IN THE INCOME TAX APPELLATE TRIBUNAL
"L" Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri Ravish Sood(JM)

I.T.A. No. 6712/Mum/2012 (Assessment Year 2009-10)

DCIT 7(2) Room No. 624 Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Reliance Natural Resources Limited H-Block, 1st Floor Dhirubhai Ambani Knowledge City Thane Belapur Road Koperkhairane Navi Mumbai-400 709.
(Appellant)		(Respondent)

I.T.A. No. 6844/Mum/2012 (Assessment Year 2009-10)

M/s. Reliance Natural Resources Limited H-Block, 1st Floor Dhirubhai Ambani Knowledge City Thane Belapur Road Koperkhairane Navi Mumbai-400 709.	Vs.	DCIT 7(2) Room No. 624 Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

PAN No.AABCR7656P

Assessee by	Shri Jintendra Sanghavi
Department by	Shri Darse S.
Date of Hearing	7.8.2017
Date of Pronouncement	11.8.2017

O R D E R

Per B.R. Baskaran (AM) :-

These cross appeals are directed against the order dated 6.8.2012 passed by the learned CIT(A)-13, Mumbai and it relate to A.Y. 2009-10.

2. The assessee is engaged in the business of providing fuel and facilitation services in various forms to power plants and isalso engaged in the joint

venture operations for exploration and production of coal based Methane blocks.

3. We shall first take up the appeal filed by the Revenue. The assessee claimed following expenses, which were incurred in connection with the issue of foreign currency convertible bonds (FCCB).

1.	Agency Fees (Barclays Bank)	1058188
2.	Commission & Fronting Fees (paid to Barclays Bank)	137338456
3.	Trustee- Maintenance Fees (Deutsche Bank)	199360
	Total FCCB Expenses	138596004

The Assessing Officer noticed that the assessee had incurred expenses of identical nature in the earlier years also and they were treated as capital expenses by the AO, as these expenses have been considered as incurred in connection with increasing the capital base of the company and not for carrying on day-to-day business activities. Accordingly, by following the orders passed in earlier years on the identical issue, the Assessing Officer disallowed the above said expenses by treating the same as capital expenditure The learned CIT(A) noticed that he had allowed the identical claim of the assessee made in the earlier years and accordingly reversed the order passed by the Assessing Officer on this issue. Aggrieved, the revenue is agitating the decision of Ld CIT(A) rendered on this issue.

4. We have heard the parties on this issue. We noticed that the Coordinate Bench of the Tribunal has considered an identical issue in ITA No. 1425/Mum/2011 dated 8.7.2016 relating to A.Y. 2007-08 and also in ITA No. 6711/Mum/2012 dated 24.8.2016 relating to A.Y. 2008-09. In both the years the Tribunal has confirmed the decision rendered by the learned CIT(A) and accordingly decided the issue in favour of the assessee.

5. We have gone through the decision rendered by the Coordinate Bench. We noticed that the decision rendered in A.Y. 2007-08 has been followed in A.Y. 2008-09. In A.Y. 2007-08, the Coordinate Bench has followed the decision rendered by the Tribunal in the case of Prime Focus Ltd. Vs. DCIT (ITA No. 836/Mum/2011 dated 4.2.2016). In the case of Prime Focus Ltd., the Tribunal observed that the FCCB is akin to borrowings made by issuing debentures and both of them are different types of debt instruments only. Accordingly it was held in the case of Prime Focus Ltd., that the expenses incurred in connection with FCCB are revenue in nature. The Tribunal in the instant case, further noticed that FCCB holders never had any voting rights as the same were not converted into equity shares of the company during that year. In view of these facts, the Coordinate Bench held that the expenditure incurred by the assessee in connection with the issue of FCCB is Revenue in nature.

6. Learned AR submitted that there is no change in the facts with regard to the present claim of the assessee and also submitted that none of the FCCB has been converted into shares during this year also. On the contrary, the Ld D.R submitted that the assessee has collected huge funds by issuing FCCB and hence the assessing officer was right in treating the expenses as capital in nature.

7. Since the co-ordinate benches have already taken a view in this matter, consistent with the view taken by the Tribunal, we hold that the learned CIT(A) was justified in holding that the expenditure incurred in connection with the issue of FCCB is deductible as revenue expenditure.

8. In the second ground the Revenue is contending that the assessee had issued FCCB for the purpose of meeting its working capital requirement, but the same has been issued in a manner contrary to the permitted use. Accordingly it has been contended by the revenue that the expenses should be treated as capital in nature. The contention of the assessee is that the revenue has taken a new dimension to the issue through this ground, i.e., this is not

the ground on which the assessing officer has made the disallowance. The Ld A.R submitted that the assessing officer has not examined the user of the funds and in any case, the same would not make any difference in the matter of allowability of expenses claimed by the assessee. Since, we have already held that the expenses incurred in connection with the issue of FCCB is revenue in nature, we do not find it necessary to adjudicate the alternative contention of the Revenue.

9. Third ground urged by the Revenue relates to disallowance of ₹ 14.86 crores u/s. 40(a)(i) of the Act for non-deduction of tax at source from certain payments.

10. Learned AR submitted that the identical payments were also made in earlier years and the Tribunal has allowed the claim of the assessee by holding that the impugned payments do not attract deduction of tax at source u/s. 195 of the Act. He further submitted that the decision rendered by the Coordinate Bench in A.Y. 2007-08 was followed in A.Y. 2008-09 also.

11. We heard the rival submissions and perused the record. During the course of assessment proceedings, the Assessing Officer asked the assessee to furnish details of expenses which were incurred in foreign exchange. The assessee furnished following details

S.No.	Name of the party	Nature of Expenses	Amount (₹)
1.	Barclays Capital, Barclays Bank PLC, UK	Agency Fees	1058188
2.	Barclays Capital, Barclays Bank PLC, UK	Commission & Fronting Fees	137338456
3.	Deutsche Bank Trustee Company Americas, UK	Trustee-Maintenance Fees	199360
4.	P.T.Kipady & Consultants, Indonesia	Professional Fees	379720
5.	Tasman Mining Pty Ltd, Australia	Professional Fees	110324
6.	KPMG	Professional Fees	88550
7.	Full Bright	Professional Fees	9063151
8.	T.T.Forex	Professional Fees	366484
9.	Deutsche Bank, Luxemborg	Listing Fee of GDR's	93060
	Total -		148697293

12. When the Assessing Officer asked the assessee to furnish details of tax deducted at source in each of the case, the assessee furnished that the tax has been deducted u/s. 195 of the Act wherever it is required as per provisions under DTAA. Accordingly, it was submitted that the disallowance is not required to be made u/s. 40(a)(i) of the Act. The Assessing Officer was not convinced with the submissions of the assessee and accordingly held that entire amount of ₹ 14.86 crores is required to be disallowed u/s. 40(a)(i) of the Act. However, since the Assessing Officer had disallowed a sum of ₹ 13.85 crores treating it as capital expenditure, the Assessing Officer disallowed the balance amount of ₹ 1.01 crore u/s. 40(a)(i) of the Act.

13. The learned CIT(A) confirmed the disallowance of Rs.3,79,720/- paid to M/s P T Kilpady & Consultants, as he held that the same is taxable as income of the payee in India and hence the assessee is required to deduct tax at source from that payment. The Ld CIT(A) confirmed the disallowance of Rs.93060/-, being the expenses incurred in listing of GDR treating the same as capital in nature. The Ld CIT(A) also confirmed the disallowance of Rs.1,10,324/-, being the amount paid to M/s Tasman Mining Pty Ltd towards technical review of cold mines, treating the same as capital expenditure.

14. The Ld CIT(A) noticed that the amount of Rs.3,66,484/- paid to T.T.Forex was in the nature of reimbursement of expenses. Hence the Ld CIT(A) deleted the addition by following the decision rendered by Hon'ble Bombay High Court in the case of M/s Siemens Aktongesellschaft (2008)(15 DTR 233).

15. The assessee has made payments made to following UK companies:-

Barclays Bank	-	10,58,188
Barclays Bank	-	13,73,38,456
Deutsche Bank	-	1,99,360
		13,85,96,004

The assessee has made the above said payments towards agency fees, Commission & fronting fees and Trustee maintenance fees respectively. Identical payments made in the immediately preceding year was held by Ld CIT(A) as not taxable in the hands of the payees in India in terms of provisions of India-UK DTAA. Accordingly the Ld CIT(A) held that there was not requirement of deducting tax at source u/s 195 of the Act and consequently there was no requirement to make disallowance u/s 40(a)(i) of the Act. Following his decision rendered in AY 2008-09, the Ld CIT(A) deleted the disallowance made by the AO.

16. The assessee has also made following payments to companies located in USA towards professional charges:-

KPMG	-	88,550
Full Bright	-	90,63,151
		91,51,701

The assessee submitted before Ld CIT(A) that the provisions of India UK DTAA and India-US DTAA are identical in nature. Accordingly the Ld CIT(A) held that these payments do not constitute income in the hands of payees as per the provisions of India-US DTAA and there was no requirement to deduct tax

at source in section 195, consequently there was no requirement to make disallowance u/s 40(a)(i) of the Act. Accordingly he deleted the disallowance made by the Assessing Officer. The revenue is aggrieved by the decision of of Ld CIT(A) in granting relief to the assessee. Though the revenue has mentioned the figure of Rs.14.86 crores in its ground, yet the fact remains that the Ld CIT(A) confirmed disallowance of Rs.3,79,720/-; Rs.93,060/- and Rs.1,10,324/- out of the above figure, as discussed by us in pargraph 13 supra. Hence the revenue should be aggrieved only in respect of relief granted by Ld CIT(A), viz.,

(a) Payment made to M/s T.T. Forex - Rs.3,66,484/-
(b) Payments made to U.K. Companies - Rs.13,85,96,004/-
(c) Payments made to USA companies - Rs.91,51,701/-

17. The assessee has claimed that the payment made to M/s T.T Forex was reimbursement of travelling expenses and hence the Ld CIT(A) has granted relief by following the decision rendered by Hon'ble Bombay High Court in the case of Siemens Aktongesellschaft (supra). The Ld D.R did not dispute the facts as well as the decision of Bombay High Court followed by Ld CIT(A). Hence we uphold his order passed on this issue.

18. We notice that the assessee had made identical payments to UK companies and hence an identical issue came to the consideration of the Tribunal in A.Y. 2007-08, wherein the Tribunal followed the decision rendered in the case of Raymond Ltd. Vs. DCIT (2003) 86 ITD 791. In the case of Raymond Ltd., it was held that neither the management commission nor underwriting commission nor selling commission would amount to FTS within the meaning of the DTAA with UK and consequently there was no obligation on the part of the assessee to deduct tax under section 195 of the Act. Accordingly, the Coordinate Bench held that there is no requirement to make the disallowance u/s. 40(a)(i) of the Act. The decision rendered in A.Y. 2007-08 was followed in A.Y. 2008-09 also. Learned AR submitted that there is no

change in facts with regard to the payments made during the year under consideration. Accordingly, consistent with the view taken by the Coordinate Bench, we uphold the decision taken by the learned CIT(A) on this issue.

19. The assessee has made payments made to USA companies towards professional charges. The assessee has submitted that these payments made for availing certain managerial and legal services and the decision rendered in the case of Raymond Ltd (supra) shall apply to the facts of these payments also. The Ld A.R submitted that the assessee is not required to deduct tax at source from the payments made to USA companies as the amount received by the payees is not taxable in India. We notice that the Ld CIT(A) has accepted the contentions of the assessee and accordingly deleted the disallowance made u/s 40(a)(i) of the Act. We also notice that the assessing officer has made the disallowance in a mechanical manner without examining the nature of payments made to USA companies. No material to contradict the submissions made by the assessee was furnished before us. Hence we have no other option, but to confirm the order passed by Ld CIT(A) on this issue.

20. Fourth and Fifth ground urged by the Revenue relate to disallowance to be made under clause (f) of Explanation-1 to section 115JB of the Act.

21. Clause (f) of Explanation-1 to section 115JB of the Act provides that the amount or amounts of expenditure relatable to any income to which section 10 (other than the provisions contained in clause-38 thereof) or section-11 or section-12 is required to be added to the net profit shown in the profit and loss account in order to arrive at the “book profit” for the purpose of section 115JB of the Act. Section 14A of the Act also mandates that no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income. Section 14A of the Act is required to be applied for the purpose of computing total income of the assessee, whereas clause (f) of Explanation-1 to section 115JB of the Act is

required to be applied for the purpose of computing book profit u/s. 115JB of the Act.

22. The assessee had computed disallowance u/s. 14A of the Act read with Rule 8D of I.T. Rules at ₹ 32.70 crores. The Assessing Officer took the view that the very same amount so disallowed u/s 14A can be added under clause (f) of Explanation-1 to section 115JB of the Act. Accordingly, he added amount of ₹ 72.70 crores for the purpose of computing book profit u/s. 115JB of the Act.

23. The learned CIT(A) took the view that disallowance computed u/s. 14A read with Rule 8D cannot imported into clause (f) of Explanation-1 to section 115JB of the Act. The learned CIT(A) further noticed that the assessee had disallowed 5.32% and 4.38% of exempt income in earlier two years for the purpose of computing book profit. The learned CIT(A) further noticed that section 80HHC has provided that 90% of the other income should be excluded, meaning thereby, expenditure incurred for earning 'other income' is taken at 10% of other income. Accordingly, the learned CIT(A) took the view that it will be appropriate to estimate 10% of the dividend income received during the year as reasonable expenses relatable to exempt income. The assessee had received dividend income at ₹ 99.22 crores. Accordingly, the learned CIT(A) worked out 10% thereof amounting to ₹ 9.22 crores as amount required to be added under clause (f) of Explanation-1 to section 115JB of the Act. The Revenue is aggrieved by the said decision of the learned CIT(A).

24. Learned AR placed reliance on the decision rendered by the Special Bench of Delhi Tribunal in the case of ACIT Vs. Vireet Investment (P) Ltd. (2017) 82 taxamnn.com 415, wherein the Special bench has held that computation under clause (f) of Explanation-1 to section 115JB of the Act is to be made without resorting to computation as contemplated under section 14A read with Rule 8D of the I.T. Rules. Learned AR further submitted that the learned CIT(A) has estimated expenditure incurred for earning exempt income

@ 10% of the dividend income. Ld AR submitted that the same would be reasonable as not much of assessee's resources are used for earning exempt income.

25. We have heard learned Departmental Representative on this issue and perused the record. In view of the decision rendered by the Special bench of the Tribunal in the case of Vireet Investment (P) Ltd.(supra), the Assessing Officer was not justified in adding the amount computed under section 14A of the Act to meet the requirement of clause (f) of Explanation-1 to section 115JB of the Act. We further noticed that the learned CIT(A) has computed the amount incurred for earning exempt income for the purpose of section 115JB at 10% of the dividend income. Considering the volume of dividend and quantum of addition of ₹ 9.22 crores, in our view the same appears to be reasonable. Accordingly, we uphold the order passed by the learned CIT(A) on this issue.

26. We shall now take the appeal filed by the assessee. The first issue relates to disallowance of Rs.3,79,720/- made under section 40(a)(i) of the Act, being the amount paid to M/s P T Kilpady & Consultants, an Indonesian company. The Learned AR submitted that an identical addition was made in A.Y. 2007-08 and 2008-09 and the Tribunal has restored the matter back to the file of the Assessing Officer for examining the same afresh. Accordingly, consistent with the view taken by the Coordinate Bench in the earlier years, we set aside the order passed by the learned CIT(A) on this issue and restore the same to the file of the Assessing Officer with similar directions.

27. Next issue relates to disallowance of professional fees of Rs.93,060/- paid for listing of GDR. Learned AR fairly admitted that this issue has been decided against the assessee in A.Y. 2007-08 and 2008-09 by the Coordinate Benches. Accordingly, consistent with the view taken by the Coordinate Benches in the earlier years, we uphold the order passed by the learned CIT(A) on this issue.

28. In the result, appeal filed by the Revenue is dismissed and appeal filed by the assessee is treated as partly allowed for statistical purposes.

Order has been pronounced in the Court on 11.8.2017.

Sd/-	Sd/-
(RAVISH SOOD)	(B.R.BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 11/8/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)

PS ITAT, Mumbai