IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, 'F': NEW DELHI

(Through Video Conferencing)

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.767/DEL/2014
[Assessment Year: 2009-10]

M/s Paramount Communications Ltd. C-125, Paramount House, Naraina INdl. Area, Phase-I, New Delhi-110028	Dy. Commissioner of Income Tax, Circle-14(1), New Delhi
PAN-AAACP0969Q	
Assessee	Revenue

ITA No.1378/DEL/2017
[Assessment Year: 2010-11]

M/s Paramount Communications Ltd. C-125, Paramount House, Naraina INdl. Area, Phase-I, New Delhi-110028	Dy. Commissioner of Income Tax, Circle-14(1), New Delhi
PAN-AAACP0969Q	
Assessee	Revenue

ITA No.2288/DEL/2017
[Assessment Year: 2010-11]

Dy. Commissioner of Income Tax, Circle-19(1), Room No.221, C.R. Building, New Delhi	M/s Paramount Communications Ltd. C-125, Paramount House, Naraina INdl. Area, Phase-I, New Delhi-110028
	PAN-AAACP0969Q
Revenue	Revenue

Assessee by	Sh. Satyan Sethi, Adv. Sh. Arta Trana Padna, Adv.
Revenue by	Ms. Sushma Singh CIT-DR

Date of Hearing	**12.04.2021**
Date of Pronouncement	**15.06.2021**

ORDER

PER R.K. PANDA, AM,

ITA No.767/Del/2014 filed by the assessee is directed against the order dated11.11.2013 of the learned CIT(A)-XVII, New Delhi, relating to Assessment Year 2009-10. ITA No.1378/Del/2017 filed by the assessee and ITA No.2288/Del/2017 filed by the Revenue are cross appeal and are directed against the order dated 30.01.2017 of the learned CIT(A)-7, New Delhi, relating to the Assessment Year 2010-11. For the sake of convenience these were heard together and are being disposed of by this common order.

ITA No.767/Del/2014

2. Facts of the case, in brief, are that the assessee is a company engaged in the business of manufacturing of Power Cable, Jelly Filled Telephone Cables & Optical Fibre Cables. Its finished products are supplied mainly to Government

Departments, Railway, DOT/BSNL/MTNL/PSU, MNCs & Other Companies. It filed its return of income on 29.09.2009 declaring nil income. During the course of assessment proceedings, the AO observed that the assessee suffered a total forex loss of Rs.30,21,30,000/- during the year out of which Rs.15,71,07,600/- pertained to non-depreciable assets of Rs.59,43,53,142/- including investment of Rs.24,82,23,001/-. After excluding the amount of investment balance of Rs.34,61,30,141/- was in respect of following items

i.	Land	Rs.6,17,61,000/-
ii.	Land of KKR Phase-II	Rs.24,04,66,312/-
iii.	Issue expenses	Rs.4,39,02,829/-

3. He observed that out of the above loss of Rs.15,71,07,600/-, a loss of Rs.12,50,03,577/- was deducted from the income in computation of income though it was not debited to P & L account thereby reducing the income/enhancing the loss by this amount. This loss of Rs.12,50,03,577/- relates to the above mentioned 03 non depreciable assets. According to the AO as per provisions of section 43A read with Rule 115 such loss is not allowable as a revenue expenditure but has to be capitalized in the value of

assets. Reason for claiming such loss from the income has not been explained. He, therefore, asked the assessee to explain the reason for claiming such loss from the income.

4. The assessee, in response to the above filed the details vide letter dated 09.12.2011 which have been reproduced by the AO in the body of the assessment order and which reads as under:-

> *"Following allocations of foreign exchange variation was done in audited accounts as duly verified by statutory auditors.*

Allocated to FCMITDA	*157107600*
Less: Transferred to P & L A/c	*34725800*
Less Transferred to General Reserve	*52930800*
Allocated to fixed assets	
Domestic	*126554992*
Imported	*18467408*

> *Treated in Income Tax Computation*
> *As per Income Tax Act foreign exchange fluctuation is governed by following section/Rules.*
>
> *- Rule 115*
>
> *- 4 3 A*
>
> *Accordingly assessee while preparing Income Tax Return has followed tax treatment as per these requirements of Income Tax Act.*
>
> *Exchange Taxation on FCCBs has been dealt as to given below: -*
>
> - *Exchange fluctuation, for pro rata borrowings used for acquiring imported fixed assets has neither been claimed as deduction in P & L a/c nor adjusted in Cost of fixed assets during the year (section 43A).*
> - *Exchange fluctuation for pro rata borrowings used for acquiring indigenous depreciable fixed assets has been adjusted in cost of fixed assets during the year.*

- *Exchange, fluctuation for prorate borrowings used for other purposes has been claimed as an expenditure.*
- *Exchange fluctuation, for pro rata borrowing used for investment in Paramount Holding Ltd. has not been claimed as an expense nor capitalized*

Accordingly, 12,65,54,992/- has been added- to fixed assets as added tin cost of fixed assets for claiming depreciation as per Income Tax Rules.

FCMITDA written off during the year of Rs.3,47,25,800/- has been added back to computation of Income & Foreign Exchange fluctuation of Rs.12,50,03,577/- not pertaining to non-depreciable assets has been claimed as deduction from computation being loss on foreign exchange fluctuation during the year."

5. Subsequently, the assessee filed another letter dated Nil filed on 15.12.2011 and explained as under:-

"Exchange fluctuation of Rs. 12,50,03,577/- for prorate borrowings used for other purposes has been claimed as an expenditure. In computation of income assessee has also added back exchange fluctuation of Rs.3,47,25,600/- which was written off to profit and loss account as FCMITDA written off during the year.

Exchange fluctuation of Rs.3,21,04,023/- for pro rata borrowing used for investment in Paramount Holding Ltd. has not been claimed as an expense nor capitalized.

FCMITDA written off during the year of Rs.3,47,25,600/- has been added back to computation of income and foreign exchange fluctuation of Rs. 12,50,03,577/- pertaining to non-depreciable assets has been claimed as deduction from computation being loss on foreign exchange fluctuation during the year

6. However, the AO was not satisfied with the explanation given by the assessee. According to him, the explanation given by the assessee does not say anything about the allowability of such claim as to how, why and under what provisions, he has deducted this amount from its income in the

computation of income. According to him, since, the loss of Rs.12,50,03,577/- pertains to capital asset, it is required to be capitalized in the value of such assets. Further, it relates to non-depreciable assets and therefore benefit of any depreciation on this account also cannot be given to the assessee. He accordingly made the addition of Rs.12,50,03,577/-.

7. The AO further noted that the assessee has opening and closing investments of Rs.27,39,71,001/-. Since, the income from the investment is exempt, therefore, provisions of section 14A are applicable to the facts of the case. On being questioned by the AO, it was explained by the assessee that it has not earned any dividend income during the year and provisions of section 14A are not applicable. However, the AO was not satisfied by the arguments advanced by the assessee. Relying on the decision the Hon'ble Bombay High Court in the case of Godrej Boyce Mfg. Co. Ltd. vs CIT, where it is held that the provisions of section 14A are constitutionally valid and the decision of the Delhi Bench of the Tribunal in the case of Cheminvest Ltd vs ITO (2009) 317 ITR (A.T.) 0086, wherein it was held that if any income is exempt from tax by virtue of

section 10 of the Act and not included in the total income of the assessee, the same would attract the provisions of section 14A, the AO made disallowance of Rs.26,92,582/-.

8. The AO similarly disallowed an amount of Rs.12,13,352/- on account of short deduction u/s 35D of the Act. Thus, the AO determined the loss of the assessee at Rs.37,98,97,365/- as against the returned loss of Rs.50,63,80,172/-.

9. In appeal, the learned CIT(A) not only confirmed the addition of Rs. 12,50,03,577/- but also issued enhancement notice on the ground that the assessee claimed benefit u/s 43A which he was not entitled to claim. He accordingly disallowed the depreciation claimed on assets at Rs.1,56,34,104/-.

9.1. So far as the disallowance of exchange fluctuation loss of Rs.12,50,03,577/- is concerned, the learned CIT(A) relying on various decisions observed that the foreign exchange fluctuation loss would be allowed as a deduction to the assessee if it is in respect of a transaction which had taken place during the relevant year and in respect of exchange rate difference on account of any transaction in the relevant year.

He analysed AS-11 and noted that AS-11 requires that every transaction in foreign currency has to be recorded at the prevailing rate of exchange as on the date of transaction. Also profit or loss arising due to exchange difference in respect of each item during an accounting period is to be recognized as income or expense in the period in which it arises. According to him the relevant term is transaction. Also that the profit or loss arising on account of such transaction incurred during the relevant account period would be considered. He noted that no transaction has taken place in the year under question in this case i.e. no payment has been made to any person. The entire proceeds were utilized in the A. Y. 2007-08 and 2008-09. The foreign exchange borrowings were for the purposes of repayment which fell beyond the accounting year and liability to such a loss did not occur in the year under consideration. Thus, the assessee has claimed loss of Rs.12,50,03,577/- on account of non depreciable assets. Further, the assessee has not made any transactions for repayment of the loans or for payment towards the assets during this year. The loss on account of foreign exchange has not occurred due to a transaction in this year. Without any transaction the assessee

cannot claim any loss on account of foreign exchange. The term used everywhere by the assessee also is "import of exchange differences arising in foreign currency transactions". Without any transaction the assessee cannot claim a difference in exchange and claim it as a loss. Further, the foreign loan were used for acquiring non depreciation capital assets and the assessee used this ploy to claim this amount as a loss as depreciation could not be claimed on these assets. He, thus, held that since, the assessee has clearly claimed the loss on non depreciation capital assets to reduce the incidence of tax and that this is first time that the assessee has claimed this loss, therefore, if there is reduction or increase in the liability of the assessee because of foreign exchange fluctuation it should be added to or reduced from the cost of the assets. The loss of Rs.12,50,03,577/- can be claimed as a capital loss and not as a revenue loss u/s 37 on account of foreign exchange fluctuation. However, even this capital loss would be allowed only in the year in which the transaction had taken place. The gain can be claimed as a capital receipt.

Distinguishing the various decisions cited before him and relying on various other decisions, he held that the assessee

cannot claim the amount of Rs. 12,50,03,577/- as forex loss on revenue account without indulging in any transaction and without any revenue element to the transaction. The foreign currency was not part of the trading assets of the company, the loss was not incurred in the course of carrying on the business and was not incidental to it. Therefore the foreign exchange loss claimed by the assessee is not allowable as a loss u/s 37. He, accordingly, confirmed the addition of Rs.12,50,03,577/- made by the AO.

9.2. The learned CIT(A) while deciding the appeal filed by the assessee further noted that the assessee has also claimed an amount of Rs.12,65,54,992/- u/s 43A which was added to the cost of assets and depreciation claimed thereupon. However, he noted that the assessee was not entitled to claim benefit u/s 43A and the amount of Rs.12,65,54,992/- could not be added to the cost of the assets and no depreciation could be claimed on this amount as the assets were indigenous. He therefore, issued a show cause notice to the assessee proposing to reduce the cost of the assets to the tune of Rs.12,65,54,992/- and disallow depreciation on this amount.

9.3. Rejecting the various explanation given by the assessee, the learned CIT(a) directed the AO to disallow depreciation of Rs.1,56,34,104/- by observing as under:-

> *"I have considered the submission of the appellant.*
>
> *5.24. Section 43A in brief states the following:*
>
> *1.)Where the assessee has acquired any assets from a country outside India.*
>
> *2.)The assets are acquired for the purpose of business or profession.*
>
> *3.) Consequent to change in rate of exchange there is increase/decrease in the liability of the assessee expressed in Indian currency towards cost of the assets or repayment of money borrowed for acquiring capital asset atongwith interest in foreign currency.*
> *4.) Such increase or reduction in the liability shall be added or deducted from the actual cost of assets as and when paid or received. "*
>
> *5.25. As can be seen from the provisions the appellant should have acquired the assets from outside India. The appellant has itself categorically stated that assets were indigenous assets. In view of this the foreign loans were utilized for purchasing indigenous assets and therefore 43A cannot be applicable. The appellant has not given any justification for making an incorrect claim.*
>
> *5.26. Further, due to change in rate of exchange there has to be an increase decrease in the liability of the appellant expressed in Indian currency towards cost of the assets on repayment of money borrowed for acquiring capital assets alongwith interest in foreign currency. The liability of the appellant has not increased/decreased during the year towards the cost of the assets or repayment of moneys borrowed for acquiring such assets. The appellant has categorically stated that the assets were acquired in A. V.* 2006- *07 and 2007-08. In view of the above, the appellant is not entitled to add Rs.l2,65,54,992/-to the cost of assets and claim depreciation as it is not covered by 43A.*
>
> *5.27. The appellant has quoted several judicial decisions whose facts are different. The appellant has made a claim*

under 43A and not u/s 37. I have already stated that the appellant would not be allowed to claim the loss u/s 37. Now it is established that the claim u/s 43A would not be allowed.

5.28. The depreciation claimed on the assets is Rs.1,56,34,104/-. The income of the appellant is enhanced by this amount. The amount of Rs.12,65,54,992/- is deducted from the cost of assets and depreciation on this amount is disallowed. Penalty proceedings u/s 271(l)(c) are initiated for furnishing inaccurate particulars income.

10. So far as the disallowance u/s 14A is concerned, the learned CIT(A) also confirmed the addition made by the AO.

11. Aggrieved with such order of the learned CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

1) *That on the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals)-XVII, New Delhi [briefly "the CIT(A)"] has erred in upholding the assessment at the total loss of Rs.37,98,97,365/-. The Appellant denies his liability to be assessed at loss of Rs.37,98,97,365/-.*

2) *That on the facts and circumstances of the case and in law, the CIT(A) has erred in holding that exchange loss of Rs. 12,50,33,577/- on foreign currency convertible bonds was not allowable under any of the provisions of the Income tax Act, 1961 (briefly "the Act").*

   2.1. That on the facts and circumstances of the case and in law, the CIT(A) has erred in not appreciating that foreign currency convertible bonds were issued for the purpose of business and hence, increase in liability on account of foreign currency fluctuation was for the purpose of business and as such was allowable because utilization of bond proceeds does not affect the purpose for which the foreign currency loan through FCCBs were raised.

3) *That on the facts and circumstances of the case and in law, the CIT(A) has erred in enhancing the income of the Appellant by Rs. 1,56,34,104/- being the depreciation allowed by the*

Assessing Officer on utilization of FCCB proceeds towards depreciable assets.

4) *That on the facts and circumstances of the case and in law, the CIT(A) has erred in upholding the disallowance of Rs.8,53,916/- under section 14A of the Act read with Rule 8D of Income tax Rules, 1962.*

4.1. That on the facts and circumstances of the case and in law, the CIT(A) has erred in not appreciating that no interest bearing funds were utilized to earn exempt income.

4.2. That on the facts and circumstances of the case and in law, the CIT(A) has erred in not appreciatingg that in the absence of nexus between borrowed funds and investment, disallowance under section 14A cannot be made on presumption."

12. The assessee has also filed an application under Rule 11 of the Income Tax Appellate Tribunal Rules, 1963 for admission of additional grounds which reads as under:-

1. That on the facts and circumstances of the case and in law, foreign exchange fluctuation loss of Rs. 12,65,54,992/- was allowable deduction under section 37 of the Act. Hence the Appellant is entitled to relief of Rs.12,65,54,992/-.

2. That on the facts and circumstances of the case and in law, CIT(A) while withdrawing depreciation of Rs.1,56,34,104/- ought to have allowed deduction of Rs.12,65,54,992/- being the loss on account of foreign exchange fluctuations attributable to acquisition of indigenous depreciable assets.

13. The learned counsel for the assessee while explaining the reasons for filing of the above additional grounds submitted that during the financial year 2006-07, the assessee had issued

unsecured foreign currency convertible bonds of US$2,70,00,000/- for a period of five years which were redeemed on 23.11.2011. As at 31.03.2008, liability towards FCCBs converted into Indian Rupee was Rs.108,00,00,000/- and as at 31.03.2009, it was Rs.138,21,30,000/-. As such, the assessee incurred loss of Rs.30,21,30,000/- on account of depreciation of rupee. The assessee in the accounts has dealt with the loss of Rs.30,21,30,000/- was dealt as under:-

S. No	Amount of loss	Remarks
(0	1,84,67,408	Attributable to imported assets. Loss was neither claimed as deduction nor adjusted in the cost of fixed assets.
(11)	12,65,54,992	Attributable to assets acquired in India. Increased liability was added to the cost of fixed assets. Depreciation was allowed by the Assessing Officer.
(iii)	12,50,03,577	Attributable to FCCBs used for other business purposes. Loss was claimed as allowable but was not allowed.
(iv)	3,21,04,023	Attributable to acquisition of foreign subsidiary. Loss was neither claimed as deduction nor has been capitalized.
Total	-30,21,30,000	

14. According to him, the position that emerges is that out of forex loss of Rs.30,21,30,000/-:-

(i) Loss of Rs. 5,05,71431 {1,84,67,408 + 3,21,04,023} was not claimed.

(ii) In respect of loss of Rs. 12,65,54,992/- being the

loss attributable to acquisition of indigenous depreciable assets, depreciation was allowed;

(iii) Loss of Rs. 12,50,03,577/- was disallowed by the Assessing Officer, for it related to acquisition of non-depreciable assets.

15. He submitted that in the first appeal, the grievance of the assessee was confined to the loss of Rs.12,50,03,577/- and the assessee did not claim the remaining loss nor it was allowed by the AO. However, the learned CIT(A) in his order dated 11.11.2013, not only upheld the disallowance of loss of Rs.12,50,03,577/- but also enhanced the income by Rs.1,56,34,104/- i.e. depreciation on exchange loss of Rs.12,65,54,992/- on acquisition of indigenous depreciable assets allowed by the AO was withdrawn. He submitted that though foreign exchange fluctuation loss of Rs. 12,65,54,992/- was an allowable deduction, however, the assessee under mis-appreciation of the legal position restricted its claim to depreciation only.

15.1. Referring to various decisions, he submitted that it is well settled that if an assessee, under a mistake, misconception or on not being properly instructed is over

assessed, then the lawful right of the assessee to claim that he was not liable to tax cannot be denied since the tax can be levied and collected only in accordance with law. He submitted that it is repeatedly held by the Courts in various decisions that even if an assessee declares an income in the return, the Assessing Officer cannot assess it merely on that basis and he has to consider its taxability in the light of other circumstances de hors the admission made in the return. He submitted that since, the loss of Rs.12,65,54,992/- was allowable deduction as per law, therefore, the assessee deserves to be allowed deduction. It cannot be denied relief merely because the loss was not claimed as deduction in the return of income. There is no estoppels against the statute is well settled as held in various decisions.

15.2 Referring to the decision of the Hon'ble Supreme Court in the case of NTPC Ltd. vs CIT 229 ITR 383(SC) and various other decisions, he submitted that since all material facts are already available on record and no new facts are required to be investigated, therefore, the additional grounds raised by the assessee should be admitted for adjudication.

16. The learned DR, on the other hand, strongly opposed the admission of the additional grounds raised by the assessee. She submitted that there is no grievance caused to the assessee except the addition of Rs.1,56,34,104/- which is already agitated by the assessee in ground no.3 of the appeal. She submitted that it is the settled law that there is no right to appeal if no grievance is caused to the assessee since the assessee itself has treated it as capital investment and filed return of income claiming only the depreciation. Since, the assessee has not claimed loss of Rs.12,65,54,992/- in the return of income, the assessee cannot claim the same in shape of additional ground before ITAT. Relying on various decisions, she submitted that the additional grounds should not be admitted.

17. We have heard the rival arguments made by both the sides on the issue of admission of the additional grounds filed by the assessee in the application under Rule 11 of the ITAT Rules, 1963. From the, various details furnished by the assessee, it can be seen that all material facts are already available on record and no new facts are required to be investigated.

18. The Hon'ble Supreme Court in the case of NTPC Ltd. (Supra) has reiterated the wide powers that the Tribunal has in admitting the additional ground. It has been held that the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that non-taxable item is taxed or a permissible deduction is denied, there is no reason as to why the assessee should be prevented from raising that question before the Tribunal.

18.1. The Hon'ble Bombay High Court in the case of CIT vs Pruthvi Brokers Shareholders Pvt. Ltd. 349 ITR 336(Bom.) has held that the assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. Various other decisions relied upon by the learned counsel for the assessee also support the case for admission of

the additional ground. Under these circumstances, we admit the addition grounds raised by the assessee.

19. Ground No.1 being general in nature is dismissed.

20. Grounds of appeal no.2 and 2.1 relates to denial of exchange loss of Rs.12,50,33,577/-.

20.1. The learned counsel for the assessee, referring to page 34 read with page 45 of the paper book submitted that in the AY 2009-10, the assessee incurred exchange loss of Rs.30,21,30,000/- [138,21,30,000 – 108,00,00,000] in respect of FCCBs. He submitted that during the FY 2006-07, the assessee issued unsecured foreign currency convertible bonds of US$2,70,00,000/-. The earlier proceeds were utilised in AY 2007-08 and 2008-09. The liability as on 31.03.2009 was in rupee terms of Rs.1,38,21,30,000/-, whereas it was Rs.1,08,00,00,000/- as on 31.03.2008. Thus, the difference was Rs.30,21,30,000/-

20.2. He submitted that out of the forex loss of Rs.30,21,30,000/-, Rs.3,21,04,023/- and Rs.1,84,67,407/- was not claimed as a deduction. Rs.12,65,54,992/- was the amount which pertained to acquisition of indigenous fixed assets. This

was added to the cost of the assets by the assessee and depreciation was claimed on this amount and this depreciation was claimed as an expense in the P & L A/c. The amount of Rs.12,50,03,577/- was claimed as loss from income. This loss as per the assessee pertained to non depreciable assets.

20.3. Referring to page 135-143 of the paper book, he submitted that AS-11 deals with effect of changes in foreign exchange rates. It provides that transactions involving foreign exchange be reported in enterprise's reporting currency (rupee). AS-11 was revised in 2003. He submitted that prior to revision of AS-11, exchange difference attributable to acquisition of fixed assets was to be adjusted in the schedule of fixed assets. However, as per AS-11 (revised 2003), such difference is required to be recognized as income or expense.

20.4. Recognition of exchange difference under AS-11 (Revised 1994) reads as under:

> *"Exchange differences arising on repayment of liabilities incurred for the purpose of acquiring fixed assets, which carried in terms of historical cost, should be adjusted in the carrying amount of the respective fixed assets. The carrying amount of such fixed assets should to the extent not already so adjusted or otherwise accounted for also be adjusted to account for any increase or decrease in the liability of the*

enterprise, as expressed in the reporting currency by applying the closing rate, for making payment towards the whole or a part of the cost of the assets or for repayment of the whole or a part of the monies borrowed by the enterprise from any person, directly or indirectly, in foreign currency specifically for the purpose of acquiring those assets."

20.5. Recognition of exchange difference under AS-11 (Revised 2003) read as under:

"Exchange difference arising on the settlement of monetary items or on reporting an enterprise's monetary items at rates different from those at which they were initially recorded during the period, or reported in previous financial statements, should be recognized as income or as expenses in the period in which they arise, with the exception of exchange differences dealt with in accordance with paragraph 15."

20.6. Referring to pages 60-63 of the paper book-II, he submitted that though AS-11 (revised 2003) was notified on 7.12.2006, however, Schedule–VI to the Companies Act continued to provide that effect of exchange fluctuation be adjusted in fixed assets. It was corrected in March 2009 by Notification 31.3.2009.

20.7. Referring to the decision in the case of CIT vs Woodward Governor India P. Ltd. (2009) 312 ITR 254 (SC) @ 265], he submitted that AS-11 is mandatory and is required to

be followed in computing the income as required by section 145(1) read with section 145(2) of the Act. Referring to the decision of the Hon'ble Delhi High Court in the case of CIT v. Virtual Soft Systems Ltd. (2012) 341 ITR 593(Del) @ 602 – 603, he submitted that the Hon'ble Delhi High Court has elaborated the duty of the AO to follow Accounting Standards. This judgment has been approved by Hon'ble Supreme Court in CIT v. Virtual Soft Systems Ltd. [2018] 404 ITR 409(SC).

20.8. Referring to page 78 of the paper book, he drew the attention of the Bench to the companies (AS) Amendment Rules 2009 and submitted that as per the said rules, notwithstanding AS-11 (revised 2003), Companies (Accounting Standards) Amendment Rules, 2009 gave following option to an enterprise w.r.e.f. 7.12.2006:

> Exchange difference relating to acquisition of a depreciable capital asset, can be added to or deducted from the cost of the asset and shall be depreciated over the balance life of the asset.
>
> In other cases, exchange difference can be accumulated in a "Foreign Currency Monetary Item Translation Difference Account" in the enterprise's financial statement and

amortized over the balance period of such long term asset / liability but not beyond 31st March 2011.

He accordingly submitted that exchange difference relatable to acquisition of depreciable capital assets is to be adjusted in the cost of the assets and all other exchange differences are to be accumulated in a FCMITDA and amortised.

20.9. The learned counsel for the assessee referring to pages 39 & 40 of the paper book drew the attention of the Bench to the accounting treatment in respect of foreign currency transactions, where following note was given in the balance sheet as at 31.03.2009.

> "Exchange difference arising on reporting of long term foreign currency monetary items:
>
> - In so far as, they relate to the acquisition of a depreciable capital assets are adjusted in the cost of assts.
> - In other cases are accumulated in a 'Foreign Currency Monetary Item Translation Difference Account (FCMITDA)' and amortized over the balance period of such long term monetary item but not beyond 31st March, 2011."

20.10. Referring to paper book page 42, he submitted that the exercise of option is allowed by Companies (AS) Amendment

Rules, 2009. He submitted that pursuant to exercise of option by Companies (AS) Amendment Rules, 2009, the assessee exercised the option of adjusting exchange difference in AY 2009-10.

20.11. Referring to page 34 r.w. page 42 of the paper book, he submitted that from Note 7 to Accounts r/w Note 9 to Schedule-E to the balance sheet as on 2009, it is clear that though the option was exercised in AY 2009-10, however, effect was given w.e.f. AY 2008-09, inasmuch as, depreciation of Rs.8,53,890/- on forex gain claimed in AY 2008-09 was deducted from the gross block and was taken to general reserve.

20.12. The learned counsel for the assessee submitted that the stand of the department is inconsistent. In the preceding assessment year i.e. 2008-09, there was foreign exchange gain of Rs.4,72,43,028/- (page 56 r/w 63 of paper book). By the revised return filed on 3.11.2009, income of Rs.40,83,13,502/- was declared. In computing the income, net profit of Rs.50,32,29,300/- as per P&L A/c was taken as the starting point (page_56 of the paper book), which included forex gain of Rs.4,72,43,028/-. Gain of Rs.4,72,43,028/- was not reduced in

computing the income and the assessment was made at the income of Rs.41,05,91,605/-. Thus, forex gain of Rs.4,72,43,028/- has been taxed in the assessment year 2008-09.

20.13. He submitted that even in the succeeding assessment year i.e. 2010-11, there was net gain of Rs.5,44,92,768/-, which in the original return filed on 22.9.2010 was offered to tax. However, on account of inconsistent stand of the department, the gain was claimed as not taxable and the issue was raised before the CIT(A). The CIT(A) appreciating the inconsistency in the stand has passed the following order in Appeal No.05/CIT(A)-7/Del/14-15 dated 30.01.2017.

> "*During the year under consideration, it earned forex gain for Rs.5,44,92,768/- and showed the same as income in the return but claimed the same in a revised computation in view of the fact that loss on this account was not allowed in the earlier year and therefore, the department needs to be consistent in its approach that if the loss was treated as of capital nature, even the receipt should be treated as of capital nature. There is merit in the submission of the Ld. AR and this argument is valid. The AO is directed to exclude the receipt from the total income. However, if in further appeal for the AY 2009-10, it is held that the loss has to be allowed as revenue expenditure the gain for the assessment year under consideration would also has to be taxed as income*".

20.14. He accordingly submitted that applying the principle of consistency, exchange loss of Rs.12,50,33,577/- should be allowed as deduction. He submitted that in the Finance Act, 2018, section 43AA has been inserted to provide that gain or loss arising on account of exchange fluctuation shall be treated as revenue income or loss.

21. The learned DR on the other hand heavily relied on the order of the learned CIT(A).

22. We have considered the rival arguments made by both sides, perused the orders of the learned AO and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us, we find during the F. Y. 2006-07, the assessee had issued unsecured foreign currency convertible bonds of US$ 2,70,00,000/-. The entire proceeds were utilized in AY 2007-08 & 2008-09. As on 31.03.2009, the liability was in Rupee terms Rs.138,21,30,000/- whereas on 31.03.2008 it was Rs.1,08,00,00,000/-. Thus, the amount of Rs.30,21,30,000/- was the difference between the two figures. Out of the forex loss of Rs.30,21,30,000/-, Rs.3,21,04,023/- and

Rs.1,84,67,407/- were not claimed as a deduction. Rs.12,65,54,992/- was the amount which pertained to acquisition of indigenous fixed assets. This was added to the cost of the assets by the assessee and depreciation was claimed on this amount and this depreciation was claimed as an expense in the P & L A/c. The amount of Rs.12,50,03,577/- was claimed as loss from income. This loss as per the assessee pertained to non depreciable assets.

22.1. We find the loss of Rs.12,50,03,577/- (proportionate to non-depreciable assets) claimed as deduction was disallowed for the reason that the loss pertained to capital assets (land) and was required to be capitalized in the value of such asset. Since, asset acquired was not depreciable, therefore, loss cannot be allowed. We find that the learned CIT(A) upheld the action of the AO on the ground that no transaction has taken place during the year, for no payment was made during the year. Further, assets were not acquired during the year. Loss can be allowed in the year in which transaction had taken place. Further, such exchange loss was capital loss and not revenue loss. It is the submission of the learned counsel for the assessee that the stand of the department is inconsistent since

in AY 2008-09, foreign exchange gain of Rs.4,72,43,028/- was taxed as income as the same was not reduced in computing the income. Similarly, in AY 2010-11, the net gain was offered to tax. However, due to inconsistent stand of the department, the gain was claimed as not taxable and the CIT(A) gave certain directions which has been reproduced in the preceding paragraphs.

22.2. We find some force in the arguments of the learned counsel for the assessee. We find the assessee has prepared its accounts as per AS-11 which deals with effect of changes in foreign exchange rate and such difference is required to be recognized as income or expenditure. The Hon'ble Supreme Court in the case of CIT v Woodward Governor India P. Ltd. (Supra) has held that AS-11 is mandatory and is required to be followed in computing the income as required by section 145(1) read with section 145(2) of the Act. The Hon'ble Delhi High Court in the case of CIT v. Virtual Soft Systems Ltd. (supra) has explained the duty of the AO to follow Accounting Standards. The Hon'ble Supreme Court has approved the decision of the Hon'ble Delhi High Court in CIT vs Virtual Soft Systems Ltd. reported in 404 ITR 409. Further, during the AY 2008-09, such

foreign exchange gain of Rs.4,72,43,028/- was treated as income or declared as income was accepted by the AO. Similarly, in AY 2010-11, although the assessee has offered the foreign exchange gain to tax, however, due to inconsistent stand of the department it claimed the gain is not taxable and the issue was raised before the CIT(A). The learned CIT(A) also appreciating the inconsistency in the stand of the department held that the department needs to be consistent in its approach that if the loss was treated as of capital nature, even the receipt should be treated as of capital nature. He, accordingly, directed the AO to exclude the receipt from the total income. However, he held that if in further appeal for the AY 2009-10, it is held that the loss has to be allowed as revenue expenditure the gain for the assessment year under consideration would also has to be taxed as income. In view of the above discussion, following the decision of the Hon'ble Supreme Court in the case of CIT v Woodward Governor India P. Ltd. (supra), where it is held that AS-11 is mandatory and required to be followed in computing the income and the decision of the Hon'ble Delhi High Court in the case of CIT vs Virtual Soft Systems Ltd.(supra), holding that it is the duty of the AO to

follow accounting standards and following the rule of consistency, we hold that the foreign exchange loss of Rs.12,50,33,577/- should be allowed as revenue expenditure. Ground no.2 and 2.1 filed by the assessee are accordingly allowed.

23. Ground no.3 relates to enhancement of the income of the assessee by Rs. 1,56,34,104/- being the depreciation allowed by the Assessing Officer on utilization of FCCB proceeds towards depreciable assets by the CIT(A). The additional ground relates to the allowability of foreign exchange fluctuation loss of Rs.12,65,54,992/- as an allowable deduction u/s 37 of the I.T. Act, 1961.

23.1. The learned Counsel for the assessee submitted that exchange loss of Rs.12,65,54,992/-was attributable to acquisition of indigenous depreciable assets. Increased liability on account of forex loss was added to the cost of the fixed assets and deprecation of Rs.1,56,34,104/- claimed, which was allowed by the Assessing Officer. The CIT(A) enhanced the income, inasmuch as, deprecation of Rs.1,56,34,104/- was withdrawn and the amount of Rs.12,65,54,992/- was reduced from the WDV, for the reason that (i) section 43A was not

applicable to such a case because the assets were not acquired from abroad and (ii) liability of the assessee towards cost of the assets or repayment of money borrowed has not increased or decreased during the year.

23.2. He submitted that Section 43A has no applicability in a case such as the present one, as has been held in Cooper Corporation (P) Ltd. v. Dy. CIT (2016) 159 ITD 165 (Pune), however, the conclusion that the liability due to exchange fluctuation has not increased during the year because the assets were acquired in earlier years runs contrary to the decision of the Hon'ble Supreme Court in CIT vs Tata Iron & Steel Co. Ltd. reported in 231 ITR 285, wherein it was laid down that transaction of loans was distinct and independent transaction in comparison to acquisition of assets. He submitted that in Cooper Corporation (P) Ltd. (supra), initially the assessee had taken rupee loan. On account of lower interest cost, the loan was converted in foreign currency loan. However, the assessee suffered losses due to exchange fluctuations. The same loss was claimed as business loss. The Assessing Officer disallowed the claim for the reason that (i) the loss was a notional loss and (ii) the loans were utilized to

acquire capital assets and therefore, the loss cannot be allowed as revenue expense.

The CIT(A) allowed partial relief. Loss to the extent of Rs.37,92,087/- being attributable to revenue items was allowed. However, loss of Rs.1,02,06,863/- was disallowed, for the same was utilized to acquire capital assets. On second appeal, the Tribunal inter- alia held that:

(i) As per AS-11 read with Notification S.O. 892(E) dated 31.3.2015, exchange difference has to be recognized as "income" or "expense" as the case may be *(paras 10.2 & 10.3 r/w 11 of the order).*

(ii) Section 43A opens with non obstante clause and it comes into play only when the assets are acquired from a country outside India and that it does not apply to acquisition of indigenous assets *(para 10.4 of the order).*

(iii) Loss was allowable on the basis of generally accepted accountancy principles. Increased liability due to exchange loss cannot be loaded to the actual cost u/s 43(1) of the Act. Loan has no bearing on the cost of the asset. Transaction of loan was distinct and independent transaction in comparison to acquisition of assets as has been held in CIT v. Tata Iron & Steel Co. Ltd. (1998) 231 ITR 285 (SC) *(paras 10.5 & 10.6 of the order).*

23.3. He submitted that on exactly similar facts and circumstances, the Co-ordinate Bench of the Tribunal in ACIT v. M/s. KEI Industries Ltd. [ITA No.1433/Del/2014 & ITA No.528/Del/2016 dated 3.12.2020] have allowed depreciation

on enhanced cost for the assessment years 2009-10 and 2012-13. Considering the issue, the Hon'ble Tribunal in para 10 of the order (page 47 to 50 of its order) has observed that:

> *"It is, therefore, clear that though Section 43A apply to the assets acquired from abroad, still the A.O. without justification applied Section 43A for making the disallowance of depreciation against the assessee. Section 43A thus could not apply in the case of the assessee which is also held by various Benches of the Tribunal in the decisions quoted above. Accounting Standard-11 would also apply in the case of the assessee. The assessee has also explained that Companies Amendment Rules also apply to the facts of the case because option is given to assessee and it provided "Where long term foreign currency monetary items relates to acquisition of depreciable capital asset, the same shall be added/deducted from the cost of the asset and shall be depreciated accordingly over the balance life of the asset.". It is not in dispute that assessee followed AS-11 regularly. In A.Y. 2010-2011 the Ld. CIT(A) allowed similar claim of the assessee, but, the Department did not file any appeal against the same Order."*

23.4. He also relied on the decision in the case of Dy. CIT v. Maddi Lakshmaiah & Co. Ltd [2017] 82 taxmarnn.com 205 (Visakhapatnam) and the decision of the Cochin Bench of the Tribunal in the case of MFAR Hotels & Resorts Ltd. v. ACIT vide ITA No.63/Coch/2015, order dated 16.03.2018. Further, Cooper Corporation (P) Ltd. (supra) has been followed in Hyundai Motor India Ltd v. Dy. CIT [2017] 81 taxmann.com 5 (Chennai).

23.5. He submitted that based on decisions rendered in Cooper Corporation (P) Ltd. (supra), MFAR Hotels & Resorts Ltd. (supra) and Maddi Lakshmaiah & Co. Ltd (supra), the assessee has a good case to argue that exchange fluctuation loss attributable to depreciable assets acquired in India is an allowable expenditure

23.6. Without prejudice to the above, the learned counsel for the assessee submitted that though loss is allowable, in case the Bench is not inclined to allow deduction of Rs.12,65,54,992/- as claimed in the additional ground for the reason that the assessee had claimed depreciation in the return of income, then the depreciation may be allowed. For the above propositions, he referred to the decision in the case of CIT vs. Industrial Finance Corporation of India Ltd. (2009) 185 Taxman 296 ('Del). In this case also, though the difference between forward contract rate and exchange rate on date of entering into contract was held to be allowable as business expenditure in year of entering into forward contract itself, however, since the assessee had spread over the expense, the Hon'ble Court allowed the spread over. Applying this principle of Industrial Finance Corporation of India Ltd. (supra), the

depreciation may be allowed to the Assessee.

23.7. Referring to the decision in the case of DDIT v. Staubil A.G. India Branch Office (ITA No.3703/Mum/2005 *para 14 to 20 of the order)*, he drew the attention of the Bench to the same and submitted that following ground was raised by the Department:

> *"2. On the facts and the circumstances of the case and in law, the Id. CIT (A) erred in holding that the Assessing Officer was not justified in disallozving depreciation of Rs. 18,636/- on capitalization of exchange control fluctuation arising on foreign currency borrowing from its head office relatable to fixed assets acquired in India without appreciating that section 43A is not applicable in the present case."*

23.8. He submitted that In this case, out of foreign currency loans, assessee had acquired premises in India. In the computation income enhanced liability on account of currency fluctuation was added to the fixed assets stating that "additions to the fixed assets include loss of foreign exchange rates at the year-end which is added to the written down value of the block of assets". The Assessing Officer disallowed depreciation for the reason that definition of WDV does not envisage such adjustment and section 43A was not applicable, for assets were not acquired from a country outside India. CIT(A) allowed

depreciation observing that else there would be a case to claim full amount of exchange fluctuation as revenue loss. In appeal, the Tribunal referring to CIT v Woodward Governor India P. Ltd. (2009) 312 ITR 254 (SC) upheld the order of CIT(A).

23.9. He accordingly submitted that the depreciation claimed by the assessee should be allowed and accordingly the additional ground may be treated as infructuous.

23.10. The learned CIT-DR on the other hand, heavily relied on the order of the CIT(A). She submitted that the learned CIT(A) has given valid reasons for disallowing the depreciation while enhancing the income of depreciation to the extent of Rs.1,56,34,104/-, since, the assets were not acquired from abroad and the liability of the assessee company towards cost of the assets or repayment of money borrowed has not increased or decreased during the year. She accordingly submitted that both ground no.3 and additional ground raised by the assessee should be dismissed.

23.11. We have considered the rival arguments made by both sides, perused the orders of the learned AO and CIT(A) and the paper book filed on behalf of the assessee. We have

also considered the various decisions cited before us. We find the assessee in the instant case had attributed the exchange loss of Rs.12,65,54,992/- to acquisition of indigenous depreciable assets. Accordingly, it had attributed the liability on account of forex loss to the cost of the fixed assets and claimed depreciation of Rs.1,56,34,104/- which was allowed by the Assessing Officer. We find the learned CIT(A) enhanced the income to the extent of depreciation of Rs.1,56,34,104/- by directing the Assessing Officer to reduce an amount of Rs.12,65,54,992/- from the WDV on the ground that section 43A was not applicable since the assets were not acquired from abroad and the liability of the assessee towards cost of the assets or repayment of money borrowed has not increased or decreased during the year. It is the submission of the learned counsel for the assessee that provisions of section 43A are not applicable to the case of the assessee. However, the conclusion that the liability due to exchange fluctuation has not increased during the year because the assets were acquired in earlier years runs contrary to the judgment of Hon'ble Supreme Court in the case of CIT v. Tata Iron and Steel Co. Ltd (1998) 231 ITR 285, wherein, it was laid down that transaction of loan was

distinct and independent transaction in comparison to acquisition of assets.

23.12. We find an identical issue had come up before the Tribunal in the case of ACIT v. M/s. KEI Industries Ltd. in ITA No.1433/Del/2014 & ITA No.528/Del/2016 order dated 3.12.2020, wherein the Tribunal had allowed depreciation on enhanced cost for the assessment years 2009-10 and 2012-13 by observing as under:-

> *"10. We have considered the rival submissions. The assessee explained before the authorities below that in assessment year under appeal, the assessee had capitalized a sum of Rs.27,37,25,941/- on account of exchange rate fluctuation in respect of machineries bought in India from the foreign funds raised through FCCBs. No repayment of loan by way of FCCBs was made during the year under appeal. However, increase in any liability on account of prevailing exchange rate was shown in the balance-sheet under the Head "Unsecured Loans" the fluctuations to the extent of acquisition of fixed assets in India by utilising FCCBs was added to the actual cost and depreciation charged thereon. Thus, the assessee purchased the machinery in India from the foreign funds through FCCBs which fact is not disputed by the authorities below. It is, therefore, clear that though Section 43A apply to the assets acquired from Abroad, still the A.O. without justification applied Section 43A for making the disallowance of depreciation against the assessee. Section 43A thus could not apply in the case of the assessee which is also held by various Benches of the Tribunal in the decisions quoted above. Accounting Standard-11 would also apply in the case of the assessee. The assessee has also explained that Companies Amendment Rules also apply to the facts of the case*

because option is given to assessee and it provided "Where long term foreign currency monetary items relates to acquisition of depreciable capital asset, the same shall be added/deducted from the cost of the asset and shall be depreciated accordingly over the balance life of the asset.". It is not in dispute that assessee followed AS-11 regularly. In A.Y. 2010-2011 the Ld. CIT(A) allowed similar claim of the assessee, but, the Department did not file any appeal against the same Order. In A.Y. 2011-2012 though the Department filed appeal before the Tribunal on this issue on allowing depreciation, but, the same has been dismissed vide Order Dated 21.10.2019 (supra). Thus, the Ld. CIT(A) was bound to follow rule of consistency and should not have taken a contrary view in A.Y. 2012- 2013. We rely upon the Judgments of the Hon'ble Supreme Court in the case of Radhasoami Satsung 193 ITR 321 (SC) and Excel Industries Ltd., 358 ITR 295 (SC). The assessee has also followed Companies Rules, 2009 because it has given option to the assessee to do so. The decision of Mumbai Bench in the case of DDIT v. Staubil A.G. India Branch Office (supra), relied upon by the Ld. CIT(A) is on identical facts. Therefore, there is no infirmity in the Order of the Ld. CIT(A) in following the same. It may also be noted here that wherever there was an exchange gain to the assessee, the same was reduced from the WDV and claim was made accordingly, therefore, assessee is following the AS-11 consistently and as such the same should not have been disputed by the authorities below. The Ld. D.R. has not pointed-out any infirmity in the Order of the Ld. CIT(A) in allowing the depreciation to the assessee as per Law. We, therefore, do not find any merit in this Ground No.2 of the appeal of the Revenue and the same is accordingly dismissed."

24. Since, the assessee in the instant case has attributed the increased liability of Rs.12,65,54,992/- to the cost of the assets and the depreciation was allowed, therefore, although the assessee has a good case to argue that exchange

fluctuation loss attributable to depreciable assets acquired in India is an allowable revenue expenditure, however, it would require tedious exercise of modifying assessments for number of year. Therefore, we hold that the assessee is entitled to depreciation on exchange loss and the additional grounds raised by the assessee for AY 2009-10 becomes in-fructuous. It is held in the case of CIT v. Industrial Finance Corp of India Ltd. (2009) 185 Taxman 296, that revenue expenditure (loss) is allowable in the year in which it is incurred but where the assessee has spread it over, the Court would allow the benefit. We find merit in the argument of the learned counsel for the assessee that it cannot be held that neither depreciation on enhanced cost due to exchange fluctuation is to be allowed nor the loss itself was to be allowed more so because claim to this effect was raised both before the Assessing Officer as well as the CIT(A). Accordingly, ground no.3 raised by the assessee is allowed and additional ground being infructuous is dismissed.

25. Ground number 4 relates to disallowance of Rs.8,53,916/- under section 14A of the Act read with Rule 8D of Income tax Rules, 1962.

25.1. Fact of the case, in brief are that the AO during the course of assessment proceedings noted that the assessee has opening and closing investment of Rs.27,39,71,001/-, the income from the investment of which is exempt under provisions of Income Tax Act. The AO relying on the decision of the Tribunal in the case of Cheminvest Ltd vs ITO (2009) 317 ITR (A.T.) 0086 computed the disallowance u/s 14A r.w.r. 8D at Rs.26,92,582/-. In appeal, the learned CIT(A) upheld the disallowance so made by the AO.

25.2. It is the submission of the learned counsel that since, the assessee during the impugned assessment year has not received any dividend income, therefore, the provision of section 14A is not applicable. For the above proposition, he relied on the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltf. Vs CIT reported in 378 ITR 33. Without prejudice to the above, he submitted that there was no fresh investment, inasmuch as, total investment as on 31.3.2008 and 31.3.2009 was Rs.27,39,71,001/- (page 29 of the paper hook). He submitted that notwithstanding that section 14A was not attracted and there was no fresh investment, still the Assessee has suo- moto disallowed Rs.27,99,459/-, out of

interest expenditure. No disallowance u/s 14A read with Rule 8D can be made without recording satisfaction that having regard to the accounts of an assessee, suo-moto disallowance u/s 14A was not correct. In the present case, satisfaction was not recorded. Therefore, no disallowance was called for. Reliance is placed on Godrej & Boyce Mfg. v. Dy. CIT (2017) 394 ITR 449 (SC). He submitted that though there is no estoppel against the statue and it can be argued that no disallowance u/s 14A was called for, however, the assessee to avoid litigation had agreed to disallowance of Rs.27,99,459/-. Therefore, to this extent the assessee has no grievance. He submitted that out of investment of Rs.27,39,71,001/- investment of Rs.24,82,23,001/- (Rs.24.82 Cr) was made on 3.8.2007 in the equity shares of Paramount Holding Ltd, Cyprus, a subsidiary company. Dividend from foreign subsidiary is taxable, therefore, section 14A has no applicability-CIT v Suzlon Energy Ltd. (2013) 354 ITR 630 (Guj.)

25.3. Referring to page 35 of the paper book, he submitted that the remaining investment of Rs.2,57,48,000/- (Rs.2.57 Cr) was made in earlier years as under:-

i. Investment of Rs.1,68,000/- in the shares of "Haryana Financial Corporation" was made in the assessment year 1996-97 and

ii. Investment of Rs.2,55,80,000/- in the shares of "Paramount Wires & Cables Ltd." another subsidiary company was made in the assessment years 2000-01 and 2001-02.

25.4. Notwithstanding the above, the Assessing Officer required the assessee to submit calculation of disallowance under Rule 8D. The same was submitted under protest *(page 4 of assessment order).* Excluding the suo-moto disallowance, the Assessing Officer made further disallowance of Rs.26,92,582/- which is not justified. He accordingly submitted that no disallowance u/s 14A r.w.r 8D is called for.

25.5. The learned DR on the other hand supported the order of the learned CIT(AO.

25.6. We have heard both the parties and perused the record. We find before the AO, the assessee has categorically stated that the assessee has not received any dividend income during the year. This fact was not controverted by the AO or

the CIT(A). Even the learned DR also could not bring any material before us to show that the assessee has received any dividend income during the year. We, therefore, following the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd. vs CIT (supra) hold that the learned CIT(A) is not justified in sustaining the disallowance made by the AO u/s 14A r.w.r 8D when assessee has admittedly not received any dividend during the year. Accordingly, ground raised by the assessee on this issue is allowed.

ITA No.2288/Del/2017 (Revenue's appeal)

26. The only effective ground raised by the Revenue reads as under:-

> "On the facts and circumstances of the case, the learned CIT(A) has erred in deleting the disallowance of forex gain of Rs.5,44,92,768/-."

27. Facts of the case, in brief, are that the assessee in respect of Foreign Currency Monetary Item Translation Difference Account (FCMITDA) had been consistently following the method of showing the gain as income and the loss as allowable deduction in computing the taxable income. Following this consistent practice, the assessee for the relevant assessment year had added back amount of Rs.5,44,92,768/-

as income being the gain on account of FCMITDA. Since, in the immediately preceding assessment year, the loss on account of such claim was denied by the Department treating the same as capital loss which was upheld by the learned CIT(A), the assessee submitted before the Assessing Officer that this amount of Rs.5,44,92,768/- offered as income is not chargeable to tax since the same was capital receipt in view of the stand taken by the department. However, the Assessing Officer did not agree with the contention of the assessee on the ground that principle of res-judicata does not apply to the assessment proceedings and therefore FCMITDA gain of the current year would not be affected by disallowance of loss made in preceding assessment year. He, further held that since, the assessee has not filed any revised return, therefore, claim made by a letter cannot be allowed.

28. Before the CIT(A), the assessee, relying on the decision of the Hon'ble Bombay High Court in the case of CIT vs Pruthvi Brokers Shareholders Pvt. Ltd. 349 ITR 336(Bom.) and various other decisions submitted that the jurisdiction of the appellate authorities to consider afresh a new ground or claim is not restricted to cases where such ground does not

exist when the return was filed and the assessment order was made. It was accordingly held that the assessee can raise a new claim which was not made in the return or when the assessment order was made. It was further submitted that the department should be consistent in its approach and cannot take two different views in two different assessment years.

29. Based on the arguments advanced by the assessee, the learned CIT(A) held that since, the loss on account of Foreign Currency Monetary Item Translation Difference Account was treated as capital in nature in preceding years, therefore, department needs to be consistent in its approach and even receipt should be treated as capital in nature. He, accordingly directed the Assessing Officer to exclude the receipts from the total income. He, however, held that if in any further appeal for AY 2009-10, it is held that the loss has to be allowed as revenue expenditure, the gain for the assessment year under consideration would also has to be taxed as income.

30. While deciding the issue for AY 2009-10, we have already held that foreign exchange fluctuation loss to be revenue in nature. Therefore, following the similar reasoning,

the gain for this assessment year has to be treated as income of the assessee for the impugned assessment year. We, therefore, hold that the amount of Rs. 5,44,92,768/- has to be treated as income of the assessee. Accordingly, the order of the Assessing Officer is upheld and the ground raised by the Revenue is allowed.

ITA No. 1378/Del/2017(Assessee's appeal)

31. Ground of appeal no.1 and 1.1 raised by the assessee reads as under:-

> *"1.That on the facts and circumstances of the case and in law, the Commissioner of Income-tax(Appeals)-XVII, New Delhi [briefly "the CIT(A)"] has erred in upholding the addition of Rs.45,64,91,290/- on account of buyback at discount of Foreign Currency Convertible Bonds (FCCBs), treating the same as revenue receipt.*
>
> *1.1. That on the facts and circumstances of the case and in law, the CIT(A) did not appreciate that FCCBs were bought back at a price less than the issue price i.e. US$ 5000 and as such, the judgments relied upon were not applicable."*

32. Facts of the case, in brief, are that the assessee filed its e-return for the AY 2010-11 on 22nd September, 2010 declaring loss of Rs.44,44,97,533/-. During the assessment proceedings, the Assessing Officer noted that the assessee in

its computation of income has claimed gain on FCCB buyback for Rs.45.65 Crore as not taxable. He, therefore, asked the assessee to explain as to why profit of Rs.45.65 Crores should not be treated as business income in the hands of the assessee through buyback of FCCBs at discounted price. The assessee relying on various decisions submitted that remission of a loan liability in respect of which no deduction for loan amount has been claimed, is not assessable as income. However, the Assessing Officer was not satisfied with the arguments advanced by the assessee and held that such write back of liability of Rs.45,64,91,290/- on account of FCCBs prepayment/buyback is taxable for the following reasons:-

- FCCBs used by assessee for raising funds are special bonds having an inbuilt option of conversion into equity at a premium.
- Buyback of FCCBs is not buyback of shares. Buyback has been made by obtaining loan from Indian bank. Interest and finance charges have been charged to the profit and loss account.
- During the preceding and current financial year, the assessee has capitalized the interest on the assets up to date of put to use and after that date interest has been charged to profit and loss account.
- Since the project was completed during assessment year 2007-08 out of FCCBs proceeds, therefore finance cost on the project has ceased.

- Even if it is accepted that waiver of interest is a capital receipt then the same should have been reduced from the cost of capital assets acquired from the FCCB proceeds u/s 43(1).

33. He accordingly made addition of the same to the total income of the assessee.

34. Before the learned CIT(A), the assessee submitted that the this issue stands decided in favour of the assessee by the decision of the Hon'ble Delhi High Court in the case of Logitronics Pvt. Ltd. vs. CIT (2011) 333 ITR 386(Bom.). It was argued that due to the following reasons the addition of Rs.45.64 Crores was not warranted:-

i. Section 41(1) did not apply to buyback of FCCBs.

ii. Even section 28(iv) does not apply to buyback of FCCBs.

iii. The decision of the Hon'ble Delhi High Court in the case of Logitronics P. Ltd. vs CIT (2011) 333 ITR 3786 (Del.) is squarely applicable to the facts of the case

iv. There is no provision to charge to tax the sum of Rs.45,64,91,290/-.

34.1. Relying on various other decisions, it was argued that addition made by the Assessing Officer has to be deleted.

35. However, the learned CIT(A) was not satisfied with the arguments advanced by the assessee and upheld the addition made by the Assessing Officer by observing as under:-

> 4.2. I have carefully considered the submissions of the AR of the appellant and the order Massed by the AO. The appellant raised a sum of USD 27 million (Rs. 118.17 crore) by way of Foreign Currency Convertible Bonds (FCCB) on 22-11-2006. The FCCBs were to carry 1% interest per annum and had to be redeemed at a premium of 45.54% on maturity on 23.11.2011. The bond-holders had the option to convert the bonds into equity shares on maturity at a pre-determined price. The FCCB amounting to Rs. 92.91 crores were redeemed during the previous year under consideration for Rs.47.26 crores, i.e. at a discount of Rs.45.65 crores. This amount of Rs.45.65 crores was shown as part of 'Other income' in the profit and loss account but was reduced from the net profit while computing the profit of business in the computation of income. According to the appellant, it was a capital receipt as it represented remission of capital liability.

4.3. The appellant is aggrieved, by the AO's action of treating the amount as revenue receipt, on the following counts:

I. It cannot be treated as 'profit chargeable to tax' u/s 41(1) or 59(1) of the Act

II. It cannot be treated as 'benefit or perquisite' u/s 28(iv) of the Act

III. There is no provision in the Income tax Act to tax such receipt as income

4.4. It has also argued that its case is squarely covered by the decision of the Delhi High Court in the case of Logitronics P Ltd. v CIT (2011) 333 ITR 386.

4.5. Normally, a borrowing company pays premium to the investor in the bonds (apart from or instead of interest payable on regular intervals). Such premium can be paid in either of the following 2 ways:

I. Upfront discount in price at the time of issue

II. Premium at the time of maturity.

4.6. The nature of the premium payable on bonds/debentures was a contentious issue and the same was examined by the Hon. Supreme Court in the case of Madras Industrial Investment Corporation Limited vs. CIT (1997) 225 ITR 802. It was held by the Hon'ble Court that the discount allowed by the borrower while issuing debentures constitutes revenue expenditure and that the same needs to spread proportionately over the life of debentures and be allowed as deduction on year to year basis.

"10. Therefore, although expenditure primarily denotes the idea of spending or paying out, it may, in given circumstances, also cover an amount of loss which has not gone out of the assessee's pocket but which is all the same, an amount which the assessee has had to give up. It also covers a liability which the assessee has incurred in praesenti although it is payable in futuro. A contingent liability that may arise in future is, however, not 'expenditure'. It would also cover not just a one-time payment but a liability spread out over a number of years...

15. Issuing debentures at a discount is another such instance where, although the assessee has incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure a benefit over a number of years. There is a continuing benefit to the business of the company over the entire period. The liability should, therefore, be spread over the period of the debentures."

4.7. Following that ratio, the Madras High Court, in the case of CIT v. Tube Investments of (India) Ltd.[2003] 261 ITR 753, held that pro-rata annual allocation of premium payable on redemption of debentures is allowable as revenue expenditure. The Calcutta High Court, in the case of National Engineering Industries Ltd. v. CIT[1999] 236 ITR 577, held as below:

"9. In our case, we are concerned not with debentures issued at a discount from the face value but with debentures which carry a premium to be paid at the end of the entire period, if the debentures are held throughout. We do not see any distinction between a discount and a premium. The result in both is that something over and above the face value and the specified interest is paid, the accounting procedure in one case being by way of a preliminary deduction from

> the mentioned amount, and the accounting procedure in the other case being an addition at the end over the prescribed and mentioned face value amount."

4.8. Continuing in the same vein, the Madras High Court in the case of CIT vs First Leasing Company of India Limited (2007) 292 ITR 110, held as below:

> "Applying the ratio laid down in the case of Madras Industrial Investment Corporation Ltd. v. CIT reported in [1997] 225 ITR 802 (SC) and in the context of the ratio laid down in the case of National Engineering Industries Ltd. v. CIT reported in [1999] 236 ITR 577 (Cal), where under it is held that there is no distinction between discount and premium, the discount on debentures as well as the premium payable on actual redemption on debentures in future years and the expenditure incurred for issue of such debentures are all held to be revenue expenditure, entitled to be spread over the period of debentures and consequently, allowable as deduction in a particular assessment year."

4.9. The settled law, thus, is that the discount allowed on debentures/bonds at the time of issue or the premium paid on the same at the time of maturity constitute revenue expenditure in the hands of the borrower.

4.10. In this case, the appellant had undertaken to pay premium at the end of the tenure of the FCCBs. But, due to certain circumstances, the borrower and the lender agreed that part of the FCCBs be redeemed at discount prematurely. Thus, instead of paying premium, the appellant ended up receiving the same as far as the FCCBs thus redeemed are concerned. The question for consideration is: What tax treatment should be given to such constructive receipt by the appellant, i.e. whether it should be treated as revenue receipt or capital receipt?

4.11. Discount in the appellant's hands is nothing but negative premium in the hands of the lender/investor. If the premium payable/paid by the appellant on FCCBs constitutes revenue expenditure, it is axiomatic that the discount received by it on premature redemption of the same should constitute revenue receipt, i.e. income chargeable to tax. It would be absurd to say that the discount allowed by the appellant on debentures should be revenue expenditure but the discount received by him on the

same should be capital receipt.

> 4.12.. As per the terms of the FCCBs, they had to be redeemed at premium of 45.54%. It has been ascertained that the appellant treated the said premium as revenue expenditure. When the appellant claimed deduction for premium payable as revenue expenditure, there is no reason why the discount received by it on the same should not be treated as revenue receipt. It is not the case that liability to the extent of Rs.45.65 crores had ceased to exist and that the appellant repaid only the liability of Rs.47.26 crores at face value. It is a case where the entire liability of Rs.92.91 crores remained intact. It is just that the appellant discharged the same by paying only Rs.47.26 crores. Flence, it is not a case of extinguishment of the loan liability but receipt of discount while discharging the same.

4.13. The appellant has relied on some decisions in support of its contention that when a part of the loan amount is waived by the lender, such benefit does not constitute income chargeable to tax in the hands of the borrower. Those decisions are not applicable to the facts of this case. In the case of a loan, interest is payable at regular intervals and the principal is repaid at face value at the end of the tenure. The nature of FCCB is different. Here the borrower pays premium over the face value at the time of redemption. Such premium may constitute capital receipt in the hands of the investor. But, as discussed above, the Hon'ble Supreme Court as held that the same constitutes revenue expenditure in the hands of the borrower. It has also been discussed elaborately why for, the same reason, the discount should be treated as revenue receipt.

4.14. This issue can be approached from another angle also. Admittedly, the FCCBs were raised for, and had actually been utilised for, acquiring capital assets for the appellant's business and. After that, the appellant entered into agreement with the bondholders and discharged its obligation of repaying Rs.92.91 crores by paying only Rs. 47.26 crores. In view of this, it can be said that the cost of those capital assets was indirectly made by those bond-holders to the extent of Rs.45.65 crores. By this logic, the 'actual cost' of those assets would be liable to be reduced by

the sum of Rs.45.65 crores and depreciation would go down accordingly for the assessment year under consideration and the subsequent assessment years. This course of action, however, need not be resorted because the discount has been held to be income.

4.15. In view of the foregoing discussion, it is held that the discount received by the appellant at the time of premature redemption of FCCBs constituted revenue receipt and, hence, income chargeable to tax. The addition of Rs.45.65 crores made by the AO is accordingly confirmed."

36. Aggrieved with such order of the learned CIT(A), the assessee is in appeal before the Tribunal.

37. The learned counsel for the assessee at the outset submitted that the issue of addition on account of buyback on FCCBs at discount is covered in favour of the assessee by the following decisions:-

- CIT vs Mahindra & Mahindra Ltd. (2018) 404 ITR 1(SC)
- Dy. CIT vs Pidilite Industries Ltd. (2019) 177 ITD 472(Mum.)
- OK Play India Ltd. vs JCIT (ITA No.3402/D/2016 dated 13.01.2020)
- ACIT vs M/s KEI Industries Ltd. (ITA No.1433/Del/2014 dated 03.12.2020)

38. He submitted that FCCB means a bond issued by an Indian company expressed in foreign currency. The principal and interest in respect of such a bond is payable in foreign

currency. These bonds, at the option of bond holders are convertible into shares. FCCBs are unsecured loans. Referring to pages 144 to 151 of the paper book, the learned counsel for the assessee submitted that on 22.11.2006, the assessee had issued 5400 FCCBs aggregating to US$ 27 million. The bonds were to be redeemed on 23.11.2011 at a price of US$ 7277 per bond. During the period 22.11.2006 to 13.11.2011, bondholders had the option to convert the bonds into equity shares @Rs.265/- per share at a fixed rate of exchange of Rs.44.99 = US$ 1. He submitted that the FCCB proceeds were utilized for setting up new manufacturing facility or expansion of manufacturing facility. Referring to page 203 of the paper book, he submitted that assessee in terms of automatic route repurchased FCCB of the value of US$ 19.50 million (Rs.92,91,10,000/ - rupee equivalent at prevailing exchange rate). Out of 5400 FCCBs of US$ 5000 each, 3900 were repurchased (3900 x 5000 = US$ 19.50 million) at Rs.47,26,18,710/-. As such, the assessee reduced its obligation to repay the principal amount of FCCBs by Rs.45,64,91,290/-. Referring to page 114 to 117 of the paper book, he drew the attention of the Bench to the note given in the balance sheet for

the year ended on 31.03.2010, as regards the buyback of FCCBs as under:-

> "During the year 1% Foreign Currency Convertible Bonds ('FCCBs') of USD 19.50 million have been bought back. This has resulted in profit of Rs.45,64,91,290/- (Previous Year Rs.NIL) which has been included under 'Other Income'. Prorata exchange difference on these 'FCCBs' transferred to 'Foreign Currency Monetary Item Translation Difference Account ('FCMITDA') has been written off to profit & loss account."

39. Referring to page 109 & 132 to 134 of the paper book, he submitted that the discount of Rs.45,64,91,290/- was shown in the balance sheet as on 31.3.2010 under the head "other income-Schedule-N". However, while computing the income, the amount of Rs.45,64,91,290/- was claimed as capital receipt. Referring to page 147 of the paper book and page 113 of the paper book, he submitted that since redemption premium was payable at the time of redemption, therefore, the same was not provided in the account and the following note was given :

> ".....Unless previously converted, redeemed or repurchased or cancelled, the Company will redeem these bonds at 145.54 percent of the principal amount on 23rd November 2011. Up to March 31, 2010 out of the total issue, FCCBs aggregating to USD 19.50 Million have been repurchased at discount. Balance of 'FCCBs' of USD 7.50 Million outstanding as on March 31, 2010 have been included and disclosed in the schedule of "Unsecured Loans". In view of these developments the Company expects that no premium would be payable and on that basis the

same is not provided for. However, the premium, if paid would be adjusted against the Securities Premium Account. Accordingly maximum premium amount payable being Rs.15,38,93,891/- (Previous year Rs.62,94,22,002/-) would be accounted for and adjusted against Securities Premium Account in the year of such redemption of repurchase or cancellation."

40. Referring to the aforesaid note, he submitted it is clear that premium payable on redemption was not provided. He submitted that both before the Assessing Officer and the CIT(A) assessee has clarified that FCCBs were bought back at discount. Such FCCBs were shown in the accounts as unsecured loan and the amount of FCCBs were neither claimed nor allowed as deduction in computing the income any earlier year. Referring to the decision of the Hon'ble Delhi High Court in the case of CIT vs Havells India Ltd. (2013) 352 ITR 376(Del.), he submitted that Hon'ble Delhi High Court while answering the question as to whether expenditure on fully convertible debentures was revenue expenditure did not accept the stand of the department that since the debentures are fully convertible and as such, it would strengthen the capital base of the company on conversion into equity, therefore, the position should not be seen only with reference to time at which convertible debentures were issued. It was held that the fact

that debentures are to be converted in the near future into equity shares is irrelevant. Therefore, the allegation of the Assessing Officer that FCCBs were convertible into shares did not change its inherent character. At the time of buyback, FCCBs were nothing but unsecured loans.

40.1. So far as the allegation of the Assessing Officer that buyback of FCCBs on discount has resulted in cessation of liability towards interest cost of FCCBs is concerned, he submitted that such reasons is factually incorrect. It was clarified before the revenue authorities that there is no waiver of interest of FCCB holders and only waiver is a part of principal which was borrowed in shape of FCCB, and was repayable. Therefore, the allegation of discount of Rs.45,64,91,290/- representing waiver of redemption premium does not arise.

40.2. So far as the allegation of the Revenue that the financial statements and notes to account, it is clear that the assessee has followed in the preceding assessment year and current year, the policy of capitalization of finance cost and after date of put to use, interest has been charged to profit & loss account as Revenue expenditure is concerned, he

submitted that this reason is affirmation of the stand of the assessee that FCCB proceeds were used only for capital expenditure and/or buying overseas companies. Further, the assessee is not in money lending business. He submitted that the learned CIT(A) was also under mistaken belief that discount on FCCBs was premium payable on redemption. The learned CIT(A) did not appreciate that the saving made by the assessee on account of buyback of FCCBs at a discount was on capital account. The distinction between principal amount of FCCBs and the premium payable on redemption has been overlooked by the Assessing Officer as well as the CIT(A). He submitted that the FCCBs is nothing but a loan.

40.3. Referring to the decisions already earlier cited, he submitted that the issue stands decided in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of Mahindra & Mahindra Ltd. (Supra). He submitted that the Hon'ble Supreme Court in the said decision has held waiver of loan can never to be taxed u/s 28(iv) nor u/s 41(1) of the Act. Referring to the decision of Mumbai Bench of the Tribunal in the case of DCIT vs Pidilite Industries Ltd. reported in (2019) 177 ITD 472(Mum.), he submitted that the Tribunal in the said

decision has held that discount received by the assessee on buyback of foreign currency convertible bonds could not be taxed u/s 28(iv) as said receipt in hands of the assessee was in form of cash/money and further, such proceeds were utilized partly for ongoing capitalization programs and thus, same was capital receipt.

41. Referring to the decision of the Co-ordinate Bench of the Tribunal in the Case of OK Play India Ltd. vs JCIT in ITA No.3402/Del/2016, order dated 13.01.2020, he submitted that the Co-ordinate Bench of the Tribunal following the decision of the Hon'ble Delhi High Court in the case of Logitrinics (P) Ltd. (supra) and various other decisions has held that discount received on FCCBs is not taxable in the hands of the assessee. Similar view has been taken by the Delhi Bench of the Tribunal in the case of ACIT vs M/s KEI Industries Ltd. in ITA No.1433/Del/2014. He accordingly submitted that this being a covered matter in favour of the assessee, the order of the learned CIT(A) on this issue should be set-aside and the grounds of the assessee should be allowed.

42. The learned CIT-DR on the other hand heavily relied upon the order of the learned CIT(A).

43. We have considered the rival arguments made by both sides, perused the orders of the learned AO and learned CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us, we find the assessee, in the instant case, had issued 5400 FCCBs aggregating to US$ 27 million on 22.11.2006. The bonds were to be redeemed on 23.11.2011 at a price of US$ 7277 per bond. During the period 22.11.2006 to 13.11.2011, bondholders had the option to convert the bonds into equity shares @Rs.265/- per share at a fixed rate of exchange of Rs.44.99 = US$ 1. The assessee in terms of automatic route repurchased FCCB of the value of US$ 19.50 million (Rs.92,91,10,000/ - rupee equivalent at prevailing exchange rate). Out of 5400 FCCBs of US$ 5000 each, 3900 bonds were repurchased (3900 x 5000 = US$ 19.50 million) at Rs.47,26,18,710/-. As such the assessee reduced its obligation to repay the principal amount of FCCBS by Rs.45,64,91,290/.-We find the Assessing Officer treated the profit of Rs.45.65 Crore through buy back of FCCB at a discounted price as revenue receipt and accordingly made addition of the same to the total income of the assessee amounting to Rs.45.65 Crores. We find the learned CIT(A)

upheld the action of the Assessing Officer, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the learned counsel for the assessee that discount received by the assessee on buyback of FCCBs could not be taxed u/s 28(iv) of the Act as such receipt in the hands of the assessee was in form of cash/money and further, such proceeds were utilized for ongoing capitalization programs and thus, same was capital receipt. We find force in the above arguments advanced by the learned counsel for the assessee on this count. It is an admitted fact that the FCCB proceeds were utilized for setting up of new manufacturing facility or expansion of manufacturing facility. The utilization of such proceeds for capital purposes has not been doubted by the Assessing Officer or learned CIT(A). We find an identical issue had come up before the Mumbai Bench of the Tribunal in the case of DCIT vs Pidilite Industries Ltd. (Supra), wherein, the Tribunal following the various decisions has upheld the action of the learned CIT(A) in deleting the addition made by the Assessing Officer and dismissed the appeal filed by the Revenue by observing as under:-

> *"5.4 Upon careful consideration, it emerges that the assessee has repurchased certain FCCB during impugned AY at a*

discount of 25%. The fact that the proceeds of these bonds was utilized partly for investment in foreign subsidiaries and partly for ongoing capitalization programs remain unrebutted before us. In fact, the RBI's terms of issue of bonds prohibits utilization of proceeds for trading purposes. The said facts lead us to form an opinion that the gains were on capital account. The Ld. AO, while making additions has invoked the provisions of Section 28(iv). These provisions consider value of any benefit or perquisite, whether convertible in money or not, arising from the business as business income. However, the benefit has to be in some form other than in the shape of money, as held by higher judicial authorities.

5.5 The Hon'ble Supreme Court in recent decision of CIT V/s Mahindra and Mahindra Ltd. [93 Taxmann.com 32] has observed as under: -

10. The term "loan" generally refers to borrowing something, especially a sum of cash that is to be paid back along with the interest decided mutually by the parties. In other terms, the debtor is under a liability to pay back the principal amount along with the agreed rate of interest within a stipulated time.

11. It is a well-settled principle that creditor or his successor may exercise their "Right of Waiver" unilaterally to absolve the debtor from his liability to repay. After such exercise, the debtor is deemed to be absolved from the liability of repayment of loan subject to the conditions of waiver. The waiver may be a partly waiver i.e., waiver of part of the principal or interest repayable, or a complete waiver of both the loan as well as interest amounts. Hence, waiver of loan by the creditor results in the debtor having extra cash in his hand. It is receipt in the hands of the debtor/assessee. The short but cogent issue in the instant case arises whether waiver of loan by the creditor is taxable as a perquisite under Section 28(iv) of the IT Act or taxable as a remission of liability under Section 41 (1) of the IT Act.

12. The first issue is the applicability of Section 28(iv) of the IT Act in the present case. Before moving further, we deem it apposite to reproduce the relevant provision herein below: —

*28. Profits and gains of business or profession. — The following income shall be chargeable to income-tax under the head "Profits and gains of business profession",— ** ** **

(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession; ** ** **'*

13. On a plain reading of Section 28(iv) of the IT Act, prima facie, it appears that for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke the provision of Section 28(iv) of the IT Act, the benefit which is received has to be in some other form rather than in the shape of money. In the present case, it is a matter of record that the amount of Rs. 57,74,064/- is having received as cash receipt due to the waiver of loan. Therefore, the very first condition of Section 28(iv) of the IT Act which says any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of money, is not satisfied in the present case. Hence, in our view, in no circumstances, it can be said that the amount of Rs 57,74,064/- can be taxed under the provisions of Section 28(iv) of the IT Act.

We agree with the submissions of Ld. AR that the propositions laid down in the above decision squarely apply to factual matrix before us. Therefore, the benefit to be received by the assessee has to be in some form other than in the shape of money so as to bring the same within the ambit of Section 28(iv).

5.6 Similar view has been taken by Hon'ble Bombay High Court in CIT V/s Xylon Holdings Pvt. Ltd [supra] wherein the case law of Solid Containers Ltd. [supra] as relied upon by Ld. AO, has been distinguished. Similar view has been expressed in CIT V/s Santogen Silk Mills Ltd. [supra].

5.7 Respectfully following the aforesaid binding judicial precedents, we confirm the view taken by Ld. first appellate authority. This ground stands dismissed.

44. We find the Co-ordinate Bench of the Tribunal in the

case of OK Play India Ltd. vs JCIT (Supra) while deciding an identical issue has allowed the appeal filed by the assessee by observing as under:-

> *3.7 We have heard rival submissions and perused the relevant material on record. The assessee raised FCCB in the earlier year and during the year repaid with discount of ₹ 9,46,73,015/- received. According to the assessee, the discount received is in the nature of capital receipt but according to the Revenue the discount is in the nature of trading receipt. The Assessing Officer has alleged the activity of raising FCCB as an adventure in the nature of trade. This finding of the Assessing officer is without any basis. The assessee is not engaged in raising the FCCB with motive of any trading and discounting and thereby earning profit on the same. The allegation by the Assessing Officer of motive and intent of earning profit by the assessee are unsubstantiated with any evidences. On the contrary, the assessee has substantiated that it raised the FCCB for funding its acquisition of assets. Further, the Ld. CIT(A) has relied on the decision of the Hon'ble Delhi High Court in the case of Logitrinics (P) Ltd (supra), wherein it is held as under:*
>
> > *"27..... We, therefore, restore this issue back to the file of the Assessing Officer for his fresh adjudication with a direction to the assessee to furnish all the details and particulars of loan, and the purpose for which the loan taken from Bank was utilized. All these information are within the control and specific knowledge of the assessee and, therefore, it would be the duty of the assessee to prove and establish that the amount of loan taken from the Bank was utilized for the purpose of acquiring capital assets in case the assessee wants to have the benefit of decision of Hon 'ble Delhi High Court in the case of Tosha International Ltd. (supra) as well as the decision of Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. (supra). If on an enquiry and verification, it transpires that the assessee has utilized the loan for the purpose of its business activity or trading activity, the amount of loan to the extent it has been waived by the bank shall be deemed to be the assessee's income chargeable to tax as per the decision of Hon'ble Bombay High Court in the case of Solid Containers Ltd. (supra), where the principle laid down by the Hon'ble*

Supreme Court in the case of TV. Sundaramlyengar& Sons Ltd. (supra) has been applied and followed.

Under section 4 , the charging section, the charge of income-tax is upon the 'total income of the previous year'. The term 'income' is defined under section 2(24). In general, all receipts of revenue nature, unless specifically exempted, are chargeable to tax. Loan taken is not normally a kind of receipt which will be treated as income. However, when a part of that loan is waived off by the creditor, some benefit accrues to the assessee. Question is what would be the character of waiver of part of the loan at the hands of tHe assessee? Waiver definitely gives some benefit to the assessee. Whether it is to be treated as capital receipt? If it is so, then only capital gains tax would be chargeable under section 45 or else, whether remission of loan is no income at all? The answer to these questions would depend upon the purpose for which the said loan was taken. If the loan was taken for acquiring the capital asset, waiver thereof would not amount to any income exigible to tax, but on the other hand, if the loan was taken for trading purpose and was treated as such from the very beginn ing in the books of account, the waiver thereof may result in the income, more so when it was transferred to the profit and loss account. [Para 23]"

3.8 The Hon'ble High Court has laid down test for holding the amount of waiver of loan as capital or trading receipt. If the amount of the loan has been utilized for capital expenditure, then the waiver amount is in the nature of the capital receipt and if the amount of the loan has been utilized for trading purposes then the waiver amount received would be in the nature of trading receipt.

3.9 Before us, the assessee has demonstrated how the FCCB amount has been utilized towards capital expenditure. The assessee submitted entire list of capital asset acquired through the funds of FCCB, which is available on page 235 to 241 of the paper book. The assessee has shown capital expenditure of more than Rs.21 Crores upto March, 2008. The Ld. DR could not controvert this factual aspect of utilization of the FCCB toward capital expenditure. In instant case, once it is undisputed that FCCB amount has been utilized toward capital expenditure, in view of the decision of the Hon'ble Delhi High Court in the case of Logotronics (P) Ltd (supra), the discount on FCCB falls in the nature of capital receipt not exigible to tax. The Ld. CIT(A) has given his

finding on wrong assumption of the fact that FCCB funds were utilized for trading or revenue expenditure, without verifying the books of account of the assessee.

3.10 The Hon'ble Apex Court in the case of CIT Vs. Mahindra and Mahindra Ltd. (supra) on the issue of benefit taxable under section 28(iv) has held as under:

> *"10. The term "loan" generally refers to borrowing something, especially a sum of cash that is to be paid back along with the interest decided mutually by the parties. In other terms, the debtor is under a liability to pay back the principal amount along with the agreed rate of interest within a stipulated time.*
>
> *11. It is a well-settled principle that creditor or his successor may exercise their "Right of Waiver" unilaterally to absolve the debtor from his liability to repay. After such exercise, the debtor is deemed to be absolved from the liability of repayment of loan subject to the conditions of waiver. The waiver may be a partly waiver i.e., waiver of part of the principal or interest repayable, or a complete waiver of both the loan as well as interest amounts. Hence, waiver of loan by the creditor results in the debtor having extra cash in his hand. It is receipt in the hands of the debtor/assessee. The short but cogent issue in the instant case arises whether waiver of loan by the creditor is taxable as a perquisite under Section 28 (iv) of the IT Act or taxable as a remission of liability under Section 41 (I) of the IT Act.*
>
> *12. The first issue is the applicability of Section 28 (iv) of the IT Act in the present case. Before moving further, we deem it apposite to reproduce the relevant provision herein below:— '*
>
> *28. Profits and gains of business or profession.— The following income shall be chargeable to income-tax under the head "Profits and gains of business profession",— (iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;*
>
> *13. On a plain reading of Section 28 (iv) of the IT Act, prima facie, it appears that for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke the provision of Section 28 (iv) of the IT Act, the benefit which is received has to be in some other form rather than in the shape of money. In the present case, it is a*

matter of record that the amount of Rs. 57,74,064/- is having received as cash receipt due to the waiver of loan. Therefore, the very first condition of Section 28 (iv) of the IT Act which says any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of money, is not satisfied in the present case. Hence, in our view, in no circumstances, it can be said that the amount of Rs 57,74,064/- can be taxed under the provisions of Section 28 (iv) of the IT Act. [Emphasis supplied]"

3.11 In the instant case, the benefit has been received in the shape of the money and thus, the said benefit cannot be held as taxable even under section 28(iv) of the Act.

3.12 In view of the discussion above, we set aside the finding of the Ld. CIT(A) on the issue in dispute and hold that the discount received on FCCB is not taxable in the hands of the assessee. The Ground No. 1 of the appeal of the assessee is accordingly allowed."

45. We further find the Delhi Bench of the Tribunal in the case of KEI Industries Ltd. in ITA No.1433/Del/2014 has also taken similar view by observing as under:-

"8. We have considered the rival submissions and perused the material on record. The stand of the assessee since the beginning had been that FCCBs proceeds were for setting-up new project for manufacture of wire has not been disputed by the A.O. In fact one of the reason to make the addition is that FCCBs were utilised in increasing the depreciable asset of the assessee company. The Ld. CIT(A) has verified this fact from the balance-sheet of the assessee company and found the utilization of FCCBs proceeds towards capital account were found to be correct. This fact is also not disputed by the A.O. The assessee has also satisfied the conditions of RBI to buy-back FCCBs. The assessee also proved on record that all the conditions of RBI in this regard have been made by assessee company. Section 41(1) of the I.T. Act would not apply because the amount of FCCBs was not allowed as expenditure or trading liability in earlier year. Further, no addition could be made under section 28(iv) of the I.T. Act. The assessee is in

manufacturing business and has admittedly utilised the FCCBs by increasing the asset of the assessee company and most of them being depreciable asset which fact is also mentioned by the A.O. in the assessment order. Since the FCCBs were raised to use the proceeds for setting-up of new project and this fact is admitted by the A.O. in the assessment order, therefore, assessee used the loan to purchase the capital asset for the company. The ITAT, Delhi E-Bench, Delhi in the case of M/s. OK Play India Ltd., Roz-Ka-Meo Industrial Estate, Tehsil Nuh, District Mewat, Haryana vs., JCIT, Range-II, Gurgaon (supra), considering the Judgment of the jurisdictional Delhi High Court in the case of Logitronics P. Ltd., vs., CIT (supra) and Judgment of Hon'ble Supreme Court in the case of CIT vs., Mahindra & Mahindra Ltd., (supra), decided the identical issue in favour of the assessee and appeal of assessee has been allowed. The findings of the Tribunal in paras 3.7 to 3.12 are reproduced as under :

"3.7. We have heard rival submissions and perused the relevant material on record. The assessee raised FCCB in the earlier year and during the year repaid with discount of Rs.9,46,73,015/- received. According to the assessee, the discount received is in the nature of capital receipt but according to the Revenue the discount is in the nature of trading receipt. The Assessing Officer has alleged the activity of raising FCCB as an adventure in the nature of trade. This finding of the Assessing officer is without any basis. The assessee is not engaged in raising the FCCB with motive of any trading and discounting and thereby earning profit on the same. The allegation by the Assessing Officer of motive and intent of earning profit by the assessee are unsubstantiated with any evidences. On the contrary, the assessee has substantiated that it raised the FCCB for funding its acquisition of assets. Further, the Ld. CIT(A) has relied on the decision of the Hon'ble Delhi High Court in the case of Logitrinics (P) Ltd (supra), wherein it is held as under:

> *"27 We, therefore, restore this issue back to the file of the Assessing Officer for his fresh adjudication with a direction to the assessee to furnish all the details and particulars of loan, and the purpose for which the loan taken from Bank was utilised. All these information are within the control and specific knowledge of the*

assessee and, therefore, it would be the duty of the assessee to prove and establish that the amount of loan taken from the Bank was utilized for the purpose of acquiring capital assets in case the assessee wants to have the benefit of decision of Hon'ble Delhi High Court in the case of Tosha International Ltd. (supra) as well as the decision of Hon'ble Bombay High Court in the case of Mahindra **&** *Mahindra Ltd. (supra) If on an enquiry and verification, it transpires that the assessee has utilized the loan for the purpose of its business activity or trading activity, the amount of loan to the extent it has been waived by the bank shall be deemed to be the assessee's income chargeable to tax as per the decision of Hon'ble Bombay High Court in the case of Solid Containers Ltd. (supra), where the principle laid down by the Hon'ble Supreme Court in the case of TV. Sundaramlyengar* **& Sons** *Ltd. (supra) has been applied and followed.*

Under section 4, the charging section, the charge of income-tax is upon the 'total income of the previous year'. The term 'income' is defined under section 2(24). In general, all receipts of revenue nature, unless specifically exempted, are chargeable to tax. Loan taken is not normally a kind of receipt which will be treated as income. However, when a part of that loan is waived off by the creditor, some benefit accrues to the assessee. Question is what would be the character of waiver of part of the loan at the hands of the assessee ? Waiver definitely gives some benefit to the assessee. Whether it is to be treated as capital receipt ? If it is so, then only capital gains tax would be chargeable under section 45 or else, whether remission of loan is no income at all ? The answer to these questions would depend upon the purpose for which the said loan was taken. If the loan was taken for acquiring the capital asset, waiver thereof would not amount to any income exigible to tax, but on the other hand, if the loan was taken for trading purpose and was treated as such from the very beginning in the books of account, the waiver thereof may result in the income, more so when it was transferred to the profit and loss account. [Para 23]"

3.8 The Hon'ble High Court has laid down test for holding the amount of waiver of loan as capital or trading receipt. If the amount of the loan has been utilized for capital expenditure, then the waiver amount is in the nature of the capital receipt and if the amount of the loan has been utilized for trading purposes then the waiver amount received would be in the nature of trading receipt.

3.9 Before us, the assessee has demonstrated how the FCCB amount has been utilized towards capital expenditure. The assessee submitted entire list of capital asset acquired through the funds of FCCB, which is available on page 235 to 241 of the paper book. The assesse has shown capital expenditure of more than Rs.21 Crores upto March, 2008. The Ld. DR could not controvert this factual aspect of utilization of the FCCB toward capital expend ture. In instant case, once it is undisputed that FCCB amount has been utilized toward capital expenditure, in view of the decision of the Hon'ble Delhi High Court in the case of Logotronics (P) Ltd (supra), the discount on FCCB falls in the nature of capital receipt not exigible to tax. The Ld. CIT(A) has given his finding on wrong assumption of the fact that FCCB funds were utilized for trading or revenue expenditure, without verifying the books of account of the assessee.

3.10. The Hon'ble Apex Court in the case of CIT **ys.** *Mahindra and Mahindra Ltd. (supra) on the issue of benefit taxable under section 28(iv) has held as*

under:

"10. The term "loan" generally refers to borrowing something, especially a sum of cash that is to be paid back along with the interest decided mutually by the parties. In other terms, the debtor is under a liability to pay back the principal amount along with the agreed rate of interest within a stipulated time.

11. It is a well-settled principle that creditor or his successor may exercise their "Right of Waiver" unilaterally to absolve the debtor from his liability to repay. After such exercise, the debtor is deemed to be absolved from the liability of repayment of loan subject to the conditions of waiver. The waiver may be a partly waiver i.e , waiver of part of the principal or interest repayable, or a complete waiver of both the loan as well as interest amounts. Hence waiver of loan by

the creditor results in the debtor having ext a cash in his hand. It is receipt in the hands of the debtor/assessee. The short but cogent issue in the instant case arises whether waiver of loan by the creditor is taxable as a perquisite under Section 28 (iv) of the IT Act or taxable as a remission of liability under Section 41 (I) of the IT Act.

12. The first issue is the applicability of Section 28 (iv) of the IT Act in the present case. Before moving further, we deem it apposite to reproduce the relevant provision herein below:—

> *'28. Profits and gains of business or profession.— The following income shall be chargeable to income-tax under the head "Profits and gains of business profession",—*
>
> *(iv) the value of any benefit or perquisite, whether convertible into money or no , arising from business or the exercise of a profession;*

13. On a plain reading of Section 28(iv) of the IT Act, prima facie, it appears that for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke the provision of Section 28 (iv) of the IT Act, the benefit which is received has to be in some other form rather than in the shape of money. In the present case, it is a matter of record that the amount of Rs.57,74,064/- is having received as cash receipt due to the waiver of loan. Therefore, the very first condition of Section 28 (iv) of the IT Act which says any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of money, is not satisfied in the present case. Hence, our view, in no circumstances, it can be said that the amount of Rs 57,74,064/- can be taxed under the provisions of Section 28 (iv) of the IT Act. [Emphasis supplied]"

3.11. In the instant case, the benefit has been received in the shape of the money and thus, the said benefit cannot be held as taxable even under section 28(iv) of the Act.

3.12. In view of the discussion above, we set aside the finding of the Ld. CIT(A) on the issue in dispute and hold that the discount received on FCCB is not taxable in the hands of the assessee. The Ground No. 1 of the appeal of the assessee is accordingly allowed. "

> 8.1. Thus the issue is covered by the aforesaid decision of the Tribunal as well as by Judgment of Hon'ble Delhi High Court in the case of Logitronics P. Ltd., vs., CIT (supra). No material is produced before us to contradict the findings of fact recorded by the Ld. CIT(A) in favour of the assessee. Therefore, we are of the view that no interference is required in the matter. We confirm the finding of fact recorded by the Ld. CIT(A) and dismiss Ground No.1 of the appeal of the Revenue."

46. Respectfully following the above decisions (supra), we hold that the learned CIT(A) was not justified in holding the discount received through buyback of FCCBs at a discounted price as income of the assessee. Accordingly, the order of the learned CIT(A) is set-aside and the grounds raised by the assessee on this issue are allowed.

47. Ground of appeal No. 2, 2.1 filed by the assessee reads as under:-

> *"2. That on the facts and circumstances of the case and in law, the CIT(A) has erred in upholding disallowance of depreciation of Rs.65,64,364/- related to exchange fluctuations in respect of assets acquired in India from the funds raised through foreign currency convertible bonds [FCCBs].*
>
> *2.1. That on the facts and circumstances of the case and in law, the CIT(A) did not appreciate that the enhanced depreciation was not claimed within the meaning of section 43A of the Act.*

48. After hearing both the sides, we find the above grounds are identical to the grounds of appeal no. 3 and

additional ground of ITA No.761/Del/2014. We have already held that the assessee is entitled to depreciation relatable to exchange fluctuation in respect of assets acquired in India from the funds raised from FCCBs. Following the similar reasoning, the grounds raised by the assessee are allowed.

49. Ground of appeal No.3 reads as under:-

> *3. That on the facts and circumstances of the case and in law, the CIT(A) has erred in not appreciating that forex gain of Rs.5,44,92,768/- was a capital receipt and was not liable to tax."*

50. After hearing both sides, we find this issue has been already been answered earlier, while deciding he ground raised by the Revenue. Therefore, this ground raised by the assessee is dismissed.

51. In the result, ITA No.767/Del/2014 is partly allowed, ITA No.2288/Del/2014 is allowed and ITA No.1378/Del/2017 is partly allowed.

Order pronounced in the Open Court on 15th June, 2021.

Sd/-	**Sd/-**
[SUCHITRA KAMBLE]	**[R.K.PANDA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Delhi; Dated: 15/06/2021.
Shekhar, Sr. P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi