**IN THE INCOME TAX APPELLATE TRIBUNAL**
**KOLKATA 'A' BENCH, KOLKATA**

**(Before Sri J. Sudhakar Reddy, Hon'ble Accountant Member & Sri Aby T. Varkey, Hon'ble Judicial Member)**

**ITA No. 359/Kol/2018**
Assessment Year: 2009-10

***M/s. Pricewaterhouse Coopers Private Limited……Appellant***
***Block-EP, Plot-Y-14***
***Salt Lake City***
***Sector-V***
***Kolkata – 700 091***
***[PAN : AABCP 9181 H]***

***Vs.***

***Asstt. Commissioner of Income Tax, Circle-2(2), Kolkata……Respondent***

**Appearances by:**
*Smt. C.S. Agarwal, Sr. Counsel & Smt. K.M. Gupta, Adv., appeared on behalf of the assessee.*
*Shri Goulen Hangshing, CIT, D/R, appearing on behalf of the Revenue.*

Date of concluding the hearing : March 22nd, 2021
Date of pronouncing the order : April 21st, 2021

**ORDER**

**Per J. Sudhakar Reddy, AM :-**

This appeal filed by the assessee is directed against the order of the Learned Commissioner of Income Tax (Appeals) - 14, (hereinafter the "ld. CIT(A)"), passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dt. 29/12/2017, for the Assessment Year 2009-10.

2. The assessee is a company and is primarily engaged in the activity of providing management consultancy services and also accounting and business advisory services. It filed its return of income on 29/09/2009 declaring total income of Rs.22,42,11,130/-. The return was revised twice and in the second revised return of income, the assessee disclosed total income of Rs.22,64,57,400/-. The Assessing Officer passed an order u/s 143(3) of the Act on 21/03/2013, determining the total income of the assessee at Rs.155,42,46,330/- *interalia* disallowing the claim of the assessee of loss incurred on foreign exchange and making disallowance on depreciation on lease assets, disallowance of charges paid to PWC firms and making additions on account of disallowance of non-compete fee and non-refundable grant.

2.1. Aggrieved the assessee carried the matter in appeal without success. The ld. First Appellate Authority gave detailed reasons as to why he has agreed with the order of the Assessing Officer.

3. Further aggrieved, the assessee is in appeal before us.

4. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

5. **Ground Nos. 1 to 1.2: <u>DISALLOWANCE OF LOSS OF Rs. 84,40,93,680/- ARISING FROM FOREIGN CURRENCY FLUCTUATION IN RESPECT OF FOREIGN CURRENCY HEDGING CONTRACTS</u>**:

6. We find that the issue is squarely covered in favour of the assessee by the decision of the Co-ordinate Bench of the ITAT Kolkata in the assessee's own case for the Assessment Year 2008-09 in *ITA No. 1156/Kol/2014, order dt. 17/02/2017,* wherein the Tribunal, relying on the decision of the Supreme Court in the case of Woodward Governor (supra) has allowed the issue in favour of the assessee. It held as under:

> *"The principles laid down by the Hon'ble Supreme Court are exactly identical to the facts of the instant case. Therefore the losses which are arising due to the foreign exchange fluctuation should be accounted for in the books of accounts and accordingly the assessee is eligible to claim the deduction of such losses. The argument of the Id. DR that the instruction issued by the CBDT has not been considered by the Hon'ble Apex Court because it came subsequent to the verdict of Hon'ble Apex Court is not tenable. It is because the instructions issued by the CBDT are not binding on the courts and whether these are issued earlier or subsequently to the verdict do not matter. In view of the above we have no hesitation to reverse the order of authorities below. Hence this ground of appeal of the assessee is allowed."*

7. Reliance was also placed on the decision of the jurisdictional Tribunal in the case of *DCIT vs. Asian Tea & Exports Ltd. [ITA No. 1241/Kol/2013 -copy enclosed as at page nos. 183 to 194 of the Case Law PB)]*, wherein the Hon'ble Tribunal, following the decision of the Special Bench of Mumbai Tribunal in the case of *DCIT vs. Bank of Bahrain & Kuwait [ITA No. 4404 & 1883/Mum/2004]* has allowed similar issue in favour of the assessee. Relevant observations of the Kolkata Tribunal are reproduced hereunder:

> *"25. Applying the above observations to the facts and circumstances of present case, We find that the claimed loss under consideration occurred to the assessee on account of five unexpired forex forward contracts i.e is a loss incurred on account of revaluation of contract on last day of accounting period before date of maturity of forward contract. The Ld.CIT-A observed that the assessee has been following a consistent accounting policy for determining loss under AS-11 and AS-30 as required under Companies Act and it is to be noted that the accounting standards were issued by the ICAI which has received judicial recognition. Accordingly the*

*assessee, the gain or loss on revaluation of the outstanding contracts was booked in the P&L a/c as per the mandatory requirements of RBI guidelines. The Hon'ble Supreme Court in the case of Woodward Governor India (P) Ltd. (supra) has observed at p. 265 para 17 that the Central Government has made AS-11 mandatory. During the course of first appellate proceedings that the CIT-A noticed that the AO allowed the loss of Rs.85,70,425/- for 2010-11 which supports to show that the assessee has been following consistently accounting standards and the liability has been accrued for a pending obligation for every year i.e the difference was arising for more than one accounting period.*

*26. We, accordingly, hold that disallowance made by the AO treating the impugned amount of Rs. 54,23,955/- for A.Y 2009-10 as contingent and notional loss is not justified and that the loss incurred to the assessee on account of five unexpired forex forward contracts on the last date of the accounting period i.e. before the date of maturity of the forward contract is not contingent and it is a actual loss, is allowable. Thus, respectfully following the observations made by the Special Bench supra, the ground no -2 raised by the assessee Revenue fails and the order of CIT-A is justified, consequently ground no-2 is dismissed."*

8. Further, reliance was also placed on the decision of the jurisdictional Tribunal in the case of *DCIT vs. Tega Industries Ltd [(2019) 112 taxmann.com 259 (Kolkata - Trib.)]* wherein also the issue of MTM loss has been allowed in the favour of the taxpayer on both counts i.e. such loss is neither speculative loss within the meaning of section 43(5) of the Act nor the same being notional or contingent in the nature.

9. Hence the said sum being loss on foreign exchange derivatives deserves to be allowed in the light of the order of Hon'ble Tribunal of the preceding assessment year i.e. AY 2008-09 wherein the facts are identical.

10. The ld. D/R, could not controvert the arguments of the assessee that the facts are identical for both the Assessment Years. Thus, consistent with the view taken by the co-ordinate bench of the Tribunal in the assessee's own case we delete the disallowance of Rs. 84,40,93,680/- on account of loss on foreign exchange derivatives and allow this ground of the assessee.

11. **Ground No. 2 to 2.3., is on the disallowance u/s 14A r.w.r. 8D of an amount of Rs. 28,14,915/-**.

11.1. Only those investments which generated exempt income during the year under consideration (i.e. US-64 units in the instant case amounting to Rs.99,000/-, in the present case) should be considered for the calculation of disallowance under section 14A r.w.r. 8D. Disallowance if any, should be restricted to the amount *suo-moto*

disallowed by the assessee. The disallowance should, in any case, be restricted to the extent of exempt income of Rs. 99,000/- only and cannot exceed the said amount as held by the **Hon'ble Delhi High Court** in the case of ***Joint Investments (P.) Ltd. vs. CIT [(2015) 59 taxmann.com 295 (Delhi)].*** The Hon'ble High Court observed as under:

> "*9. In the present case, the AO has not firstly disclosed why the appellant/assessee's claim for attributing Rs. 2,97,440 as a disallowance under s. 14A had to be rejected. Taikisha Engg. India Ltd. (supra) says that the jurisdiction to proceed further and determine amounts is derived after examination of the accounts and rejection if any of the assessee's claim or explanation. The second aspect is there appears to have been no scrutiny of the accounts by the AO-an aspect which is completely unnoticed by the CIT(A) and the Tribunal. The third, and in the opinion of this Court, important anomaly which we cannot be unmindful is that whereas the entire tax exempt income is Rs. 48,90,000, the disallowance ultimately directed works out to nearly 110 per cent of that sum, i.e., Rs. 52,56,197. By no stretch of imagination can s. 14A or r. 8D be interpreted so as to mean that the entire tax exempt income is to be disallowed. The window for disallowance is indicated in s. 14A, and is only to the extent of disallowing expenditure "incurred by the assessee in relation to the tax exempt income". This proportion or portion of the tax exempt income surely cannot swallow the entire amount as has happened in this case.*" ***(Emphasis ours)***

12. Consistent with the view taken therein, we restrict the disallowance u/s 14A of the Act to the extent of exempt income earned by the assessee company during the year. The argument that the Assessing Officer has not recorded satisfaction before the invoking Rule 8D of the Income Tax Rules, 1962 ('Rules'), is not factually correct. On a reading of the assessment order, we find that he Assessing Officer has recorded his satisfaction. In the result, ground of the assessee is allowed in part.

13. **Ground Nos. 3 to 3.2: DISALLOWANCE OF NON-COMPETE FEE OF RS. 10,00,00,000:**

13.1. The ld. Counsel for the assessee submitted that, the entire reasoning for confirming this addition by the ld. CIT(A) was based upon the judgment of the Hon'ble Delhi High Court in the case of *CIT vs. Shiv Raj Gupta [(2014) 52 taxmann.com 425)]* . This judgment was overruled by the Hon'ble Supreme Court. The ld. Counsel for the assessee also placed reliance on the following judgments, which we discuss hereinafter:-

a) The Hon'ble High Court of Madras in the case of *Hatsun Agro Products Ltd. vs. JCIT [(2018 407 ITR 674 (Madras)]* wherein the assessee was engaged in business of

manufacture, marketing and distribution of ice cream and dairy based frozen products, made payment of non-compete fee, to two of its directors. The Hon'ble High Court held that the advantage of restraining individuals from engaging in competition was in field of facilitating assessee's own business and rendering it more profitable and there was no increase in fixed capital, and hence the payment in question was to be allowed as revenue expenditure. The Hon'ble Supreme Court later dismissed the SLP filed by the Revenue against this judgment in *JCIT vs. Hatsun Agro Products Ltd. [(2020) 114 taxmann.com 172].*

b) In the case of *CIT vs. Andhra Fuels (P.) Ltd [(2016) 240 Taxman 280 (Andhra Pradesh)]* non-competition agreement was entered into by the assessee which is engaged in setting up power projects, to prevent rival company from establishing power plant in the State, for a period of three years. It was held that such restrictive covenant eliminated competition in business only for a while and it was neither permanent nor the advantage derived by assessee was enduring in nature and as such the expenditure could not be held to be capital expenditure and same had to be allowed as revenue expenditure.

c) The Hon'ble Madras High Court in the case of *Carborandum Universal Ltd. vs. JCIT [26 taxmann.com 268]* on similar set of facts, held that the payment of non-compete fees, made for protecting business interest is revenue expenditure. Relevant extracts of the judgment are reproduced below:

> "*19. It is not denied by the Revenue that U. Mohanrao was the Chairman and Managing Director of some of the companies which got merged with the assessee company. The said U. Mohanrao had access to all information starting from manufacturing process, knowhow to the clientele and the products, including the pricing of the products. By a process of amalgamation, the assessee had acquired the business of the amalgamating companies. However, for the fruitful exercise of its business as a business proposition, the assessee thought it fit to enter into a non-compete agreement with a person who had the knowledge of the entire operations, so as to get the full yield of the amalgamated company's business. In that context, rightly, the assessee took a commercial decision to pay non-compete fee to U. Mohanrao and going by the decision of the Apex Court, particularly the decision in Coal Shipments (P.) Ltd.'s case (supra), that the payment was in respect of the performing of the business of the assessee, we have no hesitation in holding that the expenditure is only on revenue account and not on capital account. In the circumstances, we accept the case of the assessee, set aside the order of the Tribunal and allow the Tax Case.*"

The Mumbai Tribunal in the case of *DCIT vs. Intervet (India) Ltd. [ITA No. 315/Hyd/2003, order dt. 19 October 2012]*, , on similar facts and following the ratio laid by the Madras High Court in the case of *Carborandum Universal Ltd. (supra)*, has held

the payment of non-compete fee to be an allowable revenue expenditure. The ITAT held as follows:-

> "*28. From the facts of the aforesaid case and also the ratio and decision given by the High Court, we find that the assessee's case is squarely covered by the aforesaid decision. We, thus, hold that, in the present case, the entire payment of Rs. ₹ 4,00,00,000 paid by the assessee to Dr. Vijay Datla and Dr. Renuka Datla, towards the non-compete fee is revenue expenditure. Once the payment has been made in this year, the entire expenditure is to be allowed. Accordingly, the finding of the Commissioner (Appeals) that it is a revenue expenditure is upheld. However, to the extent that the said expenditure is to be deferred for a period of five years cannot be sustained and is set aside. Consequently, the grounds raised by the assessee in its cross objection stands allowed, whereas, the grounds raised by the Revenue in its appeal, consequently, is dismissed.*"

The Mumbai Tribunal has further observed as under:

> "*19. The Hon'ble Supreme Court in CIT v/s Coal Shipments Pvt. Ltd., [1971] 82 ITR 902 (SC), has held that the period for which the restrictive covenant should be in operation to make it a revenue expenditure is a matter of judgment and such a judgment should be exercised having regard to the facts and circumstances of each individual case. If the restrictive covenant is for a indefinite period or for a very large portion, then technically, it can be said that the advantage is for enduring character and, hence, it can be termed as "Capital Expenditure". Now the question is whether the restrictive convenient which is operative only for a period of five years can be said to be of enduring in nature. This aspect of the matter has been decided by the Madras High Court in CIT v/s Late G. Naidu & ORs., [1957] 165 ITR 63 (Mad.), wherein Their Lordships observed and held as under:*
>
> > *"Held, that so far as the cash compensation paid by the new partners referable to the assets and goodwill of the firm was concerned, the cash took the place of the assets of the partnership and the compensation paid for restrictive covenant not to carry on similar business for a period of five years was in the nature of a separate transaction unconnected with the business of the assets of the partnership. The Tribunal was right in its view that the total compensation paid by the firms to the old partners was for (a) the share in the assets, (b) the share of the goodwill, and (c) for the restrictive covenant and that the part of the amount referable to the acquisition of the share in the assets and the share of the goodwill would be on capital account as it was in the nature of an initial outgoing and the payment towards the restrictive covenant was on revenue account and it would not amount to an acquisition of an advantage of an enduring nature. The Tribunal was also right in its view that the amount received by the recipients was not liable to tax either as income or capital gains. No question of any liability to penalty would also arise in the instant case, because the assesses were merely contending for a particular position contrary to*

> *the view taken by the Income-tax Officer which would not call for any penalty."*
>
> *In view of the aforesaid decision, it can be straight-away held that if the restrictive covenant given in the non-compete agreements is for a period of five years, then it is on the revenue account."*

Similar propositions of law has also been laid down by the Hon'ble Madras High Court in the case of *Asianet Communications Ltd. CIT [(2018) 96 taxmann.com 399)]* –

On similar facts, the Hon'ble Delhi High Court has observed as under:

> *"46. …… Any contractual term that imposes restraint on a contracting party from engaging in any business for a reasonable term must be backed by consideration. Therefore, the non-compete compensation is but a consideration paid to the party who is kept out of competing business during the term of the contract.*
>
> *47. The non-compete compensation, from the stand point of the payee of such compensation, is so paid in anticipation that absence of a competition from the other party to the contract may secure a benefit to the party paying the compensation. There is no certainty that such benefit would accrue. In other words, inspite of the fact that a competitor is kept out of the competition, one may still suffer loss. If it were to be a capital expenditure whether or not, an assessee makes a business profit, the character and value of the capital assets will, subject to depreciation, remain unaltered.*
>
> *48. Thus, the facts clearly disclose that on account of the payment of non-compete fee, the assessee has not acquired any new business, profit making apparatus has remained the same, the assets used to run the business remained the same and there is no new business or no new source of income, which accrue to the assessee on account of the payment of non-compete fee….."*.

The same view has been taken by the Hon'ble Delhi High Court in the case of *CIT vs. Eicher Ltd. [(2008) 302 ITR 249]*. In the said case, the assessee (engaged in the business of manufacturing and marketing two wheelers) entered into a non-compete agreement with a third party which restrained the said third party from carrying out any business with regard to two-wheelers. The assessee's claim of the said expenditure as revenue expenditure was upheld by the Hon'ble High Court which concurred with the views of the Tribunal that the payment is to protect the assessee's business interests, its market position and profitability. No new asset is created thereby nor is the assessee's profit making apparatus expanded or increased. The assessee does not suffer any loss or diminution or erosion in its capital assets. The Court pointed out that the payment of

non-compete fees is merely to eliminate competition in the two- wheeler business, for a while. Though there were no records to indicate the duration of the restrictive covenant, but it was neither permanent nor ephemeral. In that sense, the advantage was not of an enduring nature. The Hon'ble Supreme Court dismissed the SLP filed by the Department against the decision of the Hon'ble Delhi High Court *(312 ITR(st.) 333)*. In view of the above discussion, if the non-compete payment does not result in bringing into existence of any capital asset or an advantage which is of enduring nature, then such payment would be revenue in nature.

14. The Assessing Officer relied on the judgment in the case of *Pitney Bowes India Pvt. Ltd. vs. CIT (2012) 204 Taxmann 333(Del)*, and ld. CIT(A) has relied on the judgments in the case of *Sharp Business System v. DCIT [2011] 15 taxmann.com 144 (Delhi)* and *Tecumesh India (P.) Ltd. v. Addl. CIT [2010] 127 ITD 1 (Delhi) (SB)*.

We find that these cases are distinguishable on facts :-

- ***Pitney Bowes (Supra)***: In this case, the taxpayer had acquired going concern on lumpsum consideration. Under the Business Transfer Agreement, there was no bifurcation of the consideration for non-compete and other tangible and intangible assets so acquired. Thus, the taxpayer had bifurcated the total consideration paid for acquisition of business based upon valuation done by the independent auditor. Based upon such valuation, the taxpayer claims the amount of non-compete, being revenue expenditure as quantified by the Independent Valuer as deductible expenditure. The ITAT/High Court denied the claim of such allowance on the ground that the amount in question being non-compete is part of purchase consideration of going concern business, thus, is to be treated as capital expenditure being consideration paid for acquisition of business. It is also relevant that the consideration of non-compete fee is paid to owner of such business and not the employees/directors of the company. Hence, the facts of the above case are clearly distinguishable.

- ***Sharp Business System (Supra)***: In this case, L&T had sold its business to taxpayer under the agreement. In addition to the above, the taxpayer also paid separate consideration for non-compete fee to L&T under the same

business transfer agreement. On account of the above, the ITAT held that the amount in question is part of acquisition of business and thus non-compete fee ought to be treated as capital expenditure. As stated, in this case also, the compensation of non-compete is part of the business transfer agreement and is paid to shareholder of the company. Hence, the facts of the above case are clearly distinguishable.

- ***Tecumesh India (supra)***: In this case also, the non-compete clause is part of the business transfer agreement, and such consideration was being paid to the shareholders. Hence, this case is also clearly distinguishable.

15. Coming to the facts in the present case, it is undisputed fact that the consideration is paid to individuals who had experience in the business of consultancy for not to engage themselves in similar kind of business and activities for a period of 3 years. It is also not disputed that such consideration is independent and not part of the cost of acquisition of business paid to shareholders. It is also an admitted fact that both the Share Transfer Agreement and Non-Compete Agreement are separate agreements with different parties, though entered on the same date.

15.1. Hence reliance on above decisions by the ld. AO/CIT(A) is misplaced, as the above cases are clearly distinguishable on facts as well as the point of law involved. The cases relied upon by the assessee above are squarely applicable on the facts of the assessee's case, Thus, the payment in question is revenue in character and hence allowable as an expenditure.

16. In view of the above discussion, we delete the disallowance made on account of compete fee.

17. **Ground Nos. 4 to 4.2: Disallowance of depreciation on leased assets of Rs. 4,36,03,330 and non-grant of claim of principal portion of lease rentals amounting to Rs. 5,37,68,623/-**

17.1. The issue is covered in favour of the assessee by the order of the Hon'ble Tribunal in appellant's own case for *AY 2003-04 in* ***[ITA No. 1521/Kol/2013]***, wherein the coordinate Bench of the Hon'ble Kolkata Tribunal dismissed the Revenue's appeal and upheld the order of the CIT(A) by holding that the lease rentals (net of interest element) should be allowed as deduction. The Tribunal held as follows:-

> "*4.4. The Ld DR stated the claim of lease rental was not made by the assessee in the return of income. He vehemently relied on the order of the ld AO. In response to this, the ld AR argued that the ld AO had allowed the lease premium in the next succeeding asst year 2004-05 in section 143(3) proceedings for which he placed a copy of the assessment order dated 28.12.2006.*
>
> *4.5. We have heard the rival submissions and perused the materials available on record. In the facts and circumstances of the case, we find that the ld CITA had rightly appreciated the alternative argument of the assessee that the lease rentals (net of interest element) would have to be allowed as deduction. We find no infirmity in the order of the ld CITA in this regard. Accordingly, the ground no.1 raised by the revenue is dismissed.*"

17.2. The ld. D/R, could not controvert the submissions of the assessee that the issue is covered in its favour. Respectfully following the propositions of law laid down by the co-ordinate bench of the Tribunal in the assessee's own case, referred above, we allow this ground of the assessee to the extent of claim of deduction of lease rentals.

18. **Ground Nos. 5 to 5.3: DISALLOWANCE OF PWC WORLD FIRM CHARGES OF RS. 13,88,32,000/-:**

18.1. The issue is also covered in favour of the assessee by the order of the Kolkata Bench of the ITAT in the appellant's own case passed for *Assessment Year 2012-13 order dated 12th September, 2018 in* ***ITA No. 483/Kol/2017***. On similar facts, the Hon'ble Tribunal deleted the disallowance made by the AO on account of payment of Network Service Charges and held as under:

> "*The lower authorities seem to have disallowed the above payment mainly for the reason that the assessee could not establish the relevant business nexus / purpose and there was also a failure on its part in not deducting TDS thereupon. We have heard rival contentions reiterating both parties respective facts. There is no dispute in principle about the assessee's firm service agreement with the payee M/s PWCD's services as well as its role played as providing central services to the entire "PWC" group based on cost allocation method keeping in mind the nature of services rendered benefits derived as per pages 117 to 261 of the paper book. The assessee has also prepared a list of services availed via the payee concerned in respect of all member firms of the group involving sample cases of e-learning and education, mandatory foundation programmes, training programmes alloys specific / technical programmes etc. All this has gone unrebutted from the Revenue side whose case is that there is no business link forthcoming from the impugned expenditure. We find no substance in Revenue's instant stand. We make it clear that the assessee- company is engaged in multi functional consultancy services as a group entity of PWCDA organization based in Netherlands. Learned counsel has also filed before us relevant assessment records with regard to the payee entity*

*pertaining to the impugned assessment year itself accepting the returned income without making any addition. Necessary reference regarding Firm Services Agreement is also made to paper book pages 6304 and 6305. It emerges that this Tribunal's decision in DCIT vs. Ernst & Young (P) Ltd. 49 taxman.com 386 (Kol) also holds that no TDS is deductible in case of such firm services agreement payments not including any income component but only reimbursement of expense on cost allocation formula. We take into account all these facts as well as judicial precedents to delete impugned disallowance of Firm Services expenditure payment amounting to ₹150,046,130/-."*

19. The ld. D/R, could not controvert the submissions of the assessee that the issue is covered by this above referred order. Respectfully following the propositions of law laid down by the co-ordinate bench of the Tribunal in the assessee's own case, referred above, we allow this ground of the assessee.

20. **Ground Nos. 6 to 6.2: ADDITION ON ACCOUNT OF NON-REFUNDABLE GRANT OF RS. 19,83,20,000/-:**

21. **Facts in Brief**: During the AY under consideration, the assessee received an amount of USD 4 million (i.e. Rs. 19,83,20,000) from PwC Services BV, as a non-refundable grant specifically towards utilization in procurement of shares of another private limited company i.e. M/s ECS Limited. Accordingly, upon receipt of the said grant, the same was onward paid in totality for purchase of shares of the ECS Ltd. The assessee claimed that the receipt and the corresponding payment have been made in the capital account (i.e. balance sheet) of the assessee. The value of investment (which was Rs. 29.80 crore in aggregate) has been duly reduced (netted off) to the extent of the aforementioned grant to reflect the actual cost of investment incurred by the Assessee and debited accordingly in its books of accounts in line with the accounting principles prescribed in para 32 of Accounting Standard - 13 on "Accounting for Investments" issued by the ICAI. Since the grant was received as a one-time subvention payment for meeting a capital expenditure, the same was claimed to be a 'capital receipt' not liable to tax. Reliance was placed on the decision of the **Hon'ble Supreme Court** in the case of **Sahney Steel and Press Works Limited vs. CIT [(1997) 228 ITR 253]** and the decision of the **jurisdictional Calcutta High Court** in the case of **CIT vs. Stewarts & Lloyds of India Ltd. [(1987) 165 ITR 416]**.

21. The receipt of the grant was duly disclosed in the notes to computation of income. Subsequently, in response to queries raised by the ld. AO in relation to the aforesaid grant, the assessee filed the relevant details and detailed submissions including relevant extracts of bank statement showing receipt of grant amount, copy of grant agreement, treatment accorded in the books of accounts, etc.

22. The AO in his order of assessment, held that assessee had business connection with PwC Services BV, Netherlands pursuant to which it had received the sum. Since the said sum that had been received is nothing but benefit arising from the business and hence the same is taxable u/s 28(iv) of the Act. He further held that the money so received may have been received under the nomenclature 'non-refundable grant' and has been stated to be utilised towards the acquisition of the shares, but the receipt must be considered independently for determining its taxability.

23. The ld. CIT(A) upheld the order of the ld. AO. It was held that the appellant had business connection with PwC Services BV from which the appellant receives various services and hence the non-refundable grant arose from the business of the assessee. He further held that agreement itself shows that at least part of the fund is purely for maintenance of the resources and capabilities of PwC India which is revenue in nature. Accordingly, he held that the grant received by the assessee is taxable under section 28(iv) of the Act, by placing reliance on the decision of the **Hon'ble Madras High Court** in the case of ***CIT vs. Ramaniyam Homes (P.) Ltd. [(2016) 384 ITR 530]***.

24. The ld. Sr. Advocate, Shri C.S. Agarwal, submits that provisions of section 28(iv) does not apply in the present case as the receipt of Rs. 19.83 crores is in the nature of cash or money. It is well settled that what is taxable u/s 28(iv) is the value of benefit or perquisite, whether convertible in money or not, and not the monetary amount itself, which has been received.

25. Section 28(iv) of the Act is reproduced below for reference:

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

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

26. The Hon'ble Supreme Court in the case of *Commissioner vs. Mahindra And Mahindra Ltd. [(2018) 93 taxmann.com 32 (SC)].* In the said case, it has been categorically held by the Supreme Court that in order to invoke the provision of section 28(iv), the benefit which is received has to be in some other form rather than in the shape of money**.** Relevant extracts of the judgment is reproduced below:

"*11. ……. 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…….*

*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.*"

27. Similar view has also been laid down in the following judgments :

**i)** ***CIT vs. Santogen Silk Mills Ltd. [(2015) 57 taxmann.com 208 (Bombay HC)]***
**ii)** ***CIT vs. Xylon Holdings (P.) Ltd. [(2012) 26 taxmann.com 333 (Bombay HC)]***
**iii)** ***Ravinder Singh vs. CIT [(1993) 71 Taxman 336 (Delhi HC]***
**iv)** ***Mahindra & Mahindra Ltd. vs. CIT [(2003) 128 Taxman 394 (Bombay HC)]***
**v)** ***DCIT vs. Tosha International Ltd. [(2008) 116 TTJ 941 (Delhi Tribunal)]***

28. The judgment in the case of *M/s. Ramaniyam Homes (supra)* relied upon by the ld. CIT(A) stands reversed post the judgment of the Hon'ble Supreme Court in the case of *Mahindra & Mahindra (supra)*.

29. The ld. Sr. Advocate submitted that, the instant grant was received for the specific purpose of funding the cost of acquiring the shares of ECS Limited (i.e. to meet a capital expenditure) and such an obligation/purpose for which the grant is given could never be delinked from the receipt of the grant, since such obligation is the basic

foundation based on which the nature of the grant may be determined. The Hon'ble Supreme Court in the case of *Sahney Steel (supra)*, reproduced hereunder :

> *"18. ……. If any subsidy is given,* ***the character of the subsidy in the hands of the recipient - whether revenue or capital - will have to be determined by having regard to the purpose for which the subsidy is given.*** *If it is given by way of assistance to the assessee in carrying on of his trade or business, it has to be treated as trading receipt. The source of the fund is quite immaterial.*
>
> *19. For example, if the scheme was that the assessee will be given refund of: ales tax on purchase of machinery as well as on raw materials to enable the assessee to acquire new plants and machinery for further expansion of its manufacturing capacity in a backward area, the entire subsidy must be held to be a capital receipt in the hands of the assessee. It will not be open to the revenue to contend that the refund of sales tax paid on raw materials or finished products must be treated as the revenue receipt in the hands of the assessee. In both the cases, the Government is paying out of public funds to the assessee for a definite purpose. If the purpose is to help the assessee to set up its business or complete a project as in Seaham Harbour Dock Co.'s case (supra), the monies must be treated as to have been received for capital purpose. But if monies are given to the assessee for assisting him in carrying out the business operation and the money is given only after and conditional upon commencement of production, such subsidies must be treated as assistance for the purpose of the trade."*
>
> ***(Emphasis supplied)***

**The Hon'ble Supreme Court in CIT vs. Ponni Sugars & Chemicals Ltd. [(2008) 306 ITR 392] (page nos. 784 to 789 of Case Law PB), it was held as under:**

> "*14. In our view, the controversy in hand can be resolved if we apply the test laid down in the judgment of this Court in the case of Sahney Steel & Press Works Ltd. (supra)……. The importance of the judgment of this Court in Sahney Steel & Press Work's Ltd.'s case (supra) lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging the character of a subsidy.* ***That test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given.*** *In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee*

> *to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore,* ***it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy.*** *The form of the mechanism through which the subsidy is given is irrelevant.*
>
> ……..
>
> *One more aspect needs to be mentioned. In Sahney Steel & Press Works Ltd.'s case (supra) this Court found that the assessee was free to use the money in its business entirely as it liked. It was not obliged to spend the money for a particular purpose. In the case of Seaham Harbour Dock Co. (supra) assessee was obliged to spend the money for extension of its docks. This aspect is very important. In the present case also,* ***receipt of the subsidy was capital in nature as the assessee was obliged to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of existing business.***"
>
> **(Emphasis supplied)**

30. Reliance is also placed on the decision of the **jurisdictional Calcutta High Court** in the case of ***CIT vs. Stewarts & Lloyds of India Ltd. [(1987) 165 ITR 416]***.

31. The ld. D/R, could not factually controvert these submissions.

In view of the above discussion, based on the facts of the case and the principles laid down by various Courts, including Supreme Court and jurisdictional High Court, we find that a grant received for specific purpose i.e., for procuring a capital asset is in the nature of a capital receipt, not subject to tax and this receipt being in cash cannot be taxed u/s 28(iv) of the Act. Hence this ground of the assessee is allowed.

32. **Ground No. 7: NON-GRANT OF DEDUCTION UNDER SECTION 35(1)(II) OF THE ACT OF RS. 3,12,500/- :**

33. After hearing rival contentions, we restore this matter to the file of the Assessing Officer with a direction to verify the certificate issue u/s 35(1)(II) of the Act, which was produced by the assessee before the lower authorities. The Assessing Officer shall dispose off the issue *de novo*, in accordance with law. This ground of the assessee is allowed for statistical purposes.

34. Ground No. 8 to 8.1., is dismissed as not pressed as the assessee submits that short credit of TDS has been granted to him.

35. Ground No. 9 is on the levy of Interest under section 234B, 234D and 244A of the

Act. This ground is dismissed as it is consequential in nature. Hence disposed off as such.

36. **In the result, appeal of the assessee is allowed partly**.

***Kolkata, the 21st day of April, 2021.***

| | |
|---|---|
| ***Sd/-*** | ***Sd/-*** |
| [**Aby T. Varkey**] | [**J. Sudhakar Reddy**] |
| Judicial Member | Accountant Member |

Dated: 21.04.2021
*{SC SPS}*

*Copy of the order forwarded to:*

1. ***M/s. Pricewaterhouse Coopers Private Limited***
***Block-EP, Plot-Y-14***
***Salt Lake City***
***Sector-V***
***Kolkata – 700 091***

2. ***Asstt. Commissioner of Income Tax, Circle-2(2), Kolkata***

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches