. Acquisitions and investments in Joint Ventures abroad etc.*

*Accordingly, the appellant had stated before the AO that the question of disallowance of depreciation presuming that this is not expenditure incurred wholly and exclusively for the purpose of business, is entirely against the law and business prudence.*

*The assessee further stated before the AO that in view of generation of revenue by hiring chartering the aircraft to other corporate I users, it has applied to the DGGI, for obtaining "No-Objection Certificate (NOG)"*

*for operating non-scheduled air services and it has obtained the NOG and 'Non-Schedule Operator Passenger License (NSOP) and carrying out the air service business from 2008-09 and started earning revenue from the aircraft as well:*

*The AO rejected the reply of the assessee for the following reasons:-*

*1) It has been observed from the official website of Director General of Civil Aviation that the assessee has received the licence as NOli-Schedule Aircraft Operator with effect from 02.04.2009.*

*The type of aircraft passed by the assessee is Falcon 2000 with the seat capacity of ten (10) and the said aircraft has been registered under the passenger category.*

*2) As per the Aircraft Rule 1937, Part-IV Rule 30, the assessee has to register its aircraft in India even though the same has been used for the purpose of its personal or sole corporate purpose.*

*3) As per the Aircraft Rule 1937, Part-IX Rule 67, the assessee has to maintain the following Log Books. For better clarity, the Rule 67 of the Aircraft Rule 1937 is reproduced as under:-*

- a) a journey log book;*
- (b) an aircraft log book;*
- (c) an engine log book for each engine installed in the aircraft;*
- (d) a propeller log book for every variable pitch propeller installed in the aircraft;*
- (e) a radio apparatus log book for aircraft fitted with radio apparatus;*
- (f) any other log book that may be required by the Director-General.*

*(2) The Director-General may require that a technical log or flight log be provided in respect of an aircraft and be maintained in such manner as may be specified by him*

*(3) Log books shall be of such type and shall contain such information, entries and certification as may be*

*specified by the Director-General. Log books and logs shall be preserved until such time as may be specified.*

*Explanation- For the purpose of this rule, the expression 'Journey log book" includes any other form or manner of recording (he requisite information and acceptable to the Director General".*

*(4) Based on the 'above facts, it has been clear that, the assessee has got licence for the purpose of Non-Schedule Aircraft Operator only from the Financial Year 2009-10. It is further notable that the assessee cannot operate as Non-Schedule Operator without the permission of specific licence issued by the Director General of Civil Aviation for that purpose*

*(5) In order to prove that the said aircraft has been used wholly and exclusively for the purpose of business, the assessee has to establish the usage of aircraft with the relevant Log Book Entries vis-a-vis the specific business activities carried out based on the above journey*

*(6) Since the assessee has not furnished he requisite Log Books maintained as per Rule 67 of the Aircraft Rule, 1937, the assessee has failed to establish that the above aircraft has been used wholly and exclusively for the purpose of assessee's business.*

The Id. Assessing Officer stated the depreciation claimed on the above said aircraft, which has been purchase for the personal use instead of the business activity of the assessee cannot be allowed as deduction. Hence, the Id. Assessing Officer added to the total income of the current year. Aggrieved by the order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals).

17.2 In the appellant proceedings, the Id. Commissioner of Income Tax (Appeals) considered the facts of the case and the submissions of the Id. Authorised Representative. He was of opinion that no one can operate as non-schedule operator without the permission and specific licence issued by the Director General of Civil Aviation (DGCA). In the instant case, the AO has observed that the assessee who has owned the aircraft Falcon 2000 with the seating capacity of 10, has received the licence from the DGCA as non-schedule aircraft operator w.e.f. 2.4.2009 relevant to F.Y. 09-10. Since the assessee is not having valid licence to operate the aircraft in the financial year relevant to A.Y. 07-08, it cannot claim depreciation on such aircraft. There is no comment from the assessee side to deny this fact. In view of this, the Id. Commissioner of Income Tax (Appeals) confirmed the disallowance made by the Assessing Officer and dismissed the ground of the assessee. Aggrieved by the order, the assessee filed an appeal before Tribunal.

17.3 Before us, the Id. Authorised Representative submitted that during the assessment year, the assessee company has procured an aircraft and put to use wholly and exclusively for the purpose of its business. The aircraft is being used by the assessee's senior management personnel for making the trips relating to its

business and the assessee's customers (including prospective customers). The assessee has made the depreciation claim u/s 32 on the aircraft to the extent of ₹.21,70,15,709/-. The assessee company had furnished the reasons to the Id. Assessing Officer why it is necessitated for it to buy an aircraft on its own. But the assessing officer has disallowed the depreciation claim of the assessee stating that the assessee has not furnished the log books to establish that the aircraft is being used wholly and exclusively for the purpose of assessee's business. The Id. AR submitted that the log book details were never been called by the assessing officer. Therefore, *the* assessing officer is not a tall justified in making a disallowance based on a detail which has not been called by him. The Id . Authorised Representative explained the details of trips made during the assessment year 2007-08 and prayed for allowing the ground.

17.4 On the other hand, the Id. Departmental Representative relied on the orders of the Commissioner of Income Tax (Appeals) and vehemently opposed to the grounds.

17.5 We heard the rival submissions and perused the material on record. In our opinion if the Aircraft is kept ready for use for the business purpose, the assessee is entitled for depreciation. Before

us, the Id. Authorised Representative submitted that Aircraft was kept ready for usage and permission from Director General of Civil Aviation is not necessary for assessee's own use but giving the Aircraft on hire to others it requires permission. In our opinion whether specific licence to use the Aircraft for assessee's own business purpose is required or not to be required to be examined by Assessing Officer to so as to grant depreciation. Accordingly, the Id. Assessing Officer is directed to examine the issue afresh and decide accordingly. This ground of the assessee is partly allowed for statistical purpose.

18. The fifth ground raised by the assessee is that Commissioner of Income Tax (Appeals) erred in restricting Deprecation at 5% on Residential Building ₹1,01,129/- and disallowance of Depreciation on land including in building ₹98,973/-.

18.1 This issue is covered by the Tribunal order in assessee's own case in ITA No.2445/Mds/2005, for the assessment year 2000-2001 dated 27.09.2007 as discussed in earlier para 7.1. Accordingly, this ground of the assessee is allowed.

19.1 The sixth ground raised by the assessee with regard to disallowance u/s.14A of the Act.

19.2. We heard the rival submissions, perused the material on record and judicial decisions cited. Similar issue was considered by the Tribunal in ITA No.2086/Mds/2010, for assessment year 2006-07, dated 16.02.2016 in para 8.4 as under:-

*'8.4 We heard the rival submissions and perused the material on record and judicial decisions cited. The Id. Authorised Representative submitted that the assessee is in receipt of exempted income and no expenditure has been incurred for earning income. In assessee's own case the Co-ordinate Bench of Tribunal has considered 2% disallowance of exempted income u/s.14A of the Act. The action of the Assessing Officer applying Rule 8D is not correct as the provisions of Rule 8D are introduced effective from 24.03.2008 and applicable from the assessment year 2008-09 and we rely on the decision of Jurisdictional High Court in the case of Simpson and Co. Ltd. v. DCIT in Tax Case (Appeal) No.2621 of 2006 dated 15.10.2012 and direct the Assessing Officer to disallow 2% of exempt income as disallowance u/s.14A of the Act. This ground of the assessee is partly allowed''.*

Accordingly, this ground of the assessee is partly allowed in view of the above order of the Tribunal.

20. The seventh ground raised by the assessee is with regard to addition of ₹7,95,069/- on account of difference in Arm's Length Price.

20.1 The Brief facts of the issue are that the case was referred to the Transfer Pricing Officer, for the purpose of determining the Arm's Length Price with reference to the 'international transaction carried out by the assessee with its associated enterprises during the F.Y. 2006-07 as per the provisions of sec 92C of the Act. In response to the same, the TPO passed order vide C.R.No.A-103/TPO-I/A.Y.2007-08 dated 16.09.2010 stating that there was an adjustment of ₹7,95,069/- for the current year. Accordingly, the AO issued show cause notice to the assessee why the above adjustment on the international transaction with the associated enterprises should not be added to the total income of the current year. The assessee submitted its reply before the AO. Not satisfied with the explanation given by the assessee the AO has proceeded with Addition. The AO has taken individual transactions and found that the price variation was more than the tolerable limit of 5%. The assessee has objected stating that 5% tolerable limit has to be taken for transactions as a whole. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

20.2. In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) confirmed the findings of the Id. Assessing Officer.

Aggrieved by the order, the assessee filed an appeal before Tribunal.

20.3 We heard the rival submissions perused the material on record. In this case, the assessee is not able to show that the price variation was less than 5% when individual transaction were compared. Since, the price variation is more than 5% of tolerable limit, the addition made by the lower authorities is justified. This ground of the assessee is rejected.

21. The eighth ground raised by the assessee is with regard to disallowance of weighted deduction on R & D expenditure covered u/s.43B amounting to ₹2,43,05,200/-

21.1 The Brief facts of the issue are that the assessee has provided leave encashment & gratuity provision for ₹3,89,79,000/- and ₹96,31,399/- respectively related to the R&D unit eligible for weighted deduction u/s. 35(2AB) of the Income tax Act. With reference to the same, the assessee was show caused why the weighted deduction claimed on the above provision of leave encashment & gratuity should not be disallowed due to the fact that the above provisions cannot be allowed as per the amendment to the provisions of Section 43B of the Income-tax Act, thereby the weighted deduction claimed

u/s. 35(2AB) of the Income tax Act is disallowed. Aggrieved by the order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals).

21.2 In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) considered the facts of the case and the submissions of the Id. AR. As per the provisions of Sec. 43B of the Act certain expense are to be allowed only on the basis of actual payments. The payments falling u/sec. 43B(f) in the assessee's case are to be disallowed since they were not paid. It is also true if certain expenditure is not an allowance as per the statutes the same is true even in the case of payments applicable u/s 35(2AB), Therefore, Assessing Officer is right in making the disallowance. With regard to alternate plea taken by the appellant that the !disallowed amount may be allowed in the year in which it is paid is not acceptable since no expenditure can be allowed as allowable expenses if the same is not incurred during that year. Therefore, the alternate argument of the assessee is also not acceptable. The Id. Commissioner of Income Tax (Appeals) dismissed the ground of the assessee. Aggrieved by the order, the assessee assailed an appeal before Commissioner of Income Tax (Appeals).

21.3 We heard the rival submissions, perused the material on record. According to Id. Authorised Representative the provisions of Sec. 43B will not apply in computation of weighted deduction u/s.35D of the Act. In our opinion, the provision of Sec. 43B(f) is applicable only on actual payment, it is to be allowed. However, we are of the opinion that on actual payment basis the claim to be allowed in the relevant assessment year. This ground of the assessee is partly allowed.

22 The ninth ground raised by the assessee is with regard to exchange gain on FCCN treated as Revenue Receipts of ₹1,61,33,084/-.

22.1 This ground is disposed off as discussed in ITA No.2837/Mds/2014 in assessment year 2006-2007 in para 9.3. This ground of the assessee is allowed.

23. The next ground raised by the assessee is that the Commissioner of Income Tax (Appeals) erred in confirming the addition of capital creditors written back amounting to ₹22,94,271/-

23.1 The Brief facts of the issue are that the Assessing Officer

noticed that an amount of ₹32,16,087/- relating to the capital creditors was written back and the same was credited to the block of assets for the purpose of depreciation. The Id. Authorised Representative submitted that the assessee has adopted the above accounting treatment by relying that the creditors written back were purely related to the capital assets. The assessee submitted in its reply to the Id. Assessing Officer as under:-

*"The amount of ₹.32,16,087/- refers to the credit balances in respect of Capital creditors written back, which has been credited to block of assets for purpose of tax depreciation, since the capital cost pertaining to the said credit balances was included in the cost capitalized in earlier years. In the depreciation schedule as per the Income Tax (Annexure-V to the Tax Audit Report) these amounts are forming part of the value of disposals.*

However, Id. Assessing Officer observed that the capital creditors written back by the assessee was mainly because of the cessation of liabilities. Hence, the income received has to be taxed as per the provisions of Sec. 41(1) of the Act. Hence, the amount of ₹32,16,087/- is being added to the total income of the current year. Further the corresponding depreciation reduced by the assessee on the capital creditor is to the tune of ₹9,21,816/- is being allowed as deduction. Accordingly, the difference amount of ₹22,94,271/- is disallowed and added to the total income of the current year. Aggrieved by the order, the assessee filed an appeal before

Commissioner of Income Tax (Appeals).

23.2 In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) considered the facts and the submissions of the Id. AR and gone through the decisions relied by the Id. AR and the Id. Assessing Officer. It was held by the various courts including the Apex Court, the cession of liabilities should become the income of the assessee and the same should be brought to tax u/s 41 (1) of the Act. The argument of the assessee that since the cessation is in respect of capital creditors therefore it should go to block of assets is not acceptable. The decision of the AO in bringing to tax such income after giving credit to the depreciation already claimed by the assessee is in order and dismissed the ground of the assessee. Aggrieved by the order, the assessee filed an appeal before Tribunal.

23.3 We heard the rival submissions, perused the material on record. The provisions of Sec. 43(1) of the Act cannot be applied in respect of capital receipts written back. The trading liability written back is only to be considered as income of the assessee in terms of Sec. 43(1) of the Act. Hence, this ground of the assessee is allowed.

24. The last ground raised by the assessee is with regard to disallowance of expenditure on software licence u/s.40(a)(i) /40(a) (ia) of the Act ₹2,99,26,327/-

24.1 The brief facts of the assessee is that the Id. Assessing Officer observed that the assessee had incurred the following expenditure on account of purchase of software license. The details of the same are reproduced as under:-

Sl.No	Particulars	Nature/usage	Amount
1	CITRIX Access Suite	Provided VPN acces to Laptops users (given to field personal) to connect AL's servers. This is connectivity software and not application software	4,880,000
2	Articualte Rapid E-Learning Software	Used by management development centre for developing e-courses	46,748
3	Allen Bradley Software	For programming of conveyor line (Linked to machinery)	64,048
4	Horiba Partial Flow Dilution	Used for Emission Analysis in Engine Testing (Linked to machinery)	936,000
5	71 E'MATRIX 10 Solution	PLM software issued by product Development for release of Designs for manufacture	19,365,240
6	Acoustics Software	Used for designing Noise shields to reduce the noise emitted by vehicles and meet the noise norms that are in force.	4,634,291
	Total		29,926,327

The Id. Assessing Officer observed that it is the responsibility of the payer to deduct tax on the acquisition of the software licences & during the payments on the receipt of computer related series as per the provisions of Chapter XVII-B of the Act. Since the assessee has

not complied with Chapter XVII B, the Id. Assessing Officer disallowed the expenditure of ₹2,99,26,327/- u/sc. 40(a)(i) and (ia) of the Act and added to the total income of the current year. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

24.2. In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) observed that from the submissions of the assessee the expenditure incurred on software licence was meant for use of copyrighted article but not use of copyright. This line of argument of the assessee cannot be accepted since as per the details furnished by it before the *AO* the payments made for the software licence is in the nature of copyrights of the software. Therefore, it should be taken as 'royalty' and the payments made should have been subjected to TDS. With regard to DTAA's and non-reference to royalty in DTAA's, the decision of Delhi ITAT relied on by the *AO* clarifies the issue. The Hon'ble Delhi Bench has observed that the proposition that the DTAA will prevail over the Act is not infallible. If an amendment in the Act comes subsequent to DTAA like in the case of DTAA with USA which was entered In 20.12.90, the principle of DTAA will prevail over the Act is no relevance. Therefore, the argument of the assessee is rejected. Further, it is to be noted as

admitted by the assessee that as per Explanation 4 to s.9(1)(vi) computers software is treated as royalty w. e. f. 1.6.76. The other line of argument of the assessee that the disallowance u/s 40(a)(i) / 40(a)(ia) will not be applicable to amount already paid but attracts only the amount payable is also not tenable. So far as TDS provisions are concerned the word 'payable' used here is more relevant. When the amount is already paid the question of making of TDS on that amount does not arise. Therefore, the legislature have deliberately used the word 'payable' in this context since these are TDS provisions. The respite is given for the situation of amount having been paid already in the form of amendment to s.201 w.e.f. 01.07.2012 whereby no such disallowance is possible if the assessee obtains a certificate from the Accountant of deductee to the extent that entire receipts were offered to tax in his hands. In view of this, the Id. Commissioner of Income Tax (Appeals) rejected the arguments of the assessee. Aggrieved by the order, the assessee assailed an appeal before us.

24.3 Before us, the Id. AR submitted that the expenditure incurred on operational software. The assessee has no right of copying has it has only right to use. Hence, it is to be considered as Revenue expenditure only as the issue is covered by the order of the Tribunal

in the case of Reliance Industries 43 SOT 506 and prayed for allowing the ground.

24.4 On the other hand, the Id. Departmental Representative relied on the orders of Commissioner of Income Tax (Appeals) and vehemently opposed to the ground.

24.5 We heard the rival submissions, perused the material on record and judicial decision cited. In our opinion this is purchase of software which is in a nature of capital asset. Hence, the assessee is entitled for depreciation at prescribed rates, the issue is remitted to Assessing Officer for fresh consideration.

25. In the result, the appeal of the assessee in ITA No.2838/Mds/2014 is partly allowed.

26. **ITA No.2839/Mds/2014 of assessment year 2008-2009:-**

The first ground raised by the assessee is with regard to disallowance of the claim of additional depreciation u/sec. 32(iia) of the Act ₹24,31,32,108/-.

26.1 This issue is covered by the order of the Tribunal in assessee's own in ITA No.2086/Mds/2010 for assessment year 2006-2007 vide order dated 16.02.2016 in favour of assessee at para 4.4 as under:-

*'4.4 We heard the rival submissions, perused the material on record and judicial decisions cited. The Id. Authorised Representative drew attention to the provisions u/s.32(1)(iia) of the Act for claim of additional depreciation and also provisions of law on carry forward. Since the asset was purchased during the second half of financial year 2004-05 and only 50% of depreciation was allowed and pleaded for carry forward of balance 50% to be claimed in the assessment year 2006-07. On perusal of the judicial decisions and objections of Finance Minister speech Additional depreciation has to be allowed only in the case of new plant and machinery and not WDV value on subsequent years. The assessee also relied on the decision Cosmos Films Ltd (supra) where the Tribunal has allowed the claim of assessee for 50% of additional depreciation u/s.32(i)(iia) in respect of new Plant & Machinery installed at the new eligible industrial undertaking where Plant & Machinery were put to use for less than 180 days in the year of installation and the assessee had claimed only 50% of the additional depreciation and the balance amount was claimed in the next year. Respectfully following the Tribunal decisions, we direct the Assessing Officer to allow additional depreciation claimed by the assessee. This ground of the assessee is allowed.*

26.2 Accordingly, this ground of the assessee is allowed.

27. The second ground raised by the assessee is with regard to disallowance of additional depreciation on assets eligible for 100% depreciation and put to use for less than 180 days ₹5,41,42,948/-

27.1 This issue is covered by the order of the Tribunal in assessee's own in ITA No.2086/Mds/2010 for assessment year 2006-2007 vide order dated 16.02.2016 at para 5.4 as under:-

*"5.4 We heard the rival submissions and perused the material on record and judicial decisions cited by the Id. Authorised Representative . The legislature is clear where the assets itself is allowed 100% depreciation which have been used for less than for 180 days. The claim for additional depreciation does not satisfy the provisions under Sec. 32(1)(iia) of the Act. Therefore, we are of the opinion that the Assessing Officer has examined and correctly disallowed and we uphold the findings of the Assessing Officer and dismiss the assessee ground".*

Accordingly, this ground of the assessee is dismissed.

28. The third ground raised by the assessee is with regard to deprecation restricted at 5% on residential building ₹1,80,090/-.

28.1 This issue is covered by the order of the Tribunal in assessee's own in ITA No.2445/Mds/2015 for assessment year 2000-2001 vide order dated 27.09.2007 at para 6 as under:-

*"6. We have heard the parties at length. The short controversy before us is that if the assessee has provided residential flats to its employees, then at*

*what rate depreciation is to be allowed. The CIT(Appeals) has tried to interpret the circular by stating that the Board might have issued the said circular in the context of the employees' quarters built in the factory premises and not to the residential flats which. are away from the Factory. On the perusal of the CSDT Instructions/letter, we find that no such distinction is made. In our opinion, the Circular/letter issued ambiguous language and no second interpretation is required. We, therefore/hold that the AO was not justified in restricting the depreciation to 5% in respect of the five residential flats which are used by the employees of the assessee company. We, therefore, allow ground no.2 in favour of the assessee and on this issue set aside the order of Commissioner of Income Tax (Appeals) .*

Accordingly, this ground is decided in favour of the assessee. The ground of the assessee is allowed.

29. The fourth ground raised by the assessee is with regard to disallowance of depreciation on Aircraft of ₹38,81,02,135/-.

29.1. As discussed in ITA No.2838/Mds/2014 in assessment year 2007-2008 in para 17.5, this ground of the assessee is remitted to Id. Assessing Officer for fresh consideration.

30. The fifth ground raised by the assessee is with regard to difference in Arm's Length price of ₹1,06,80,935/-.

30.1 The facts in this case are that there are TP adjustment in respect of foreign transaction as sale of spare parts to ₹6,93,253/- and Guarantee commission ₹99,87,682/- total aggregating to ₹106,80,935/-. Regarding addition towards sale of spare parts, the Id. Authorised Representative submitted that the assessee is entitled for volume discount. Regarding guarantee commission it is submitted that there cannot be an TP adjustment in view of the order of Tribunal in the case of Redington India Ltd vs. ACIT 155 ITD 873 (Chennai).

30.2 We have heard both the sides. In our opinion the plea of the assessee is justified. Accordingly, we hold that the assessee is entitled for volume discount in respect of sale of spare parts. Regarding guarantee commission as it was held by the Co-ordinate Bench of the Tribunal in the case of Redington India Ltd (cited supra) that the corporate guarantee issued for benefit of AE does not involve any cost to the assessee and does not have any bearing profit, income and loss of assets of the assessee. Therefore, it was outside the ambit of international transaction to which ALP

adjustment can be made. Accordingly, this ground of the assessee is allowed.

31. The sixth ground raised by the assessee is with regard to addition of capital creditors written back ₹55,52,528/-.

31.1 As discussed in ITA No.2838/Mds/2014 in assessment year 2007-2008 in para 23.3, this ground of the assessee is allowed.

32. The seventh ground raised by the assessee is with regard to exchange gain on FCCN treated as Revenue receipts ₹15,94,32,297/-/

32.1 As discussed in ITA No.2836/Mds/2014 in assessment year 2005-2006 in para 9.3, this ground of the assessee is allowed.

33. The eighth ground raised by the assessee is with regard to restriction to 100% of the weighted deduction on R & D expenditure of ₹2,73,24,500/-.

33.1 As discussed in ITA No.2838/Mds/2014 in assessment year 2007-2008 in para 21.3, this ground of the assessee is partly allowed.

34 The ninth ground raised by the assessee is with regard to disallowance of R & D expenditure covered u/s.43B amounting to ₹1,41,25,515/-

34.1 As discussed in ITA No.2838/Mds/2014 in assessment year 2007-2008 in para 21.3, this ground of the assessee is partly allowed.

35. The tenth ground raised by the assessee is with regard to disallowance of expenditure on Software licence u/s.40(a)(i)/40(a)(ia) of the Act ₹5,63,59,646/-.

35.1 As discussed in ITA No.2838/Mds/2014 in assessment year 2007-2008 in para 24.5, this ground of the assessee is partly allowed for statistical purpose.

36. The eleventh ground raised by the assessee is with regard to disallowance u/s.14A r.w.s Rule 8D of the Act.

36.1 As discussed in ITA No.2838/Mds/2014 in assessment year 2007-2008 in para 19.2, this ground of the assessee is partly allowed .

37 In the result, the appeal of the assessee in ITA No.2839/Mds/2015 in assessment year 2008-2009 is partly allowed.

38. Departmental Appeal in ITA No. 2825/Mds/2014 of assessment year 2005-2006 :-

38.1 The first ground raised by the Revenue is that the Id. Commissioner of Income Tax (Appeals) erred in directing the Id. Assessing Officer to disallow only 2% of exempted income u/s.14A of the Act, in place of amount of ₹3,19,35,900/- disallowed by the Assessing Officer by invoking the provisions of section 14A r.w. Rule 8D.

38.2 This issue came up for consideration in the assessment year 2006-2007 in ITA No.2086/Mds/2016, for assessment year 2006-07 vide order dated 16.02.2016 wherein it was held at para 8.4 as under:-

*'8.4 We heard the rival submissions and perused the material on record and judicial decisions cited. The Id. Authorised Representative submitted that the assessee is in receipt of exempted income and no expenditure has been incurred for earning income. In assessee's own case the Co-ordinate Bench of Tribunal has considered 2% disallowance of exempted income u/s.14A of the Act. The action of the Assessing Officer applying Rule 8D is not correct as the provisions of Rule 8D are introduced effective from 24.03.2008 and applicable from the assessment year 2008-09 and we rely on the decision of Jurisdictional High Court in the case of Simpson and Co. Ltd. v. DCIT in Tax Case (Appeal) No.2621 of 2006 dated 15.10.2012 and direct the Assessing Officer to disallow 2% of exempt income as disallowance u/s.14A of the Act. This ground of the assessee is partly allowed''.*

Accordingly, this ground of the Revenue is dismissed.

39. The next ground raised by the Revenue is that the Id. Commissioner of Income Tax (Appeals) erred in directing the Assessing Officer to allow weighted deduction u/s.35(2AB) of the Act for the entire period from 01.04.2004 to 31.03.2005 as against the allowance made by the Assessing Officer for the period from 21.09.2004 to 31.03.2005 on the basis of notification no.245/2004/SO/1021(E) dated 21.09.2004.

39.1 The Brief facts of the case are that the Id. Assessing Officer observed that the assessee has claimed weighted deduction

u/s.150% u/s.35(2AB) in respect of capital expenditure and revenue expenditure incurred for the period 21.09.2004 to 31.3.2005 for the whole year whereas as per Notification No.245/2004/SO/1021 (E) dated 21.9.2004, the assessee is entitled to weighted deduction in respect of automobile components only from 21.9.2004 to 31.3.2005 and not for the whole year. The AO allowed 100% deduction against 150% deduction claimed by the appellant for the above period 1.4.04 to 20.9.04 and accordingly disallowed the excess deduction claimed of ₹8,17,53, 134/- (₹24,52,59,403 – ₹16,35,06,269) in respect of capital expenditure and ₹7,20,91,344/- (₹21,62,74,033 – ₹14,41 ,82,689) in respect of revenue expenditure, totaling to ₹15,38,44,478/-. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

39.2 In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) considered the facts of the case and the submissions of the Id.AR and also gone through the Board's Notification dated 21.9.04 wherein the automobiles and automobile components were made part of s.35(2AB). The Commissioner of Income Tax (Appeals) perused the written document of the Finance

Minister's Speech on 2004-05 budget wherein at para 105 stated as under:-

*"105. The Automobile sector has done well and needs to be encouraged. I therefore propose to notify the automobile industry as an industry entitled to 150% deduction of expenditure on In-house R & O facilities."*

The Id. Commissioner of Income Tax (Appeals) observed that even though the Notification has come on 21.9.04, as per the 2004-05 budget the provisions are applicable from the beginning of the year. By reading together both the budget contents and the Notification, the assessee is entitled for the benefit for the whole year. So, the Id. Commissioner of Income Tax (Appeals) allowed the appeal of the assessee. Aggrieved by the order, the Revenue is in appeal before us.

39.3 After hearing both the parties and going through the above order of the Commissioner of Income Tax (Appeals), the Commissioner of Income Tax (Appeals) has rightly observed that though the notification has come into effect on 21.09.2004 but it is to be applicable for the full previous year relevant to assessment year 2005-2006. Accordingly, we confirm the findings of the Id. Commissioner of Income Tax (Appeals) on this issue. This ground of the Revenue is dismissed.

40. The next ground raised by the Revenue is that the Id. Commissioner of Income Tax (Appeals) erred in deleting the addition made on account of disallowance of warranty provision of ₹2,27,00,000/-.

40.1 In the assessment proceedings, the Id. Assessing Officer stated that the warranty claim consists of two components namely warranty cost of Rs.30,59,71,000/- and provisions of ₹2,27,00,000/-. Relying on the decision of the Hon'ble Madras High Court in the case of *M/s Rotork Control India Ltd & Others (293 ITR 311)*, the Id. Assessing Officer has denied the benefit. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

40.2 In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) considered the facts of the case, submissions of the Id.AR and gone through the decisions relied on by the Id.AR and the AO. The AO disallowed the provision for warranty mainly by holding that it is a contingent liability. It depends on the happening of a future event and hence would not come within the scope of section

37 of the Act. The Id. Commissioner of Income Tax (Appeals) relied on the decision of the Hon'ble jurisdictional High Court under similar facts in the case of *CIT v. Rotark Controls India Pvt. Ltd*, 293 ITR 311 (Mad). However, the decision has been reversed by the Hon'ble Supreme Court in the same case, i.e *Rotark Control India Ltd.v.CIT 314 ITR 62(SC)*. The Hon'ble Supreme Court has held that provision for warranty is an allowable expenditure u/s. 37 of the Act. Following the decision of the Apex Court, the Commissioner of Income Tax (Appeals) allowed the ground of the assessee. Against this, the Revenue has assailed an appeal before Tribunal.

40.3 We heard the rival submissions, perused the material on record and judicial decisions. The warranty provisions should be based on actuarial valuation or to be based on scientific method. The Id.CIT(A) relied on the judgment of Supreme Court in the case of *Rotark Control India Ltd. (cited supra)* without examining the basic on which the royalty was provided for. Accordingly in the interest of justice, we remit the issue to the file of the Id. Assessing Officer to examine the issue fresh and allow the claim of the assessee if it is based on any scientific method. The ground of the Revenue is partly allowed.

41. The last ground raised by the Revenue is that the

Commissioner of Income Tax (Appeals) failed to appreciate that the Wealth Tax paid in respect of business assets is not a allowable expenditure even as per the explanation to Sec. 40(a)(iia) of the Act.

41.2. We heard the rival submissions and perused the material on records. We are of the opinion that this issue came for consideration before this Tribunal in assessee's own case for the assessment year 2006-07 in ITA No.2086/Mds/2010, dated 16.2.2006 wherein it was observed at para 9.2 as under:-

*"9.2 On appeal before Tribunal, the Id. Authorised Representative reiterated his submissions and relied on the grounds of appeal and argued that Wealth Tax paid on business assets should be allowed. The arguments of the Id. Authorised Representative are not convincing and the provisions are very clear u/s.40(iia) as any sum paid on account of Wealth Tax is not deductible. Considering the apparent facts, we confirm the disallowance of the Assessing Officer and dismiss the assessee ground".*

Accordingly, this ground of the Revenue is allowed.

41.3 In the result, the appeal of the Revenue in ITA No.2825/Mds/2014 of assessment year 2005-06 is partly allowed for statistical purpose.

42. ITA No.2826/Mds/2014 of assessment year 2006-2007:- The first ground raised by the Revenue is that the Id. CIT(A) erred in

directing the Assessing Officer to verify and allow the additional depreciation on the computer system installed in the factory premises without appreciating the fact that the computer system is entitle for higher depreciation @ 60% and cannot be considered as the part of the plant and machinery for claiming additional depreciation.

42.1 We heard the rival submissions and perused the material on records. We are of the opinion that this issue came for consideration before this Tribunal in assessee's own case for the assessment year 2006-07 in ITA No.2086/Mds/2010, dated 16.2.2006 wherein it was observed at para 6.4 as under:-

*'6.4 We heard the rival submissions and perused the material on record and judicial decisions cited. Prime facie the assessee is in the business of manufacture of commercial vehicles and engines and additional depreciation is claimed on leased asset of windmills. During the previous year the assessee has purchased windmills leased out to others and claimed additional depreciation on such leased assets. On perusal of provisions u/s.32(1)(iia) of the Act and the decisions relied by the assessee which are in leasing business and cannot be brought into category of manufacture of commercial vehicles. The provisions are very clear on this issue. The claim of additional depreciation is in violation of provisions u/s.32 of the Act where depreciation is allowed. We are of the opinion that the decisions relied by the assessee are not directly on the issue and distinguishable and additional depreciation on leased asset does not fit into the provisions of the Act and we uphold the findings and*

*order of the Assessing Officer on this ground and allow the ground in favour of the Revenue”.*

Accordingly, this ground of the Revenue is allowed.

43. The last ground raised by the Revenue is that the Id. CIT(A) erred in holding that provisions of section 40(a)(i) are not Applicable in respect of income accrued to non-residents on conversion of foreign currency convertible notes(FCCN).

43.1 In the assessment proceedings, the Id. Assessing Officer found that during the year, the assessee company has converted 22,700 FCCN (Face value 22.70 Million US Dollars) to 3,22,92,576 shares. These FCCN had been issued bearing 0.5% interest per annum. While converting, these FCCN were given a value increase of 42.2%. Thus the holders of the FCCN worth 2,27,00,000 U.S. Dollars were compensated with an additional income of 95,79,400 dollars. In terms of rupees, this amounted to ₹42,26,91,504/-. This amount, indirectly represents the increase in asset value occurred to the non-resident in the form of compensation against accrued interest. On the specific query in this regard on the taxability and the tax deductibility, the assessee has pleaded that Section 115AC does not

mandate taxation of such FCCN. The assessee also pleaded that this conversion is not a transfer as per section 47(xa) of the Act. The plea of the assessee that this income is not to be taxed u/s.115AC is superfluous. Section 115AC is meant for taxing certain incomes at a lower rate (10%) than the normal rate. If a particular income is not included in Chapter XII of the Act, then it has to be taxed at the normal rates. Assessee's plea is not that the income is exempt from tax. The conversion of FCCN to shares has resulted in an income to the non-resident and can be seen as an "other income" envisaged in section 195 of the I. T Act. The assessee should have disallowed tax u/s.195 which it has failed to do. Hence, the amount of ₹42,26,91,504/- is an expenditure attracting provisions of section 40(a)(i) of the I. T Act and Id. Assessing Officer added to the returned income. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

43.2 In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) considered the facts of the case and the submissions of the Id. AR. The AO has disallowed the amount of Rs.42.26 crores u/s 40(a)(i) for not subjecting the amount for TDS. This is the amount of increase in asset value to the non-residents on conversion of FCCN to shares and the resultant conversion to Indian rupee. The

AO has taken such benefit to the non-residents on the accrual basis. Opposing the action of the AO, the assessee has contended that there was no income accrued to the Note Holders since the Note Holders have been allotted with the shares equivalent to the note value only and argued that there is no necessity to withhold any taxes on the conversion of notes into shares. The assessee also holds that it will not amount to transfer subject to capital gains in view of exemption clause in s.47(x). The assessee has also submitted that it has not claimed the conversion as expenditure and disallowing an expenditure which was not claimed is not valid as per law. In my considered opinion, the transaction arisen out of conversion will not attract capital gains and will not attract provisions of s.40(a)(i) since no income has accrued to the Note Holders and not claimed by the assessee. The Id. Commissioner of Income Tax (Appeals) allowed the ground of the assessee .

43.3 We heard the rival submissions and perused the material on record. Plain reading of Sec.47(x) r.w.s. 49(2A) of the Act does not specify transfer on conversion of FCCN to shares and it cannot be said that the assessee incurred any expenditure so as to deduct TDS u/s.40(a)(i) of the Act and accordingly, deletion by the Commissioner of Income Tax (Appeals) is justified. This ground of the Revenue is

rejected.

44. In the result, the appeal of the Department in ITA No. 2826/Mds/2014 in assessment year 2006-2007 is partly allowed.

45. ITA No.2827/Mds/2014 of assessment year 2007-2008:- The first ground raised by the Department is that the Id. CIT(A) erred in directing the Assessing Officer to disallow only 5% of exempted income u/s 14A of I. T. Act, in place of amount of ₹4,13,16,188/- disallowed by the Assessing Officer by invoking the provisions of section 14A r.w. Rule 8D.

45.1 We heard the rival submissions, perused the material on record. Similar issue came for our consideration in assessee's own case in ITA No.2086/Mds/2010 for assessment year 2006-07, vide order dated 16.02.2016 wherein held at para 8.4 as under:-

*"8.4 We heard the rival submissions and perused the material on record and judicial decisions cited. The Id. Authorised Representative submitted that the assessee is in receipt of exempted income and no expenditure has been incurred for earning income. In assessee's own case the Co-ordinate Bench of Tribunal has considered 2% disallowance of exempted income u/s.14A of the Act. The action of the Assessing*

*Officer applying Rule 8D is not correct as the provisions of Rule 8D are introduced effective from 24.03.2008 and applicable from the assessment year 2008-09 and we rely on the decision of Jurisdictional High Court in the case of Simpson and Co. Ltd. v. DCIT in Tax Case (Appeal) No.2621 of 2006 dated 15.10.2012 and direct the Assessing Officer to disallow 2% of exempt income as disallowance u/s.14A of the Act. This ground of the assessee is partly allowed”.*

Accordingly, we confirm the order of the Commissioner of Income Tax (Appeals). The ground of the Revenue is dismissed.

46. The next ground raised by the Revenue is that the Id. Commissioner of Income Tax (Appeals) failed to appreciate that the wealth tax paid in respect of business assets is not a allowable expenditure even as per the explanation to section 40(a)(iia) of I. T. Act.

46.1 We heard the rival submissions, perused the material on record. Similar issue came for our consideration in assessee's own case in ITA No.2086/Mds/2010 for assessment year 2006-07, vide order dated 16.02.2016 wherein held it was held that Wealth Tax liability is not business expenditure. Accordingly, this ground of the Revenue is allowed.

47. The next ground raised by the Revenue is that the Id. Commissioner of Income Tax (Appeals) failed to appreciate that the UPS could be considered as part of plant and machinery.

47.1 Similar issue came for our consideration in assessee's own case in ITA No.2086/Mds/2010 for assessment year 2006-07, vide order dated 16.02.2016 wherein the Tribunal allowed the claim of depreciation on UPS at 60%. Accordingly, we confirm the order of Commissioner of Income Tax (Appeals). This ground of the Revenue is dismissed.

48. In the result, the appeal of the Revenue in ITA No.2827/Mds/2014 for assessment year 2007-2008 is partly allowed.

49. In the result, appeals of the assessee in ITA No.2834/Mds/2014 of A.Y. 95-96 is dismissed, ITA No.2835/2014 of A.Y 2004-05 is partly allowed for statistical purpose, ITA No.2836/2014 of assessment year 2005-06 is partly allowed, ITA No.2837/2014 of assessment year 2006-07 is dismissed, ITA No.2838/2014 of assessment year 2007-08 is partly allowed and ITA No.2839/2014 of assessment year 2008-09 is partly allowed.

In Revenue appeals in ITA No.2825/Mds/2014 of assessment year

2005-06 is partly allowed for statistical purpose. ITA No.2826/Mds/2014 of assessment year 2006-07 is partly allowed and ITA No.2827/Mds/2014 of assessment year 2007-2008 is partly allowed.

Order pronounced on Friday, the 23<sup>rd</sup> September, 2016 at Chennai.

Sd/-

(जी. पवन कुमार)

**(G. PAVAN KUMAR)**

**न्यायिक सदस्य/JUDICIAL MEMBER**

Sd/-

(चंद्र पूजारी)

**(CHANDRA POOJARI)**

**लेखा सदस्य /ACCOUNTANT MEMBER**

चेन्नई/Chennai

दिनांक/Dated:23.09.2016

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

- |                          |                              |                         |
|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant   | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT           | 6. गार्ड फाईल/GF        |