IN THE INCOME TAX APPELLATE TRIBUNAL, 'I-2' BENCH MUMBAI

BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.2285/Mum/2014
(**Assessment Year :2008-09**)

M/s. Vodafone Idea Ltd., (Formerly known as Idea Cellular Ltd.,) 10th Floor, Birla Centurian Mills Compound Pandurang Budhkar Marg Worli, Mumbai – 400 030	Vs.	Dy. Commissioner of Income Tax-3(2) Mumbai Room NO.608, 6th Floor Aaykar Bhawan M.K.Road, Mumbai – 400 020
PAN/GIR No.AAACB2100P		
(Appellant)	..	**(Respondent)**

ITA No.2273/Mum/2014
(**Assessment Year :2008-09**)

Dy. Commissioner of Income Tax-3(2) Mumbai Room NO.608, 6th Floor Aaykar Bhawan M.K.Road, Mumbai – 400 020	Vs.	M/s. Vodafone Idea Ltd., (Formerly known as Idea Cellular Ltd.,) 10th Floor, Birla Centurian Mills Compound Pandurang Budhkar Marg Worli, Mumbai – 400 030
PAN/GIR No.AAACB2100P		
(Appellant)	..	**(Respondent)**

Assessee by	Shri J D Mistry
Revenue by	Shri T Shankar
Date of Hearing	**14/07/2022**
Date of Pronouncement	**12/10/2022**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

These cross appeals in ITA No.2285/Mum/2014 & 2273/Mum/2014 for A.Y.2008-09 arise out of the order by the ld. Commissioner of Income Tax (Appeals)-4, Mumbai in appeal No.CIT(A) No.4/IT-239/ITO.3(2)(4)/2011-12 dated 10/01/2014 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 27/12/2010 by the ld. Dy. Commissioner of Income Tax-3(2), Mumbai (hereinafter referred to as ld. AO).

Since these are cross appeals, they are taken up together and disposed of by this common order for the sake of convenience. The assessee has filed concise grounds of appeal before us for A.Y.2008-09.

2. The ground No.II raised by the assessee is challenging the disallowance of discount amounting to Rs.320,00,00,000/- given to prepaid distributors u/s.40(a)(ia) of the Act for non-deduction of tax at source u/s.194H of the Act. The ground No.I raised by the assessee is with regard to non-adjudication of additional evidences filed before the ld. CIT(A) is interconnected with ground No.II. Hence, they are taken up together for disposal.

2.1. We have heard rival submissions and perused the materials available on record. We find that assessee is in the business of providing cellular services in the telecom circles of Maharashtra, Gujarat, Andhra Pradesh, Delhi, Uttar Pradesh (West), Uttar Pradesh East, Haryana, Kerala, Rajasthan, Himachal Pradesh and Madhya Pradesh. The company also trades in handsets and accessories which are integral part of the nature of business in which the assessee is operating. During the course of assessment proceedings, the assessee was asked to submit details of commission and discount given to dealers and tax deducted on the same. On perusal of the details furnished by the assessee, the ld. AO observed that assessee had deducted tax at source for the commission payments made but had not deducted tax for the discount allowed to the distributors. Accordingly, the assessee was asked to make its submissions as to why tax was not deducted on the discount allowed to the distributors. The assessee furnished a copy of agreement entered into with the distributors and filed a detailed reply before the ld. AO. It was submitted by the assessee that it appoints distributors who purchase prepaid Starter Packs and recharge vouchers in bulk and then sell them to sub-dealers or retailers. It was submitted that there is a principal to principal relationship between the assessee company and the distributors and the prepaid Starter Packs and Recharge Vouchers are given to them at a discounted price. It was submitted that the assessee company receives the sale proceeds from the distributors in advance and thereafter, deliver the products to the distributors irrespective of whether they inturn are sold or unsold by the distributors. The distributors are free to sell the prepaid cards / recharge vouchers to any retailers who shall be appointed by them on their own account (i.e. the distributors) and no control is being exercised by the assessee company thereon, at any price which the distributor decides subject to maximum retail price (MRP). The assessee company does not have any risk of any bad debts as payment is received by it in advance from the distributors. It was submitted that any loss which the distributor may suffer on account of any unsold / damaged / obsolete stock is not compensated by the assessee company. Thus, what the distributor earns is the difference between price paid to the assessee company and the price at which they decide to sell the products to retailers. The assessee company is not concerned with the profit and loss which the distributors incurs, earns / as the case may be. The assessee company enclosed the copy of agreement entered with the distributor for a territory in Madhya Pradesh, Chhattisgarh circle and also explained that it is a standard agreement for all the distributors entered across India. Accordingly, it was pleaded that the relationship between assessee company and the distributor is on principal to principal basis and therefore, the discount given to prepaid distributors would not be subjected to TDS. It was also pointed out by the assessee, on without prejudice basis, that the assessee receives the entire sale price from the distributors in advance and that no payment is made to the distributors or credit given in favour of the distributor and accordingly, the entire provisions of Chapter XVIIB of the Act warranting deduction of tax at source fails. The assessee stated that for deducting tax in terms of Section 194H of the Act –

(a) Income should be in the nature of commission or brokerage
(b) Payment should be received by a person acting on behalf of other, in the course of rendering services to third parties.
(c) Such income should be paid or credited by the payer in favour of payee.
(d) The payer should be a person responsible for paying such income to payee.
(e) The amount of commission should be actually ascertainable.
(f) The time of credit or payment should also be known.

2.2. Accordingly, it was submitted that to effectuate TDS, an amount that would be paid should be clearly determinable, the time when tax should be deducted at source should have crystallised, and the payer should be responsible for earning of such income by the distributor. Since, all these parameters fail, the assessee company is not obligated to deduct tax at source on the discount given to distributors for prepaid cards.

2.3. The ld. AO observed that similar arguments made hereinabove were duly considered by the Hon'ble Delhi High Court in assessee's own case i.e.CIT vs. Idea Cellular Ltd., reported in 325 ITR 148 wherein the issue was decided in favour of the Revenue. Accordingly, the ld. AO concluded that the discount given to the dealers / distributors is in the nature of commission on which tax is deductible u/s 194H of the Act which has not been done by the assessee and consequently the same would be liable for disallowance u/s.40(a)(ia) of the Act. For the purpose of arriving at the disallowance figure, the ld. AO vide order sheet noting dated 16/12/2010 asked the assessee to submit details of discount debited during the year. The assessee during the course of hearing on 24/12/2010 submitted that a sum of Rs.162 Crores represent discount for the half year. Accordingly, the ld. AO extrapolated the same for the remaining half year and arrived at the total discount figure for the whole year at Rs.320 Crores and disallowed the same u/s.40(a)(ia) of the Act. However, this has been subsequently reduced to Rs.262.82 Crores (Rs.320 – Rs.57.18 Crores) by the ld. AO vide order u/s.154 of the Act dated 16/09/2015 by considering the actual figures. This action of the ld. AO was upheld by the ld. CIT(A).

2.4. We find that assessee in the course of its business appoints prepaid distributors (i.e. distributors). The assessee supplies prepaid sim cards and recharge vouchers to its distributors at a discounted price. The assessee supplies prepaid sim cards containing the talk time worth at a higher figure than the discounted price to the distributors. The distributors supply them to the retailers and retailers sell the same to the ultimate customer / user. The distributors make payment of the discounted price in advance to the assessee and there is no payment of any kind made by the assessee to its distributors. The distributors would sell to the retailers after adding its margin and the retailers would sell to the customer after adding his margin. The ultimate price to the customer / user is subjected to the Maximum Retail Price (MRP) fixed by the assessee. It is pertinent to note that the distributor does not earn any income just by obtaining the prepaid sim cards and recharge vouchers from the assessee. The distributor earns income only if the said sim cards and recharge vouchers were sold further. Hence, there is no fixed amount of commission that could be determined from the agreement entered into by the assessee with the distributors. Once the amount of commission income that could be determined in the hands of the distributor is not permissible, there cannot be any obligation of deduction of tax at source that could be casted on the assessee.

2.5. From the perusal of the distributors agreement, we find that the distributor is allowed to distribute to its retailers at any price between the consideration paid to the assessee and the MRP fixed by the assessee. The distributor possesses complete freedom of pricing. Hence, the first tranche of the transaction is selling of prepaid sim cards and recharge vouchers containing the talk time for a higher value by the assessee to the distributors, on which the distributor does not earn any income at all. As stated supra, the distributors earn income only when the said sim cards and recharge vouchers were sold at a price higher than its purchase price (i.e. the price paid by the distributor to the assessee herein). Hence, it is highly impossible to determine the amount of income that would accrue to the distributor on which tax ought to have been deducted by the assessee u/s.194H of the Act. Hence, the entire TDS computation mechanism fails in this case. In this regard, we find that the ld. AR rightly placed reliance on the decision of *Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd vs DCIT reported in 372 ITR 33 (Kar)* wherein it was held as under:-

> ***62**. In the appeals before us, the assessees sell prepaid cards/vouchers to the distributors. At the time of the assessee selling these pre-paid cards for a consideration to the distributor, the distributor does not earn any income. In fact, rather than earning income, distributors incur expenditure for the purchase of prepaid cards. Only after the resale of those prepaid cards, distributors would derive income. At the time of the assessee selling these pre-paid cards, he is not in possession of any income belonging to the distributor. Therefore, the question of any income accruing or arising to the distributor at the point of time of sale of prepaid card by the assessee to the distributor does not arise. The condition precedent for attracting Section 194H of the Act is that there should be an income payable by the assessee to the distributor. In other words the income accrued or belonging to the distributor should be in the hands of the assessees. Then out of that income, the assessee has to deduct income tax thereon at the rate of 10% and then pay the remaining portion of the income to the distributor. In this context it is pertinent to mention that the assessee sells SIM cards to the distributor and allows a discount of Rs.20/-, that Rs.20/- does not represent the income at the hands of the distributor because the distributor in turn may sell the SIM cards to a subdistributor who in turn may sell the SIM cards to the retailer and it is the retailer who sells it to the customer. The profit earned by the distributor, sub-distributor and the retailer would be dependant on the agreement between them and all of them have to share Rs.20/- which is allowed as discount by the assessee to the distributor. There is no relationship between the assessee and the sub-distributor as well as the retailer. However, under the terms of the agreement, several obligations flow in so far as the services to be rendered by the assessee to the customer is concerned and, therefore, it cannot be said that there exists a relationship of principal and agent. In the facts of the case, we are satisfied that, it is a sale of right to service. The relationship between the assessee and the distributor is that of principal to principal and, therefore, when the assessee sells the SIM cards to the distributor, he is not paying any commission; by such sale no income accrues in the hands of the distributor and he is not under any obligation to pay any tax as no income is generated in his hands. The deduction of income tax at source being a vicarious responsibility, when there is no primary responsibility, the assessee has no obligation to deduct TDS. Once it is held that the right to service can be sold then the relationship between the assessee and the distributor would be that of*

principal and principal and not principal and agent. The terms of the agreement set out supra in unmistakable terms demonstrate that the relationship between the assessee and the distributor is not that of principal and agent but it is that of principal to principal.

2.6. First of all, the assessee herein does not make any payment of commission or discount to the distributor in the instant case. What assessee does is - it sells prepaid sim cards and recharge vouchers at a discounted price than the MRP to the distributors. This amounts to sale of right to service (i.e. talk time upto MRP). Assuming the MRP of the sim cards and recharge vouchers is Rs.100/-, the assessee sells the same to its distributors at a discounted price of Rs.70/-. Later the distributor in turn sells the same product to retailers at Rs.90/- and thereafter, the retailer sells the same product to the ultimate customer / user at Rs.100/-. In this case, the distributors margin would be Rs.20/- (i.e. Rs.90-Rs.70) and retailers margin would be Rs.10 (Rs.100-Rs.90). From the above example, it could be seen that there are different amounts of margins earned by the distributor and retailer at every point in time. As stated supra, the margins arise to the distributor or the retailer only when the product is ultimately sold by them to the respective parties, i.e. the distributor earns the margin when he sells the sim cards to the retailers and retailer earns margin when he sells to the ultimate customer / user. In this scenario, how the assessee could be expected to determine the margins that could be derived by the distributor or the retailer and deduct tax at source. Admittedly, the agreement is entered by the assessee only with the distributors. It is very likely that the distributor may not be able to sell the prepaid sim cards and recharge vouchers. In this scenario, there cannot be any income that would accrue to the distributors and hence there would be no question of deduction of tax at source by the assessee company. The assessee has got absolutely no control over the appointment of retailers. Hence, the entire computation mechanism of deduction of tax at source in terms of Section 194H of the Act grossly fails as the income component thereon is not determinable when the assessee sells the sim cards to the distributors. Accordingly, the arguments advanced by the ld. DR before us vehemently that the TDS is to be done by the assessee at the difference in price of MRP and its sale price is rejected. We hold that the argument of the Revenue only results in impossibility of performance in the hands of the assessee. The famous legal maxim *"LEX NON COGUT AD IMPOSSIBLIA"* , meaning thereby – *'law cannot compel a person to perform an act which he could not possibly perform'* , would certainly come to the rescue of the assessee herein. As stated supra, the assessee only collects the discounted price of goods from its distributors and does not make any payment thereon. This aspect is squarely covered by the decision of *Hon'ble Jurisdictional High Court in the case of CIT(TDS) vs Super Religare Laboratories Ltd reported in 284 Taxman 657 (Bom)* wherein the head notes are reproduced hereunder:-

> *Section 194H of the Income-tax Act, 1961 - Deduction of tax at source - Commissions, brokerages etc. (Collection centres, discount allowed to) - Assessee-company was engaged in providing laboratory and testing services to customers through its own and through third party collection centres - It allowed certain discount to these collection centres - Assessing Officer held that such discount allowed by assessee to collection centres was in nature of commission and assessee was obligated under section 194H to deduct tax at source on same - It was noted that provision of section 194H to deduct tax was applicable only to a person who was responsible for paying, at time of credit to account of payee or at time of payment - Whether, since assessee did not perform any act of paying but was only receiving payments from these collection centres, there was no obligation on assessee-company to deduct tax at source under section 194H on discount so allowed - Held, yes [In favour of assessee]*

2.6.1. Similarly in yet another decision of *Hon'ble Jurisdictional High Court in the case of CIT vs Qatar Airways reported in 332 ITR 253 (Bom),* the same decision was rendered. The facts of that case and decision rendered thereon are reproduced herein for the sake of convenience :-

> ***1.*** *The question of law as raised in this appeal is as under:*
>
> > *"Whether on the facts and in the circumstances of the case and in law, the difference in amount between commercial price and published price is special commission in the nature of commission or brokerage within the meaning of Explanation (i) to section 194H of the Income-tax Act 1961 ?"*
>
> ***2.*** *It is not in dispute that the airlines have a discretion to reduce the published price to their tickets. In the present case, the airlines had an agreement with their agents to sell their tickets at a minimum fixed commercial price which was lower than the published price but was of a variable nature and could be increased by the agent, at his discretion, to the extent up to the published price. It is not in dispute that under rules of IATA, the commission payable to the agent was 9 per cent. of the published price. It is an admitted position that the TDS has been deducted while payment of this commission of 9 per cent. It is the contention of the Revenue that the difference between the published price and the minimum fixed commercial price amounts to an additional special commission and therefore, TDS is deductible on this amount under section 194H of the Income-tax Act.*
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> ***3.*** *On a perusal of the order of the Income-tax Appellate Tribunal, we find that it proceeded on the basis of its earlier decision in the case of Korean Air v. Dy. CIT in which, in similar circumstances, it was held that TDS was not deductible. He finds that though an appeal was preferred against the aforesaid decision the same has been rejected by this court for non-removal of the office objections under rule 986. Be that as it may, for section 194H to be attracted, the income being paid out by the assessee must be in the nature of commission or brokerage. Counsel for the Revenue contended that it was not the case of the Revenue that this difference between the principal price of the tickets and the minimum fixed commercial price amounted to payment of brokerage. We find however, that in order to deduct tax at source the income being paid out must necessarily be ascertainable in the hands of the assessee. In the facts of the present case, it is seen that the airlines would have no information about the exact rate at which the tickets were ultimately sold by their agents since the agents had been given discretion to sell the tickets at any rate between the fixed minimum commercial price and the published price and it would be impracticable and unreasonable to expect the assessee to get a feed back from their numerous agents in respect of each ticket sold. Further, if the airlines have discretion to sell the tickets at the price lower than the published price then the permission granted to the agent to sell it at a lower price, according to us, can neither amount to commission nor brokerage at the hands of the agent. We hasten to add any amount which the agent may earn over and above the fixed minimum commercial price would naturally be income in the hands of the agent and will be taxable as such in his hands. In this view of the matter, according to us, there is no error in the impugned order and the question of law as framed does not arise. The appeal is therefore, dismissed in limini.*

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2.7. With regard to yet another argument advanced by the ld. DR before us that the assessee had changed its method of accounting during the middle of the year i.e.upto October 2007, the assessee had recorded sale of prepaid sim cards and recharge vouchers to distributors at Rs.100/- in its income side and had debited discount of Rs.30/- in the expenditure side of the profit and loss account. However, after October 2007, the assessee had recorded the sales at discounted price to distributors at Rs.70/- as income in the profit and loss account. Though the net effect of both these accounting methods would result in the same profit ultimately, it does present a picture that would enable the Revenue to expect assessee to deduct tax at source on the discount portion of Rs.30/- deducted in the profit and loss account. In this regard, it is well settled proposition that entries in the books of accounts are not determinative and conclusive for the purpose of determining the tax liability of a person. Reliance in this regard is placed on the following celebrated decisions of *Hon'ble Supreme Court*:-

a) Kedarnath Jute Manufacturing Co. Ltd vs CIT reported in 82 ITR 363 (SC)
b) Tuticorin Alkali Chemicals & Fertilizers Ltd vs CIT reported in 227 ITR 172 (SC)
c) Taparia Tools Ltd vs JCIT reported in 372 ITR 605 (SC)

2.8. The ld. DR before us referred to Clauses 7.5, 7.6, 7.7, 7.9, 7.14, 7.16, 7.21, 7.22, 7.23, 8, 9.5, 16, 23.1 & 24.1 of the distributors agreement to drive home the point that the relationship between the assessee is only principal and agent and not principal to principal. The ld. DR vehemently submitted - that assessee had held distributors only as agent; that no rights had been based on to the distributors; that distributors can return the sim cards within expiry period; that appointment of retailers by the distributors should be in accordance with policy of Idea Cellular Ltd which goes to prove that distributor does not have free hand; that the KYC norms compliance had to be made by the distributor about the retailers and documentary evidence in that record are to be sent to the assessee; that the distributor does not have any freedom of pricing as it cannot sell beyond MRP; that the Intellectual Property Rights (IPR) of distributors vests with assessee company on termination of agreement ; that the distributor shall keep minimum stock and shall always order minimum quantity of IDEA products as may be prescribed by assessee from time to time; that distributor shall submit reports and other reports in relation to business in the format as intimated by the assessee company from time to time; that distributor shall permit the assessee company or its representative at all reasonable times to inspect and take copies of all materials i.e. subject matter of distributors agreement and for this purpose to enter into any premises used for the purpose of business; that in the event of any dispute arising between distributor and end user, the distributor shall forthwith inform the assessee company and provide the details of the circumstance of the dispute and shall not institute proceedings in respect of it without prior consent of the assessee company; that the assessee company may at its cost organise training programmes for the distributors and its authorised retailers to train them on all aspects of the use of Idea Prepaid services so that they will be able to explain the same to the ultimate customers without any difficulty; that in case of any disputes it is only assessee company’s Managing Director or Chief Financial Officer who shall have the right to appoint the sole arbitrator; that all financial penalties could be levied only by the assessee company and not by distributors for any non-compliance or violation of the terms of the agreement; that the distributor had agreed to indemnify, defend and hold the assessee company and its Directors and office bearers, employees, their legal heirs etc., harmless against any liabilities for any claims whatsoever and demands arising out of the conduct of the distributors business or breach or violation by it of any of its terms of this agreement, so on and so forth. Accordingly, the ld. DR from the aforesaid clauses of the distributors agreement concluded that the relationship between the assessee is only that of Principal to Agent and not Principal to Principal. Further, with regard to various case laws relied upon by the ld. AR at the time of hearing on certain Tribunal decisions and Hon'ble High Court decisions, the ld. DR defended the same by stating that in all those cases there was an established fact of principal to principal relationship between those assessees and distributors, whereas in the instant case the relationship between assessee and distributors is that of Principal and Agent. The ld. DR submitted that accordingly all those case laws are factually distinguishable. The ld. DR further placed reliance on the decision of the *Hon'ble Calcutta High Court in the case of Hutchison Telecom East Ltd, vs. CIT (TDS) Calcutta reported in 59 taxmann.com 176 (Calcutta)* wherein he relied on paras 8,10,11,12,14,18 & 19 of the said judgement. The ld. DR argued that in this case, the relationship of principal to agent was clearly established and the decision of the *Hon'ble Karnataka High Court in the case of Bharti Aritel Ltd., vs. DCIT reported in 372 ITR 33* was distinguished. Similarly, the ld. DR placed reliance on the decision of *Hon'ble Kerala High Court in the case of Vodafone Essar Cellular Ltd., vs. ACIT reported in 194 Taxman 518 / 332 ITR 255 (Ker)* wherein the same issue was decided in favour of the Revenue. The ld. DR also placed reliance on the decision of the *Hon'ble Delhi High Court in the case of CIT vs. Idea Cellular Ltd., (assessee herein) reported in 189 Taxman 118 / 325 ITR 148 (Del)* wherein the impugned issue was decided in favour of the Revenue. The ld. DR placed the evidences on record that against the decisions of Hon'ble Kerala High Court and the Hon'ble Delhi High Court that the assessee had withdrawn the Special Leave Petition filed before the Hon'ble Supreme Court. The evidences in this regard were placed by the ld. DR in pages 27 and 30 of the department paper book – page 4. Accordingly, he argued that the decision of Hon'ble Kerala High Court and Hon'ble Delhi High Court had attained finality wherein the impugned issue is in favour of the Revenue.

2.8.1. From the perusal of the various clauses of the distributors agreement, we are convinced that the relationship between the assessee and the distributor is only that of principal to principal and not principal to agent as alleged by the Revenue. This is clearly established from the fact that the distributor is merely purchasing the prepaid sim cards and recharge vouchers from the assessee and has got complete freedom of pricing and accordingly, it could sell the sim cards to the retailers at any price of its choice subject to MRP. The MRP had to be fixed by the assessee as it gives the ultimate customer / user the talk time worth the MRP by paying the price equivalent to MRP. This is the reason the assessee is fixing the MRP. This does not tantamount to fixation of pricing of the product by the assessee or exercising control over the distributors on pricing. Hence, the arguments advanced by the ld. DR in this regard are hereby rejected. Ultimately, the assessee by selling the prepaid sim cards gives the content of talk time of Rs.100/-(as per our example stated supra). No customer will pay the MRP i.e. Rs.100/- and get the reduced talk time. We find that as per Clause 4 of the Distribution Agreement which clearly specifies the RELATIONSHIP between assessee and the distributor to be at Principal to Principal. With regard to yet another argument advanced by the ld. DR that revenue is recognised by the assessee only when talk time is activated by the end user i.e the customer, which goes to prove that the ownership remained with the assessee and all the distributors and retailers are only acting as agents of the assessee to enable them to sell the sim cards ultimately to the customer. In this regard, we find that assessee in its Accounting Policies vide Point No. 9 had stated that revenue is recognised as and when the talk time gets activated. When the retailer sells the sim card to the customer, the customer has to scratch the sim card and there would be a key code reflected thereon. Once the said key code is entered, the talk time gets activated. Actually what is sold by the assessee is only the talk time. The said talk time gets materialised / usable only when it gets activated by the customer by entering the key code. This is what is reflected in Accounting Policies , on which we don't find any infirmity. Merely because the revenue recognition is postponed , the distributors does not become the agent of the assessee. As stated earlier, the assessee had sold the right to service the sim card. In this regard, we find that the Hon'ble Karnataka High Court in the case of Bharti Cellular Ltd reported in 372 ITR 33 (Kar) had indeed addressed the very same issue as under:-

> *59. The telephone service is nothing but service. SIM cards, have no intrinsic sale value. It is supplied to the customers for providing mobile services to them. The SIM card is in the nature of a key to the consumer to have access to the telephone network established and operated by the assessee-company on its own behalf. Therefore, the SIM card, on its own but without service would hardly have any value. A customer, who wants to have its service initially, has to purchase a sim-card. When he pays for the sim-card, he gets the mobile service activated. Service can only be rendered and cannot be sold. However, right to service can be sold. What is sold by the service provider to the distributor is the right to service. Once the distributor pays for the service, and the service provider, delivers the Sim Card or Recharge Coupons, the distributor acquires a right to demand service. Once such a right is acquired the distributor may use it by himself. He may also sell the right to sub-distributors who in turn may sell it to retailers. It is a well-settled proposition that if the property in the goods is transferred and gets vested in the distributor at the time of the delivery then he is*

> *thereafter liable for the same and would be dealing with them in his own right as a principal and not as an agent. The seller may have fixed the MRP and the price at which they sell the products to the distributors but the products are sold and ownership vests and is transferred to the distributors. However, who ever ultimately sells the said right to customers is not entitled to charge more than the MRP. The income of these middlemen would be the difference in the sale price and the MRP, which they have to share as per the agreement between them. The said income accrues to them only when they sell this right to service and not when they purchase this right to service. The assessee is not concerned with quantum and time of accrual of income to the distributors by reselling the prepaid cards to the sub-distributors/retailers. As at the time of sale of prepaid card by the assessee to the distributor, income has not accrued or arisen to the distributor, there is no primary liability to tax on the Distributor. In the absence of primary liability on the distributor at such point of time, there is no liability on the assessee to deduct tax at source. The difference between the sale price to retailer and the price which the distributor pays to the assessee is his income from business. It cannot be categorized as commission. The sale is subject to conditions, and stipulations. This by itself does not show and establish principal and agent relationship.*

2.8.2. We find that in the case before the Co-ordinate Bench of Pune Tribunal in the case of Idea Cellular Limited vs DCIT (TDS) in ITA Nos. 1041, 1042, 1953 -1955/Pun/2013 and ITA Nos. 1867 -1870 /Pun/2014 dated 04/01/2017, the lower authorities had held that relationship between assessee and its distributors was Principal and Agent. It was only the Pune Tribunal which after examining the distributors agreement came to the conclusion that the relationship is that of Principal to Principal. Infact Pune Tribunal also examined the very same agreement which is the subject matter of agreement before us in the instant case before us, as it is not in dispute that all the distributors agreements are standard agreements across India. We also find that the Pune Tribunal relied on para 62 of the decision of *Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd vs DCIT reported in 372 ITR 33 (Kar)*. We find that the Pune Tribunal had taken note of the fact that Hon'ble Karnataka High Court in 372 ITR 33 had distinguished all the three High Court judgements (i.e. Kerala, Calcutta and Delhi) relied upon by the ld. DR hereinabove. Effectively Pune Tribunal adopted the decision of Hon'ble

Karnataka High Court. The ld. DR relied on para 64 of decision of Hon'ble Karnataka High Court and argued that it is against assessee for the first 7 months since discount is separately shown in the books of the assessee as an expenditure. In our considered opinion, what is to be seen is the broader question raised before the *Hon'ble Jurisdictional High Court in Income Tax Appeal No. 1129 of 2017 dated 13/01/2020 in assessee's own case against the order of Pune Tribunal*. For the sake of convenience, the entire order is reproduced hereunder:-

> *"Heard learned counsel for the parties.*
>
> *2. The Appellant-Revenue challenges the order dated 4 January 2017 passed by the Income Tax Appellate Tribunal in Income Tax Appeal No.1041, 1042 and 1953 to 1955/PUN/2013.*
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> *3. This Appeal pertains to the Assessment Year is 2010-11.*
>
> *4. The Appellant-Revenue has raised the following questions as a substantial questions of law :-*
>
> > ***"(a) Whether on the facts and circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal erred in holding the discount given by the assessee to its distributors on prepaid SIM Cards does not require deduction of tax under** Section 194H **of the Income Tax Act ?***
> >
> > *(b) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal erred in setting aside the case to the Assessing Officer ?"*
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> *5. **The Tribunal noted the observations of the Assessing Officer that the discount allowed to the distributors by the Respondent - assessee company is on account of principal to principal relationship and not that of principal to agent.** The Tribunal followed the decision of the Karnataka High Court in the case of* Bharati Airtel Ltd. vs. DCIT *[372 ITR 33] and held that the sale of SIM cards/recharge coupons at discounted rate to the distributors was not commission and therefore not liable to deduct the TDS under* Section 194H*. The Tribunal noted that there was no decision of this Court on this issue on that date.*
>
> *6. Learned counsel for the parties have tendered the copy of the order passed in Income Tax Appeal No. 702 of 2017 subsequently in the case of* Pr. Commissioner of Income Tax-8 vs. M/s. Reliance Communications

> Infrastructure Ltd., *where same issue arose for the consideration of this Court. The Division Bench of this Court while holding against the Appellant - Revenue observed thus :-*
>
> > *"3. Having heard the learned Counsel for the parties and having perused the documents on record, we do not find any error in the view of the Tribunal. The Tribunal, as noted, besides holding that the Commissioner's order setting aside the order passed under Section 201 was not carried in appeal, had also independently examined the nature of the transaction and come to the conclusion that when the transaction was between two persons on principal to principal basis, deduction of tax at source as per section 194H of the Act, would not be made since the payment was not for commission or brokerage."*
>
> *7. In view of the finding of fact rendered by the Tribunal which we have noted above, the same principle would apply in the present case. Therefore, the questions of law as proposed do not give any rise to substantial question of law. The Appeal is disposed of."*

(emphasis supplied by us)

2.8.2.1. It is also pertinent to note that the Distribution Agreement of Maharashtra Circle was subject matter of examination and adjudication by the Pune Tribunal wherein the Pune Tribunal had recorded a finding of fact that the relationship between assessee and distributor is that of Principal to Principal. This Order has been approved by the Hon'ble Jurisdictional High Court. We find that the Hon'ble Jurisdictional High Court held that once Principal to Principal relationship is established, there could be no commission or discount and consequently no deduction of tax at source in terms of section 194 H of the Act is warranted.

2.8.3. With regard to reliance placed by the ld. DR vehemently on the decision of Hon'ble Delhi High Court in assessee's own case reported in 325 ITR 148 (Del) is concerned, we find that the Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd (372 ITR 33) referred supra had after considering the decision of Hon'ble Delhi High Court referred supra and decided the issue in favour of the assessee. We find that the Hon'ble

Karnataka High Court had also followed the decision of Hon'ble Jurisdictional High Court in the case of Qatar Airways reported in 332 ITR 253 (Bom). Hence the reliance placed on the decision of Hon'ble Delhi High Court by the ld. DR does not advance the case of the revenue. In any case, the decisions of Hon'ble Delhi High Court, Hon'ble Kerala High Court and Hon'ble Calcutta High Court referred supra had been considered and distinguished by the Hon'ble Karnataka High Court referred supra.

2.8.4. We further find that the *Hon'ble Rajasthan High Court in the case of Hindustan Coca Cola Beverages (P) Ltd vs CIT III Jaipur reported in 402 ITR 539 (Raj)* which had rendered a comprehensive judgement on the impugned issue together with various other assesses including Idea Cellular Ltd (assessee herein). The relevant Income Tax Appeal Nos. 168/2015 , 169/2015 . 170/2015 and 171/2015 which were admitted by the Hon'ble Rajasthan High Court on 18/10/2016 relates to assessee herein for Rajasthan Circle in respect of the identical issue. The question no.1 raised before the Hon'ble Rajasthan High Court is as under:-

1. *Whether in the facts and circumstances of the case, the Tribunal was justified in holding that whether the assessee is liable to deduct TDS u/s. 194-H of IT Act, as the relation between assessee and distributor is that of Principal to Agent?*

2.8.4.1. We find that the Hon'ble Rajasthan High Court after considering the plethora of judgements on the impugned issue of various High Courts (which includes the three High Court decisions of Kerala, Delhi and Calcutta relied upon by the ld. DR before us herein) had rendered its decision as under:-

Idea Cellular

58. *As the agreement is produced, issues are answered in favour of assessee in the departmental appeals.*

59. *Even the contention which has been raised by the counsel for the assessee that the final tax is paid by the Distributor and not by the agent, the revenue is not at loss in any form.*

60. *In view of above, all the issues in each appeal are answered in tabular form as follows:*

Sr.No.	*Appeal No.*	*Ques.1*	*Ques.2*	*Ques.3*	*Ques.4*	*Ques.5*
1.	205/2005	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	--	--
2.	206/2005	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	--	--
3.	10/2007	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	--	–
4.	55/2007	In favour of assessee and against the department	In favour of assessee and against the department	–	--	--
5.	6/2008	In favour of assessee and against the department	In favour of assessee and against the department	–	--	–
6.	7/2008	In favour of assessee and against the department	In favour of assessee and against the department	–	--	--
7.	540/2009	In favour of assessee	In favour of assessee	–	--	--

		and against the department	and against the department			
8.	1/2014	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department
9.	2/2014	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department
10.	3/2014	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department
11.	4/2014	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department
12.	124/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	-
13.	125/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
14.	126/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
15.	131/2015	Against the department and In	Against the department	--	--	--

		favour of assessee	and In favour of assessee			
16.	132/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
17.	**168/2015**	**Against the department and In favour of assessee**	Against the department and In favour of assessee	--	--	--
18.	**169/2015**	**Against the department and In favour of assessee**	Against the department and In favour of assessee	--	--	--
19.	**170/2015**	**Against the department and In favour of assessee**	Against the department and In favour of assessee	--	--	--
20.	**171/2015**	**Against the department and In favour of assessee**	Against the department and In favour of assessee	--	--	--
21.	195/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
22.	08/2016	Against the department and In favour of assessee	Against the department and In favour of	--	--	-

			assessee			
23.	45/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
24.	48/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
25.	49/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
26.	96/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
27.	97/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
28.	98/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
29.	99/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee

30.	100/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
31.	101/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
32.	102/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
33.	103/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
34.	104/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
35.	105/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
36.	106/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	–	–
37.	107/2016	Against the department	Against the	--	-	--

		and In favour of assessee	department and In favour of assessee			
38.	108/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	-	--
39.	199/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	-	--
40.	200/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	-	--
41.	204/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	-	--
42.	209/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	-	--
43.	210/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	-	--
44.	217/2016	Against the department and In favour of	Against the department and In	Against the department and In	Against the department and In	Against the department and In

		assessee	favour of assessee	favour of assessee	favour of assessee	favour of assessee

61. *In view of the above discussion, all the appeals of assessees are allowed and those of Department are dismissed.*

(BOLD PORTION PERTAINS TO ASSESSEE IN THE AFORESAID JUDGEMENT OF HON'BLE RAJASTHAN HIGH COURT)

2.8.5. We further find that the *Hon'ble Rajasthan High Court in the case of CIT (TDS) Jaipur vs Idea Cellular Ltd in Income Tax Appeal No. 90/2018 dated 12/04/2018* had taken an identical view on the identical set of facts. Further we find that the Hon'ble Jurisdictional High Court in the case of CIT(TDS) Pune vs Vodafone Cellular Ltd (assessee's own case) in Income Tax Appeal Nos. 1152 , 1274, 1995, of 2017 & Income Tax Appeal Nos. 571, 1266 of 2018 dated 27/01/2020 had also taken an identical view in respect of identical issue.

2.8.6. The ld.DR before us placed heavy reliance on the decision of *Hon'ble Supreme Court in the case of Union of India vs Association of Unified Telecom Service Providers of India and Others reported in (2020) 3 SCC 525* dated 24/10/2019 to drive home the point that the assessee had erred in accounting the discounted price of sales as its revenue when sim cards are sold to distributors. We have gone through the said decision and we find that the said decision was rendered in the context of determination of Annual Gross Revenue for the purpose of fixing the licence fee payable to Government by the telecom service providers. It further held that while reckoning the Gross Revenues, no deduction would be available such as discount , commission etc. First of all, we have already held that the assessee had not made any payment of discount to the distributors. In any case, we have already held that the entries in the books of accounts are not determinative of tax liability of an assessee by placing relaicne on various decisions of Hon'ble Apex Court. Those decisions still rule the field as they were not overruled by the latest Supreme Court decision relied upon supra by the ld. DR. It is trite law that though the decision of Hon'ble Apex Court would be binding as per Article 141 of the Constitution of India, still the judgement of the Hon'ble Supreme Court should be understood from the issue raised before it. In our considered opinion, this decision has got absolutely nothing to do with the applicability of provisions of section 194H of the Act. Hence we hold that the reliance placed by the ld. DR on the said decision is grossly misplaced.

2.8.7. The ld. DR before us vehemently submitted that the orders of Hon'ble Rajasthan High Courts and Hon'ble Jurisdictional High Courts and Hon'ble Karnataka High Court had not attained finality as they had been appealed by the revenue before the Hon'ble Supreme Court. This argument of the revenue, in our considered opinion, cannot be a deterrent for this Tribunal to follow those High Court orders. We find that the similarly worded distribution agreement had been subject matter of adjudication and examination by the Hon'ble Rajasthan High Court and Hon'ble Jurisdictional High Court wherein the Hon'ble High Courts had taken a categorical view that the relationship between assessee and distributor is only that of Principal to Principal. Hence this finding cannot be disturbed by this tribunal by respectfully following the judicial hierarchy. Infact no contrary materials on facts were even brought on record by the revenue before us to disturb the findings of Hon'ble High Courts. Hence we have no hesitation in holding that the relationship between assessee and distributor is only that of Principal to Principal and not that of Principal to Agent and accordingly there is no obligation for the assessee to deduct tax at source in terms of section 194H of the Act.

2.8.8. In view of the aforesaid observations and findings given thereon, we do not deem it fit to adjudicate other arguments advanced by the ld. AR on the applicability of second proviso to section 40(a)(ia) read with section 201 of the Act, as it would become academic in nature. This aspect of the issue is left open.

2.9. In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that the sale of prepaid sim cards / recharge vouchers by the assessee to distributors cannot be treated as commission / discount to attract the provisions of section 194H of the Act and hence there cannot be any obligation on the part of the assessee to deduct tax at source thereon and consequentially there cannot be any disallowance u/s 40(a)(ia) of the Act. Accordingly, the Ground No. II raised by the assessee is allowed. The Ground No. I raised by the assessee is only supporting the Ground No. II for furnishing of additional evidences, the adjudication of which becomes academic in nature. Hence Ground No. I is also allowed.

3. The ground No.III filed by the assessee is challenging the action of the ld. CIT(A) in upholding the disallowance of compensation cost of ESOP amounting to Rs.3,75,90,000/- on account of Employee Stock Option Scheme (ESOP). This amount charged to profit and loss account represents the amortisation of intrinsic value of ESOP option. The assessee also submitted before the ld. AO that the said expenditure has been claimed based on SEBI guidelines i.e. Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock

Purchase Scheme) Guidelines, 1999. It was submitted that 1,99,31,000 options have been granted to the eligible employees as on 31/12/2007. Each option when exercised would be converted into one equity share of Rs.10/- fully paid up of the company. The options vest 25% each on a specified date in four subsequent years from the date of grant. The maximum period of exercise is five years from the date of vesting. The compensation cost of stock option granted to employees has been arrived by the company by using intrinsic value method. The ld. AO noted that copy of ESOP documents were submitted by the assessee vide letter dated 02/12/2010. He observed that the assessee had not sought approval of the relevant scheme from the concerned CIT / CCIT as envisaged in Circular No.323 of 2001 dated 11/10/2001. He observed that the stock option has not been exercised by the employees of the assessee and that the scheme was eventually revised at a lower price for the employees of the assessee. The ld. AO observed that the scheme was not subscribed in subsequent years and it is purely optional for the employees and assessee cannot know for certain that the same would be subscribed by the employees in a particular year. In other words, the ld. AO observed that the liability on account of difference in the market price and the ESOP price is purely contingent and not ascertained. With these observations, the ld. AO disallowed the provision made on account of ESOP in the sum of Rs.3,75,90,000/- in the assessment.

3.1. The ld. CIT(A) observed that assessee has not explained or commented on reversal of the value of entries due to retirement, death, VRS, quitting etc., of eligible employees on 31/12/2008, 31/12/2009, 31/12/2010 and 31/12/2011. The ld. CIT(A) further observed that if eligible employees did not exercise their options, then the ESOP should go back to the assessee. The ld. CIT(A) by placing reliance on the decision of the Delhi Tribunal in the case of Ranbaxy Laboratories Ltd., reported in 124 TTJ 771 upheld the action of the ld. AO by stating that the provisions made for ESOP expenditure is notional and contingent in nature.

3.2. Further, the ld. CIT(A) in para 5.7.4 had also observed that since the shares were the capital of the assessee company and any loss on account of capital should be considered as capital loss and not the Revenue expenditure. Accordingly, he observed that the loss suffered by the assessee as a result of allotment of shares to its employees under ESOP scheme below market price was on capital account and not deductable as revenue expenditure.

3.3. The ld. CIT(A) also observed that in the present case, the assessee has not incurred any actual expenditure and accordingly, the same would not be eligible for deduction u/s.37 of the Act. With the aforesaid observation, the ld. CIT(A) upheld the action of the ld. AO.

3.4. We find the workings for amounts debited on account of ESOP have been duly furnished by the assessee before the lower authorities as under:-

(Amount in Rs.)

Particulars		**Remarks**
No. Of options granted	A	1,99,31,000
Grant Date		December 31, 2007
Market Price	B	131.3
Exercise Price	C	112.57
Difference between Market price and exercise price	D=B-C	18.73
Attrition Rate		13%

Particulars		**F.Y. 2007-08**	**F.Y. 2008-09**	**F.Y. 2009-10**	**F.Y. 2010-11**
Vesting Date Options vested on each vesting	E	**December 31, 2008**	**December 31, 2009**	**December 31, 2010**	**December 31, 2011** 25%

date No. of options vested Attrition Rate No. of shares expected to vest Fair Value of options expected to vest Vesting period (in months) No. of months out of vesting period that fall in the captioned Assessment Year	F =A*E G H I =H*D J K	25% 4,982,750 13% 4,334,993 (F* 0.87) 81,194,419 12 3	25% 4,982,750 13% 3,771,443 (F* 0.87*0.87) 70,639,127 24 3	25% 4,982,750 13% 3,281,156 (F* 0.87* 0.87*0.87) 61,456,052 36 3	4,982,750 13% 2,854,606 (F* 087*0.87*0.87*0.87) 53,466,770 48 3
ESOP expenses amortised to P & L	**L=I/J*K**	**20,298,605**	**8,829,891**	**5,121,338**	**3,341,673**
Total ESOP expenses charged to P & L during the captioned Assessment Year					**37,591,506**

3.5. We find that the aforesaid workings had duly considered the observation made by the ld. CIT(A) that the employees may not avail the ESOP option due to death, VRS, quitting etc. We find that the aforesaid workings had considered the attrition rate at 13% and had discounted the same while arriving at the number of shares expected to vest with the employees. Hence, the observation of the ld. CIT(A) in this regard is grossly ill-founded.

3.6. Moreover, we find that the entire amortisation of ESOP expenditure based on intrinsic value has been made in accordance with SEBI guidelines on ESOP segment. The said guidelines prescribed to amortise the ESOP cost over the vesting period of the options as per Schedule J of the guidelines. Further, we find from Note 21 of the audited financial statements for the year ended 31/03/2008, the assessee had duly disclosed the treatment adopted for ESOP scheme as per SEBI guidelines. The copy of SEBI guidelines 1999 in respect of ESOP scheme was also placed on record. We further find that assessee is actually listed on stock exchange and hence, SEBI guidelines are mandatorily to be followed by the assessee. The ld. CIT(A) had grossly erred in stating that assessee is not a listed company at all. Complete disclosure with regard to manner in which the ESOP cost has been arrived at by the assessee is duly disclosed both in the financial statements, notes on accounts and in the Directors' Report of the assessee company for the year ended 31/03/2008.

3.7. Yet another grievance addressed by the lower authorities and by the ld. DR is that the Fringe benefit tax (FBT) is not paid by the assessee company on the amortisation cost of ESOP. In this regard, we find that the assessee had specifically mentioned in its tax audit report that the said amortisation cost has not been considered for calculation of FBT as FBT would be payable only at the time when stock options are exercised by the employees. This note has been conveniently ignored by the lower authorities. Moreover, whether the particular expenditure has suffered fringe benefit taxed or not is of no relevance for the purpose of allowability of expenditure while computing the total income of the assessee. What is relevant to be seen is that whether the said expenditure is incurred wholly and exclusively for the purpose of business of the assessee. In our considered opinion, the compensation cost of ESOP has been incurred by the assessee only as a measure of employees incentive and in order to retain employees with the assessee company. Hence, we conclude that it is purely incurred wholly and exclusively for the purpose of business of the assessee company. The ESOP scheme whether it is approved by CIT or CCIT is of no relevance for the purpose of allowability of deduction.

3.8. In any case, we find that this issue is no longer res integra in view of the decision of Special Bench of Bangalore Tribunal in the case of Biocon Ltd., vs. DCIT reported in 144 ITD 21 wherein all the arguments advanced by the ld. DR before us in the instant case has already been addressed including the decision of Delhi Tribunal in the case of Ranbaxy Laboratories relied upon by the ld. CIT(A). The relevant operative portion of the said decision is reproduced below:-

> ***8.*** *We will take up these three steps one by one for consideration and decision.*
> *I. WHETHER ANY DEDUCTION OF SUCH DISCOUNT IS ALLOWABLE ?*
>
> ***9.1*** *The crux of the arguments put forth by the ld. AR is that discount under ESOP is nothing but employees cost incurred by the assessee for which deduction is warranted. On the other hand, the Revenue has set up a case that no deduction can be allowed as such discount is not only a short capital receipt but also a contingent liability.*
> *A. Is discount under ESOP a short capital receipt?*
>
> ***9.2.1*** *The ld. DR stated that the question of deduction u/s 37 can arise only if the assessee incurs any expenditure, which thereafter satisfies the requisite conditions of the sub-section (1). He submitted that the word "expenditure" has been described by the Hon'ble Supreme Court in the case of Indian Molasses Co. (P.) Ltd. v. CIT [1959] 37 ITR 66 as denoting spending or paying out, i.e. something going out of the coffers of the assessee. It was put forth that by issuing shares at discounted premium, nothing is paid out by the company. Once there is no "paying out or away", the same cannot constitute an expenditure and resultantly section 37(1), which applies to only expenditure, cannot be activated. He further took pains in explaining that there is no revenue expenditure involved in the transaction of issuance of ESOP at discount. The so called 'discount' represents the difference between market price of the shares at the time of grant of options and the price at which such options are granted. Since the amount over and above the face value of the shares, being the share premium, is itself a capital receipt, any under-recovery of such share premium on account of obligation to issue shares to employees in future at a lower premium, would be a case of short capital receipt. If at all it is to be viewed in terms of expenditure, then, at best, it would be in the nature of a capital expenditure. He supported his view by relying on the order passed by the Delhi Bench of the Tribunal in Ranbaxy Laboratories Ltd. v. Addl. CIT [2010] 39 SOT 17 (URO). It was stated that the Tribunal in that case has held that since the receipt of share premium is not taxable, any short receipt of such premium on issuing options to employees will be notional loss and not actual loss for which any liability is incurred. The learned Departmental Representative contended that the Mumbai bench of the Tribunal in the case of VIP Industries v. Dy. CIT [IT Appeal No.7242 (Mum.) of 2008 has also taken similar view vide its order dated 17.09.2010.]*
>
> ***9.2.2*** *Per contra, the learned AR submitted that it is not a case of any short receipt of share premium but that of compensation given to employees. He supported the admissibility of deduction of the amount of discount on the strength of the order passed by the Chennai bench of the tribunal in the case of S.S.I. Ltd. (supra) granting deduction of such discount by treating it as an employee*

cost. He submitted that the above view taken by the Chennai Bench has been approved by the Hon'ble Madras High Court in CIT v. PVP Ventures Ltd. [2012] 211 Taxman 554/23 taxmann.com 286. The learned AR argued that PVP Ventures Ltd. (supra) is a solitary judgment rendered by any High Court on the issue and hence the same needs to be followed in preference to any contrary Tribunal order. It was also pointed out that the Chennai bench's view has been subsequently followed by the Chandigarh Bench of the Tribunal in Asstt. CIT v. Spray Engineering Devices Ltd. [2012] 23 taxmann.com 267/53 SOT 70 (URO).

***9.2.3** Let us examine the facts of the case of Ranbaxy Laboratories Ltd. (supra), which has been strongly relied by the learned Departmental Representative. It deals with a situation in which the assessee granted stock option to its employees. The shares were to be issued at Rs. 559 per share as against the face value of Rs. 10 and the market price on the date of grant at Rs. 738.95 per share. The assessee treated the difference between Rs. 738.95 and Rs. 595 as employees compensation in the books of account and charged the same to its Profit and loss account by spreading it over the vesting period. It was one of the years of the vesting period for which the assessee claimed deduction that came up for consideration before the Tribunal. It was held by the Tribunal that the market price of Rs. 738.55 per share would have resulted in realization of higher share premium. Since the assessee did not account for the difference between Rs. 738.55 and Rs. 10 as its income during the year, there was no loss of income. It was further noticed that by issuing shares at below the market price, there was no incurring of any expenditure. Rather it resulted into short receipt of share premium which the assessee was otherwise entitled to. As the receipt of share premium is not taxable, any short receipt of such premium will only be a notional loss and not actual loss requiring any deduction. The Tribunal further noticed that incurring of such notional loss cannot be considered as expenditure within the meaning of section 37(1) as there was no "spending" or "paying out or away". The contention of the assessee that SEBI Guidelines recommend claim for deduction of discount over the vesting period, did not find favour with the Tribunal on the ground that the SEBI Guidelines were not relevant in determining the total income chargeable to tax.*

***9.2.4** In order to appreciate the rival submissions, it is of the utmost importance to understand the concept of ESOP. Section 2(15A) of the Indian Companies Act, 1956 defines "employee stock option" to mean 'the option given to the whole-time Directors, Officers or employees of a company, which gives such Directors, Officers or employees, the benefit or right to purchase or subscribe at a future date, the securities offered by the company at a predetermined price". In an ESOP, the given company undertakes to issue shares to its employees at a future date at a price lower than the current market price. This is achieved by granting stock options to its employees at discount. The amount of discount represents the difference between market price of the shares at the time of the grant of option and the offer price. In order to be eligible for acquiring the shares under the ESOP, the concerned employees are obliged to render services to the company during the vesting period as given in the scheme. On the completion of the vesting period in the service of the company, such options vest with the employees. The* *options are then exercised by the employees by making application to the employer for the issue of shares against the options vested in them. The gap between the completion of vesting period and the time for exercising the options is usually negligible. The company, on the exercise of option by the employees, allots shares to them who can then freely sell such shares in the open market subject to the terms of the ESOP. Thus it can be seen that it is during the vesting period that the options granted to the employees vest with them. This period commences with the grant of option and terminates when the options so granted vest in the employees after serving the company for the agreed period. By granting the options, the company gets a sort of assurance from its employee for rendering uninterrupted services during the vesting period and as a quid pro quo it undertakes to compensate the employees with a certain amount given in the shape of discounted premium on the issue of shares.*

***9.2.5** The core of the arguments of the ld. DR in this regard is two-fold. First, that it is not an expenditure in itself and secondly, it is a short capital receipt or at the most a sort of capital expenditure. In our considered opinion both the legs of this contention are legally unsustainable.*

***9.2.6** There is no doubt that the amount of share premium is otherwise a capital receipt and hence not chargeable to tax in the hands of company. The Finance Act, 2012 has inserted clause (viib) of section 56(2) w.e.f. 1.4.2013 providing that: 'where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares', then such excess share premium shall be charged to tax under the head 'Income from other sources'. But for that, the amount of share premium has always been understood and accepted as a capital receipt. If a company issues shares to the public or the existing shareholders at less than the otherwise prevailing premium due to market sentiment or otherwise, such short receipt of premium would be a case of a receipt of a lower amount on capital account. It is so because the object of issuing such shares at a lower price is nowhere directly connected with the earning of income. It is in such like situation that the contention of the learned Departmental Representative would properly fit in, thereby debarring the company from claiming any deduction towards discounted premium. It is quite basic that the object of issuing shares can never be lost sight of. Having seen the rationale and modus operandi of the ESOP, it becomes out-and-out clear that when a company undertakes to issue shares to its employees at a discounted premium on a future date, the primary object of this exercise is not to raise share capital but to earn profit by securing the consistent and concentrated efforts of its dedicated employees during the vesting period. Such discount is construed, both by the employees and company, as nothing but a part of package of remuneration. In other words, such discounted premium on shares is a substitute to giving direct incentive in cash for availing the services of the employees. There is no difference in two situations viz., one, when the company issues shares to public at market price and a part of the premium is given to the employees in lieu of their services and two, when the shares are directly issued to employees at a reduced rate. In both the situations, the* *employees stand compensated for their effort. If under the first situation, the company, say, on receipt of premium amounting to Rs. 100 from issue of shares to public, gives Rs. 60 as incentive to its employees, such incentive of Rs. 60 would be remuneration to employees and hence deductible. In the same way, if the company, instead, issues shares to its employees at a premium of Rs. 40, the discounted premium of Rs. 60, being the difference between Rs. 100 and Rs. 40, is again nothing but a different mode of awarding remuneration to employees for their continued services. In both the cases, the object is to compensate employees to the tune of Rs. 60. It follows that the discount on premium under ESOP is simply one of the modes of compensating the employees for their services and is a part of their remuneration. Thus, the contention of the ld. DR that by issuing shares to employees at a discounted premium, the company got a lower capital receipt, is bereft of an force. The sole object of issuing shares to employees at a discounted premium is to compensate them for the continuity of their services to the company. By no stretch of imagination, we can describe such discount as either a short capital receipt or a capital expenditure. It is nothing but the employees cost incurred by the company. The substance of this transaction is disbursing compensation to the employees for their services, for which the form of issuing shares at a discounted premium is adopted.*

9.2.7 *Now we espouse the second part of the submission of the ld. DR in this regard. He canvassed a view that an expenditure denotes "paying out or away" and unless the money goes out from the assessee, there can be no expenditure so as to qualify for deduction u/s 37. Sub-section (1) of the section provides that any expenditure (not being expenditure in the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession". To put it differently, an expenditure must be laid out or expended wholly and exclusively for the purpose of business so as to be eligible for deduction u/s 37(1). There is absolutely no doubt that section 37(1) talks of granting deduction for an 'expenditure', and the Hon'ble Supreme Court in Indian Molasses Co. (P.) Ltd. (supra) has described 'expenditure' to mean what is 'paid out or away' and is something which has gone irretrievably. However, it is pertinent to note that this section does not restrict paying out of expenditure in cash alone. Section 43 contains the definition of certain terms relevant to income from profits of business or profession covering sections 28 to 41. Section 37 obviously falls under Chapter IV-D. Sub-section (2) of section 43 defines "paid" to mean: "actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under the head 'profits and gains of business or profession'." When we read the definition of the word "paid" u/s 43(2) in juxtaposition to section 37(1), the position which emerges is that it is not only paying of expenditure but also incurring of the expenditure which entails deduction u/s 37(1) subject to the fulfilment of other conditions. At this juncture, it is imperative to note that the word 'expenditure' has not been defined in the Act. However, sec. 2(h) of the Expenditure Act, 1957 defines 'expenditure' as : 'Any sum of money or money's worth spent or disbursed or for the spending or disbursing of which a liability has been incurred by an assessee……'. When* *section 43(2) of the Act is read in conjunction with section 37(1), the meaning of the term 'expenditure' turns out to be the same as is there in the aforequoted part of the definition under section 2(h) of the Expenditure Act, 1957, viz., not only 'paying out' but also 'incurring'. Coming back to our context, it is seen that by undertaking to issue shares at discounted premium, the company does not pay anything to its employees but incurs obligation of issuing shares at a discounted price on a future date in lieu of their services, which is nothing but an expenditure u/s 37(1) of the Act.*

***9.2.8** Though discount on premium is nothing but an expenditure u/s 37(1), it is worth noting that the Hon'ble Supreme Court in the case of CIT v. Woodward Governor India (P.) Ltd. [2009] 312 ITR 254/179 Taxman 326 has gone to the extent of covering "loss" in certain circumstances within the purview of "expenditure" as used in section in 37(1). In that case, the assessee incurred additional liability due to exchange rate fluctuation on a revenue account. The Assessing Officer did not allow deduction u/s 37. When the matter finally reached the Hon'ble Supreme Court, their Lordships noticed that the word "expenditure" has not been defined in the Act. They held that : "the word "expenditure" is, therefore, required to be understood in the context in which it is used. Section 37 enjoins that any expenditure not being expenditure of the nature described in sections 30 to 36 laid out or expended wholly and exclusively for the purposes of the business should be allowed in computing the income chargeable under the head "profits and gains of business or profession". In sections 30 to 36 the expression "expenditure incurred", as well as allowance and depreciation, has also been used. For example depreciation and allowances are dealt with in section 32, therefore, the parliament has used expression "any expenditure" in section 37 to cover both. Therefore, the expression "expenditure" as used in section 37 made in the circumstances of a particular case, covers an amount which is really a "loss" even though the said amount has not gone out from the pocket of the assessee'. From the above enunciation of law by the Hon'ble Summit Court, there remains no doubt whatsoever that the term 'expenditure' in certain circumstances can also encompass 'loss' even though no amount is actually paid out. Ex consequenti, the alternative argument of the ld. DR that discount on shares is 'loss' and hence can't be covered u/s 37(1), also does not hold water in the light of the above judgment. In view of the above discussion, we, with utmost respect, are unable to concur with the view taken in Ranbaxy Laboratories Ltd. (supra).*
B. Is discount a Contingent liability ?

***9.3.1** The learned Departmental Representative supported the impugned order by contending that the entitlement to ESOP depends upon the fulfilment of several conditions laid down under the scheme. It is only when all such conditions are fulfilled and the employees render services during the vesting period that the question of any ascertained liability can arise. He submitted that during the entire vesting period, it is only a contingent liability and no deduction is admissible under the provisions of the Act for a contingent liability. The options so granted may lapse during the vesting period itself by reason of termination of employment or some of the employees may not choose to exercise the option even after rendering the services during the vesting period. It was, therefore, argued that the* *discount is nothing but a contingent liability during the vesting period not calling for any deduction. In the opposition, the learned AR submitted that the amount of discount claimed by the assessee as deduction is not a contingent liability but an ascertained liability. He stated that in the ESOP 2000, there is a vesting period of four years, which means that the options to the extent of 25% of the total grant would vest with the eligible employees at the end of first year after rendering unhindered service for one year and it would go on till the completion of four years.*

9.3.2 *It is a trite law and there can be no quarrel over the settled legal position that deduction is permissible in respect of an ascertained liability and not a contingent liability. Section 31 of the Indian Contract Act, 1872 defines "contingent contract" as "a contract to do or not do something, if some event, collateral to such contract does not happen". We need to determine as to whether the liability arising on the assessee-company for issuing shares at a discounted premium can be characterized as a contingent liability in the light of the definition of contingent contract. From the stand point of the company, the options under ESOP 2000 vest with the employees at the rate of 25% only on putting in service for one year by the employees. Unless such service is rendered, the employees do not qualify for such options. In other words, rendering of service for one year is sine qua non for becoming eligible to avail the benefit under the scheme. Once the service is rendered for one year, it becomes obligatory on the part of the company to honor its commitment of allowing the vesting of 25% of the option. It is at the end of the first year that the company incurs liability of fulfilling its promise of allowing proportionate discount, which liability would be actually discharged at the end of the fourth year when the options are exercised by the employees. Now the question arises as to whether the liability at the end of each year can be construed as a contingent one?*

9.3.3 *The Hon'ble Supreme Court in Bharat Earth Movers v. CIT [2000] 245 ITR 428/112 Taxman 61 dealt with the deductibility or otherwise of provision for liability towards encashment of earned leave. In that case, the company floated beneficial scheme for its employees for encashment of leave. The earned leave could be accumulated up to certain days. The assessee created provision of Rs. 62.25 lakh for encashment of accrued leave and claimed deduction for the same. The Assessing Officer held it to be a contingent liability and hence not a permissible deduction. When the matter finally came up before the Hon'ble Supreme Court, it was held that the provision for meeting the liability for encashment of earned leave by the employee was an admissible deduction. In holding so, the Hon'ble Apex Court observed that : "the law is settled : if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain." From the above enunciation of law by the Hon'ble Supreme Court, it is manifest that a definite business* *liability arising in an accounting year qualifies for deduction even though the liability may have to be quantified and discharged at a future date. We consider it our earnest duty to mention that the legislature has inserted clause (f) to section 43B by providing that "any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee" shall be allowed as deduction in computing the income of the previous year in which such sum is actually paid. With this legislative amendment, the application of the ratio decidendi in the case of Bharat Earth Movers (supra) to the provision for leave encashment has been nullified. However, the principle laid down in the said judgment is absolutely intact that a liability definitely incurred by an assessee is deductible notwithstanding the fact that its quantification may take place in a later year. The mere fact that the quantification is not precisely possible at the time of incurring the liability would not make an ascertained liability a contingent.*

9.3.4 *Almost to the similar effect, there is another judgment of the Hon'ble Supreme Court in the case of Rotork Controls India (P.) Ltd. v. CIT [2009] 314 ITR 62/180 Taxman 422. In that case, the assessee-company was engaged in selling certain products. At the time of sale, the company provided a standard warranty that in the event of certain part becoming defective within 12 months from the date of commissioning or 18 months from the date of dispatch, whichever is earlier, the company would rectify or replace the defective parts free of charge. This warranty was given under certain conditions stipulated in the warranty clause. The assessee made a provision for warranty at Rs. 5.18 lakh towards the warranty claim likely to arise on the sales effected by the assessee. The Assessing Officer disallowed the same on the ground that the liability was merely a contingent liability and hence not allowable as deduction u/s 37 of the Act. When the matter finally came up before the Hon'ble Supreme court, it entitled the assessee to deduction on the "accrual" concept by holding that a provision is recognized when : "(a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation : and (c) a reliable estimate can be made of the amount of the obligation". Resultantly, the provision was held to be deductible.*

9.3.5 *When we consider the facts of the present case in the backdrop of the ratio laid down by the Hon'ble Supreme Court in Bharat Earth Movers (supra) and Rotork Controls India (P.) Ltd. (supra), it becomes vivid that the mandate of these cases is applicable with full force to the deductibility of the discount on incurring of liability on the rendition of service by the employees. The factum of the employees becoming entitled to exercise options at the end of the vesting period and it is only then that the actual amount of discount would be determined, is akin to the quantification of the precise liability taking place at a future date, thereby not disturbing the otherwise liability which stood incurred at the end of the each year on availing the services.*

9.3.6 *As regards the contention of the ld. DR about the contingent liability arising on account of the options lapsing during the vesting period or the employees not choosing to exercise the option, we find that normally it is provided in the schemes of ESOP that the vested options that lapse due to non-exercise and/or unvested options that get cancelled due to resignation of the employees or* *otherwise, would be available for grant at a future date or would be available for being re-granted at a future date. If we consider it at micro level qua each individual employee, it may sound contingent, but if view it at macro level qua the group of employees as a whole, it loses the tag of 'contingent' because such lapsing options are up for grabs to the other eligible employees. In any case, if some of the options remain unvested or are not exercised, the discount hitherto claimed as deduction is required to be reversed and offered for taxation in such later year. We, therefore, hold that the discount in relation to options vesting during the year cannot be held as a contingent liability.*

C. Fringe benefit

***9.4.1** There is another important dimension of this issue. Chapter XII-H of the Act consisting of sections 115W to 115WL with the caption : "Income-Tax on Fringe Benefits" has been inserted by the Finance Act, 2005 w.e.f. 1.4.2006. Memorandum explaining the provisions of the Finance Bill, 2005 highlights the details of the Fringe Benefits Tax. It provides that : 'Fringe benefits as outlined in section 115WB, mean any privilege, service, facility or amenity directly or indirectly provided by an employer to his employees (including former employees) by reason of their employment.' Charging section 115WA of this Chapter provides that : "In addition to the income-tax charged under this Act, there shall be charged for every assessment year………..fringe benefit tax in respect of fringe benefits provided or deemed to have been provided by an employee to his employees during the previous year…………". Section 115WB gives meaning to the expression 'Fringe Benefits'. Sub-section (1) provides that for the purposes of this Chapter, 'fringe benefits' means any consideration for employment as provided under clauses (a) to (d). Clause (d), which is relevant for our purpose, states that : 'any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer free of cost or at concessional rate to his employees (including former employee or employees)' shall be taken as fringe benefit. Explanation to this clause clarifies that for the purposes of this clause,- (i) "specified security" means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and, where employees' stock option has been granted under any plan or scheme thereof, includes the securities offered under such plan or scheme. Thus it is discernible from the above provisions of the Act that the legislature itself contemplates the discount on premium under ESOP as a benefit provided by the employer to its employees during the course of service. If the legislature considers such discounted premium to the employees as a fringe benefit or 'any consideration for employment', it is not open to argue contrary. Once it is held as a consideration for employment, the natural corollary which follows is that such discount (i) is an expenditure; (ii) such expenditure is on account of an ascertained (not contingent) liability ; and (iii) it cannot be treated as a short capital receipt. In view of the foregoing discussion, we are of the considered opinion that discount on shares under the ESOP is an allowable deduction.*

II. IF YES, THEN WHEN AND HOW MUCH?

10.1 *Having seen that the discount under ESOP is a deductible expenditure u/s 37(1), the next question is that 'when' and for 'how much' amount should the deduction be granted ?*

10.2 *The assessee is a limited company and hence it is obliged to maintain its accounts on mercantile basis. Under such system of accounting, an item of income becomes taxable when a right to receive it is finally acquired notwithstanding the fact that when such income is actually received. Even if such income is actually received in a later year, its taxability would not be evaded for the year in which right to receive was finally acquired. In the same manner, an expense becomes deductible when liability to pay arises irrespective of its actual discharge. The incurring of liability and the resultant deduction cannot be marred by mere reason of some difficulty in proper quantification of such liability at that stage. The very point of incurring the liability enables the assessee to claim deduction under mercantile system of accounting. We have noticed the mandate of the Hon'ble Supreme Court in Bharat Earth Movers (supra) that if a business liability has definitely arisen in an accounting year, then the deduction should be allowed in that year itself notwithstanding the fact that such liability is incapable of proper quantification at that stage and is dischargeable at a future date. It follows that the deduction for an expense is allowable on incurring of liability and the same cannot be disturbed simply because of some difficulty in the proper quantification. A line of distinction needs to be drawn between a situation in which a liability is not incurred and a situation in which the liability is incurred but its quantification is not possible at the material time. Whereas in the first case, there cannot be any question of allowing deduction, in the second case, deduction has to be allowed for a sum determined on some rational basis representing the amount of liability incurred.*

10.3 *We have earlier underlined the concepts of grant of options, vesting of options and exercise of options. The period from grant of option to the vesting of option is the 'vesting period'. It is during such period that an employee is supposed to render service to the company so as to earn an entitlement to the shares at a discounted premium. The vesting period may vary from a case to case. If the vesting period is, say, four years with equal vesting at the end of each year, then it is at the end of the vesting period or during the exercise period, which in turn immediately succeeds the vesting period, that the employee becomes entitled to exercise 100 options or qualify for receipt of 100 shares at discount. Though the shares are allotted at the end of the vesting period, but it is during such vesting period that the entitlement is earned. It means that 25 options vest with the employee at the end of each year on his rendering service for the respective year. If during the interregnum, he leaves the service, say after one year, he will still remain entitled to exercise option for 25 shares at the discounted premium at the time of exercise of option. In that case, the benefit which would have accrued to him at the end of the second, third and fourth years would stand forfeited. Thus it becomes abundantly clear that an employee becomes entitled to the shares at a discounted premium over the vesting period depending upon the length of service provided by him to the company. In all such schemes, it is at the end of the vesting* *period that option is exercisable albeit the proportionate right to option is acquired by rendering service at the end of each year.*

***10.4** Similar is the position from the stand point of the company. An obligation falls upon the company to allot shares at the time of exercise of option depending upon the length of service rendered by the employee during the vesting period. The incurring of liability towards the discounted premium, being compensation to employee, is directly linked with the span of service put in by the employee. In the above illustration, when 25 out of 100 shares vest in the employee after rendering one year's service, the company also incurs equal obligation at the end of the first year for which it becomes entitled to rightfully claim deduction u/s 37(1) of the Act. Similarly at the end of the second year of service by the employees, the company can claim deduction for discounted premium in respect of further 25 shares so on and so forth till fourth year when the last tranche of discounted premium in respect of 25 shares becomes available for deduction. It, therefore, transpires that a company under the mercantile system can lawfully claim deduction for total discounted premium representing the employees cost over the vesting period at the rate at which there is vesting of options in the employees.*

***10.5** From the above discussion it is lucid that at the event of granting options, the company does not incur any obligation to issue the shares at discounted premium. Mere granting of option does neither entitle the employee to exercise such option nor allow the company to claim deduction for the discounted premium. It is during the vesting period that the company incurs obligation to issue discounted shares at the time of exercise of option. Thus the event of granting options does not cast any liability on the company. On the other end is the date of exercising the options. Though the employees become entitled to exercise the option at such stage but the fact is that it is simply a result of vesting of options with them over the vesting period on the rendition of services to the company. In other words, it is a stage of realization of income earned during the vesting period. In the same manner, though the company becomes liable to issue shares at the time of the exercise of option, but it is in lieu of the employees compensation liability which it incurred over the vesting period by obtaining their services. From the above it is apparent that the company incurs liability to issue shares at the discounted premium only during the vesting period. The liability is neither incurred at the stage of the grant of options nor when such options are exercised.*

***10.6** Let us consider the facts of the case of S.S.I. Ltd. (supra), which has been strongly relied by the ld. AR in support of his claim for deduction of discount during the years of vesting of options. In that case the vesting period was three years and the assessment order was passed u/s 143(3), inter alia, allowing deduction of Rs. 66.82 lakh under the head "Staff welfare expenses" on account of amortization of discounted value of option over a period of three years. The CIT revised such order by directing the A.O. to disallow ESOP expenditure of Rs. 66.82 lakh. When the matter came up before the Tribunal, it was held that the expenditure in that behalf was an ascertained liability and not contingent upon happening of certain events. It was further noticed that the assessee claimed deduction of such discount on ESOP by following the SEBI Guidelines. As the* *expenditure itself was an ascertained liability, the Tribunal held that the same to be deductible.*

10.7 *Before proceeding further it would be befitting to take stock of the nutshell of the SEBI Guidelines in this regard. These Guidelines provide for granting of deduction on account of discount on issue of options during the vesting period. It has been so explained with the help of an example in Schedule I to the Guidelines. For the sake of simplicity, we are taking an instance under which an option of share with face value of Rs. 10 is given under ESOP to employees at the option price of Rs. 10 as against the market price of such shares at Rs. 110 on that date. Further suppose that the vesting period is four years with equal vesting @ 25% at the end of each year. Total discount comes to Rs. 100 (Rs. 110 - Rs. 10). These Guidelines provide for claiming deduction in the accounts for a total discount of Rs. 100 divided over the vesting period of four years on straight line basis at the rate of Rs. 25 each. The case of S.S.I. Ltd. (supra) deals with a controversy relating to one of the vesting years. The tribunal entitled the assessee to proportionate deduction. Thus it is evident that the view taken by the tribunal in that case not only matches with the SEBI Guidelines but also the 'accrual concept' in the mercantile system of accounting, thereby allowing deduction at the stage of incurring of liability.*

10.8 *Reverting to the questions of 'when' and 'how much' of deduction for discount on options is to be granted, we hold that the liability to pay the discounted premium is incurred during the vesting period and the amount of such deduction is to be found out as per the terms of the ESOP scheme by considering the period and percentage of vesting during such period. We, therefore, agree with the conclusion drawn by the tribunal in S.S.I. Ltd.'s case (supra) allowing deduction of the discounted premium during the years of vesting on a straight line basis, which coincides with our above reasoning.*

III. SUBSEQUENT ADJUSTMENT TO DISCOUNT

11.1.1 *Having answered the first major issue in affirmative that the discount on options under ESOP is an ascertained liability and the second major issue that the discount is deductible over the vesting period on straight line basis unless the vesting is not uniform, then arises the present issue as to whether any subsequent adjustment is warranted at the time of exercise of options, to the deductions earlier allowed for the amount of discount. It is noticed that the assessment years 2003-2004 to 2007-2008 are under consideration and during these years ESOP 2000 has come to an end and the ESOP 2004 has started. Further, the extant issue is a vital part of the overall question of the deductibility or otherwise of the amount of discount under ESOP.*

11.1.2 *We have noticed above that the company incurs a definite liability during the vesting period, but its proper quantification is not possible at that stage as the actual amount of employees cost to the company, can be finally determined at the time of the exercise of option or when the options remain unvested or lapse at the end of the exercise period. It is at this later stage that the provisional amount of* *discount on ESOP, initially quantified on the basis of market price at the time of grant of options, needs to be suitably adjusted with the actual amount of discount.*

11.1.3 *As regards the adjustment of discount when the options remain unvested or lapse at the end of the exercise period, it is but natural that there is no employee cost to that extent and hence there can be no deduction of discount qua such part of unvested or lapsing options. But, as the amount was claimed as deduction by the company during the period starting with the date of grant till the happening of this event, such discount needs to be reversed and taken as income. It is so because logically when the options have not eventually vested in the employees, to that extent, the company has incurred no employee cost. And if there is no cost to the company, the tentative amount of deduction earlier claimed on the basis of the market price at the time of grant of option ceases to be admissible and hence needs to be reversed. The ld. AR stated that the discount in respect of the unvested/lapsing options has been reversed on the happening of such events and the overall employee cost has been correspondingly reduced. We find that the SEBI Guidelines also provide that the discount written off in respect of unvested options and the options lapsing at the end of the exercise period shall be reversed at the appropriate time. As the accounting treatment directed through the Guidelines accords with the taxation principle of not allowing deduction for the amount of discount on unvested/lapsing options and further the assessee has admitted to have offered such amount as income in the relevant years, we stop here by holding that the amount of discount claimed as deduction earlier in respect of unvested/lapsing options, has to be taxed as income on the happening of such events.*

11.1.4 *Now we take up the second situation in which the options are exercised by the employees after putting in service during the vesting period. In such a scenario, the actual amount of remuneration to the employees would be only the amount of actual discounted premium at the time of exercise of option. The Hon'ble Supreme Court in the case of CIT v. Infosys Technologies Ltd. [2008] 297 ITR 167/166 Taxman 204 relevant to the assessment years 1997-98 to 1999-2000 has held that the allotment of shares to employees under ESOP subject to a lock in period of five years and other conditions could not be treated as a perquisite as there was no benefit and the value of benefit, if any, was unascertainable at the time when options were exercised. The Finance Act, 1999 inserted section 17(2)(iiia) with effect from 1st April, 2000 providing that : "the value of any specified security allotted or transferred, directly or indirectly, by any person free of cost or at a concessional rate to an individual who is or has been in employment of that person" shall be treated as a perquisite. It further provides that in a case the allotment or transfer of specified securities is made in pursuance of an option exercised by an individual, the value of the specified securities shall be taxable in the previous year in which such option is exercised by such individual. Such clause (iiia) was subsequently deleted with effect from 1st April, 2001. After certain changes to the relevant provisions in this regard, the position which now stands is that the discount on ESOP is taxable as perquisite u/s 17(2)(vi) for : 'the value of any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer, or former employer, free of cost or at concessional rate to the assessee'. Clause (c) of*

Explanation to section 17(2)(vi) provides that : 'the value of any specified security or sweat equity shares shall be the fair market value of the specified security or sweat equity shares, as the case may be, on the date on which the option is exercised by the assessee as reduced by the amount actually paid by, or recovered from, the assessee in respect of such security or shares'. Two things surface from the above provisions. First, that the perquisite arises on the 'allotment' of shares and second, the value of such perquisite is to be computed by considering the fair market value of the shares on 'the date on which the option is exercised' by the assessee as reduced by the amount actually paid. The position that such amount was or was not taxable during some of the years in the hands of the employees is not relevant in considering the occasion and the amount of benefit accruing to the employee under ESOP. Any exemption or the deductibility of an allowance or benefit to employee from taxation does not obliterate the benefit itself. It simply means that the benefit accrued to the assessee but the same did not attract tax. The position has now been clarified beyond doubt by the legislature that the ESOP discount, which is nothing but the reward for services, is a taxable perquisite to the employee at the time of exercise of option, and its valuation is to be done by considering the fair market value of the shares on the date on which the option is exercised.

***11.1.5** The other side of the coin is the amount of remuneration to the employees in the hands of the company. We have noticed earlier that an expense becomes deductible on the incurring of liability under the mercantile system of accounting. Although the stage of taxability of perquisite in the hands of the employee may differ from the stage of the deductibility of expense in the hands of the company depending upon the method of account followed by the company, but the amount of such discount or employees remuneration can never be different. If the value of perquisite in the hands of the employee, whether or not taxable, is 'x', then its cost in the hands of the company has also to be 'x'. It can neither be 'x+1' nor 'x-1'. It is simple and plain that the amount of remuneration which percolates to the employees will always be equal to the amount flowing from the company and such remuneration to the employee in the present context is the amount which he actually becomes entitled to on the exercise of options. Thus, it is palpable that since the remuneration to the employees under the ESOP is the amount of discount w.r.t. the market price of shares at the time of exercise of option, the employees cost in the hands of the company should also be w.r.t. the same base.*

***11.1.6** The amount of discount at the stage of granting of options w.r.t. the market price of shares at the time of grant of options is always a tentative employees cost because of the impossibility in correctly visualizing the likely market price of shares at the time of exercise of option by the employees, which, in turn, would reflect the correct employees cost. Since the definite liability is incurred during the vesting period, it has to be quantified on some logical basis. It is this market price at the time of the grant of options which is considered for working out the amount of discount during the vesting period. But, since actual amount of employees cost can be precisely determined only at the time of the exercise of option by the employees, the provisional amount of discount availed as deduction during the vesting period needs to be adjusted in the light of the actual discount on the basis of the market price of the shares at the time of exercise of options. It* *can be done by making suitable northwards or southwards adjustment at the time of exercise of option. This can be explained with the following example with the assumption of vesting period of four years and the benefit vesting at 25% each at the end of 1st to 4th years:—*

	At the time of granting option	*At the time of exercise of option*		
		Situation I	*Situation II*	*Situation III*
Market value per share	*110*	*110*	*130*	*90*
Option price	*10*	*10*	*10*	*10*
Employees compensation or Discount	*100*	*100*	*120*	*80*

11.1.7 *From the above table it can be noticed that the market price of the shares at the time of grant of option was Rs. 110 against the option price of Rs. 10, which resulted in discount at Rs. 100. With the vesting period of four years with the equal vesting, the company can rightly claim deduction at the rate of Rs. 25 each at the end of first, second, third and fourth year of vesting. But this total deduction for discount of Rs. 100 over the vesting period needs to be adjusted at the time of exercise of option by the employee when the shares are issued. In Situation I, the market price of shares at the time of exercise of option is at Rs. 110, which is similar to the market price at the time of grant of option. As the total amount of discount of Rs. 100 over the vesting period is actually quantified at Rs. 100, no further adjustment to the discount is required at the time of exercise of option. In Situation II, the market price of the share at the time of exercise of option has gone up to Rs. 130. The amount of real compensation to employee is Rs. 120 as against the tentative compensation of Rs. 100 per share which was accounted for and allowed as deduction during the vesting period. As the actual quantification of the compensation has turned out to be Rs. 120, the company is entitled to a further deduction of Rs. 20 at the time of exercise of option. In Situation III, the market price of the share at the time of exercise of option has come down to Rs. 90. The amount of real compensation to employees is Rs. 80 as against the tentative compensation of Rs. 100, which was allowed as deduction during the vesting period. As the actual quantification of the compensation has turned out to be Rs. 80, the company is liable to reverse the deduction of Rs. 20 at the time of exercise of option.*
Taxation vis-à-vis Accountancy principles

11.2.1 *It has been noticed that broadly there are three stages having effect on the total income of the company in the life cycle of ESOP, viz., (i) during the vesting period, (ii) at the time of unvesting/lapse of options and (iii) finally at the time of exercise of options. It has been argued that the assessee company claimed* *deduction for the amount of discount during the vesting period on the basis of the market price of shares at the time of grant of options and also reversed the proportionate discount on unvesting/lapsing of options at the appropriate time on the basis of the SEBI Guidelines. If this contention is correct, it would mean that the first two stages have been rightly given effect to. But the appellant assessee does not appear to have made any downward adjustment to the amount of discount at the time of exercise of option by the employees with the difference in the market price of the shares at the time of grant of option and price at the time of exercise of option. The argument seems to be that the SEBI Guidelines do not provide for such downward adjustment. It has been argued by the ld. AR that where the provisions of the Act specifically provide for treatment of a particular source of income in a particular manner, then the germane provision should be followed. If, however, there is no specific provision dealing with an issue in the Act, then the accounting principles should be adhered to while determining the total income of the assessee. In this regard, he relied on the judgment in the case of Challapalli Sugars Ltd.'s (supra), wherein the Hon'ble Supreme Court has held that the interest payable on capital borrowed by the assessee for purchase of plant and machinery before the commencement of business should be capitalized on the basis of accepted accountancy rule. Similarly in the case of U.P. State Industrial Development Corpn. (supra), the Hon'ble Apex Court held in the case of an underwriter that it would be right to consider the net investment, that is the purchase price less the underwriting commission received by the underwriter as investment as against treating the gross amount by taking into consideration the principles of commercial accounting. He stated that since there is no specific provision in the Act providing for the treatment of discount on ESOP in the computation of total income, the accounting principles formulated by way of the SEBI Guidelines are required to be followed.*

***11.2.2** In the oppugnation, the learned Departmental Representative submitted that the SEBI Guidelines cannot mandate the deductibility or otherwise of an amount under the provisions of the Act. He relied on the judgments of the Hon'ble Supreme Court in Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra) and Godhra Electricity Co. Ltd. (supra) in support of this proposition.*

***11.2.3** We are not persuaded by the submissions put forth by the ld. AR that, in the absence of any specific provision in the Act, the accounting principles should be followed for determining the total income of the assessee. What is true for accounting purpose need not necessarily be true for taxation. Taxation principles are enshrined in the legislature. Power to legislate lies with the Parliament. Accounting standards or Guidance Note or Guidelines etc., by whatever name called, issued by any autonomous or even statutory bodies including the Institute of Chartered Accountants of India, or for that matter, the SEBI are meant only to prescribe the way in which the transactions should be recorded in books or reflected in the annual accounts. These guidelines do not have the force of an Act of Parliament. Since the subject matter of tax on income falls in the Union List as per Part XI of the Indian Constitution, it is only the Parliament which can legislate on its scope.*

11.2.4 *Be that as it may, there is no weight in the contention of the ld. AR that there is no specific provision in the Act on the ESOP discount. It is axiomatic that the taxation rules are always embodied in the relevant Act, either in a specific or a general manner. These can be specific by making a clear cut provision in respect of deductibility of a particular item of expense or taxation of a particular item of income. General provisions are those which set out the overall principles to govern the deductibility or taxability of unspecified items. For example, the definition of 'income' u/s 2(24) has been given by the Act in an inclusive manner. There have been enshrined clauses (i) to (xvi) dealing with the items specifically listed. However, the provision has been couched in such a way so as to include general items of receipts having character of income, even though not specifically mentioned. Similar is the position regarding deductions. Under the head 'Profits and gains of business or profession', there are sections granting deductions in respect of specific expenses or allowances. Similarly, there is section 37(1), which grants deduction for expenses not specifically set out in other sections, if the conditions stipulated in the section, are fulfilled. All other items of expenses, which fulfil the requisite conditions, gain deductibility under section 37(1). To put it in simple words, this section is a specific provision for granting deduction in respect of the unspecified or the general categories of expenses. Discount on ESOP is a general expense and hence covered by the specific provision of section 37. The contention of the ld. AR that there is no provision in the Act dealing with the deductibility of ESOP discount, is therefore, devoid of any merit. This concludes the question of granting of deduction of discount during the vesting period.*

11.2.5 *The SEBI Guidelines have been taken shelter of to contend that there is no requirement for the adjustment of discount at the time of exercise of options. Primarily, we are unable to trace the proposition anywhere from the Act that the accounting principles are also determinative of the tax liability. The jurisprudence is rather the other way around. In Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra), the Hon'ble Supreme Court has laid down in so many words that the taxing principles cannot walk on the footsteps of the accounting principles. At this juncture, it would be useful to have a glimpse at the following observations of the Hon'ble Supreme Court in the afore noted case: 'It is true that this court has very often referred to accounting practice for ascertainment of profit made by a company or value of the assets of a company. But when the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law and not in accordance with accountancy practice. Accounting practice cannot override section 56 or any other provision of the Act. As was pointed out by Lord Russell in the case of B.S. C. Footwear Ltd. v. Ridguary (Inspector of Taxes [1970] 77 ITR 857 (CA), the income-tax law does not march step by step in the footprints of the accountancy profession.'*

11.2.6 *The same view has been adopted by the Hon'ble Supreme Court in Godhra Electricity Co. Ltd. (supra), by holding that : 'Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the* *substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a hypothetical income, which does not materialise.'*

11.2.7 *It follows that accounting principles have absolutely no role to play in the matter of determination of total income under the Act. If an accounting principle is referred to by the higher judiciary, then there is an underlying presumption that such accounting principle is in conformity with and not in conflict with the taxation principle. The essence of the matter is that taxation principles are to be followed. If an accounting principle is in conformity with the mandate of taxing principle and reference is made to such accounting principle while deciding the issue, it does not mean that the accounting principle has been followed. It simply means that the taxation principle has been followed and the accounting principle, which is in line with such taxation principle, has been simply taken note of. If however, an accounting principle runs counter to the taxation principle, then there is no prize for guessing that it is only the taxation principle which shall prevail.*

11.2.8 *The plea now raised before us by the ld. AR, relying on the case of Challapalli Sugars Ltd. (supra), was also taken up before the Hon'ble Supreme Court in the case of Tuticorin Alkalis Chemicals & Fertilizers Ltd (supra). Dealing with the same, the Hon'ble Supreme Court held that : "The question in Challapalli Sugars Ltd.'s case (supra) was about computation of depreciation and development rebate under the Indian Income-tax Act, 1922. In order to calculate depreciation and development rebate it was necessary to find out "the actual cost" of the plant and machinery purchased by the company. This court held that "cost" is a word of wider connotation than "price". There was a difference between the price of a machinery and its cost. This court thereafter pointed out that the expression "actual cost" had not been defined in the Act. It was, therefore, necessary to find out the commercial sense of the phrase. ………….The judgment in Challapalli Sugar Ltd's case (supra), goes to show that the court was not in any way departing from legal principles because of any opinion expressed by the Institute of Chartered Accountants." From the above observations there is not even an iota of doubt in our minds that there can be no question of following the accounting principle or Guidance notes etc. in the matter of determination of total income.*

11.2.9 *The trump card of the ld. AR to bolster his submission for assigning the status of binding force to the SEBI Guidelines is the order in the case of S.S.I. Ltd. (supra) which came to be affirmed by the Hon'ble Madras High Court in PVP Ventures Ltd. (supra). We have noticed above that the said case dealt a situation falling within one of the three years of the vesting period, in which it was held that one third of the total amount of discount computed on the basis of the market price of the shares at the time of grant of option, is deductible. It is evident from the SEBI Guidelines that these deal with the deductibility of discount in the hands of company during the years of vesting period. These Guidelines are silent on the position emanating from variation in the market price of the shares at the time of exercise of option by the employees vis-à-vis the market price at the time of grant of option. In other words, the SEBI Guidelines prescribe accounting* *treatment only in respect of the period of vesting of the options and the situation arising out of unvested options or vested options lapsing. The very reference by the Chennai Bench of the Tribunal in SSI Limited (supra) to the SEBI Guidelines is indicative of the fact that it dealt with a year during which the options were vesting with the employees and the company claimed discount during the vesting period. The Hon'ble Madras High Court in the case of PVP Ventures Ltd. (supra) has upheld the view taken by the Chennai Bench in the case of S.S.I. Ltd. (supra). The granting of the binding force to the SEBI Guidelines by the Hon'ble Madras High Court should be viewed in the context of the issue before it, which was about the deductibility of discount during one of the vesting years. In the earlier part of this order, we have held that the deductibility of discount during the vesting period, as prescribed under the SEBI Guidelines, matches with the treatment under the mercantile system of accounting. To that extent, we also hold that the SEBI guidelines are applicable in the matter of deduction of discount. Neither there was any issue before the Hon'ble Madras High Court nor it dealt with a situation in which the market price of the shares at the time of exercise of option is more or less than the market price at the time of grant of option. It is a situation which has also not been dealt with by the Guidelines. Accordingly, the aforenoted taxation principle of granting deduction for the additional discount and reversing deduction for the short amount of discount at the time of exercise of option, needs to be scrupulously followed.*

11.3 *We, therefore, sum up the position that the discount under ESOP is in the nature of employees cost and is hence deductible during the vesting period w.r.t. the market price of shares at the time of grant of options to the employees. The amount of discount claimed as deduction during the vesting period is required to be reversed in relation to the unvesting/lapsing options at the appropriate time. However, an adjustment to the income is called for at the time of exercise of option by the amount of difference in the amount of discount calculated with reference the market price at the time of grant of option and the market price at the time of exercise of option. No accounting principle can be determinative in the matter of computation of total income under the Act. The question before the special bench is thus answered in affirmative by holding that discount on issue of Employee Stock Options is allowable as deduction in computing the income under the head 'Profits and gains of business or profession'.*

3.9. We further find that the aforesaid decision on Special Bench of Bangalore Tribunal has been approved by the Hon'ble Karnataka High Court in the case of CIT vs. Biocon Ltd., reported 430 ITR 151 / 121 taxmann.com 351. The relevant operative portion of the judgement of the Hon'ble Karnataka High Court are reproduced hereunder:-

*"**10**. From perusal of section 37(1), which has been referred to supra, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the*

> *expenditure has been incurred. The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of section 37(1) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal therefore, in paragraphs 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under section 37(1) of the Act subject to fulfilment of the condition.*
>
> ***11**. The deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of account, which has been prepared in accordance with Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.”*

3.10. In view of the aforesaid observation and respectfully following the judicial precedents relied upon hereinabove, the ground No.III raised by the assessee is hereby allowed.

4. Ground No. IV raised by the assessee is challenging the action of the ld. CIT(A) upholding the addition made on account of foreign exchange gain of Rs.51,96,46,461/- to the total income on the ground that cost of assets was not reduced with the aforesaid gain and thereby assessee had claimed excess depreciation.

4.1. We have heard rival submissions and perused the materials available on record. The ld. AO observed that in the computation of income, the assessee has reduced an amount of Rs.51,96,46,461/- on account of gain of foreign exchange fluctuation relating to fixed assets. In the notes attached with the computation of income, it was mentioned by the assessee that –

> “*Foreign Exchange Fluctuation Gains included in the profit and loss account in accordance with AS-11 includes an amount of Rs.51,96,46,461/- relating to foreign exchange fluctuation gains*

> *which needs to be adjusted in the cost of assets in accordance with the provisions of Section 43A of the Income Tax Act, 1961. Accordingly, the same has been reduced from total taxable income.*

4.1.1. The aforesaid note was enclosed alongwith computation of income vide Note No.4 thereon. In the computation of income tax depreciation u/s.32 of the Act vide Annexure-3 of Form No.3CD filed by the assessee, the assessee had stated vide note No.3(a) as under:-

> *Additions during the year included Rs.519.65 million towards foreign exchange gains (net) on loans and creditors in foreign currency (not covered by forward contract) related to acquisition of capital assets.*

4.2. From the above note, the ld. AO concluded that assessee had not reduced the foreign exchange gain of Rs.51,96,46,461/- by adjusting the same with the cost of assets and had claimed excess depreciation in the return so as to reduce the taxable profits.

4.3. Before the ld. CIT(A), the assessee sought to produce a certificate dated 10/04/2013 which is enclosed in page 513 of the paper book filed before us, wherein the tax auditor had duly clarified that a sum of Rs.51,96,46,461/- had been actually reduced from the cost of fixed assets, being the foreign exchange gain on loans taken in foreign currency utilised for acquisition of fixed assets in accordance with Section 43A of the Income Tax Act. The ld. CIT(A) ignores this certificate without even mentioning the fact of filing of the said certificate and upheld the action of the ld. AO.

4.4. Before us, the ld. DR vehemently argued that the tax audit certificate dated 10/04/2013 is purely an afterthought and was given after five years from the time of filing the return. The ld. DR argued that the assessee had not proved that the foreign exchange gain of Rs.51.96 Crores had been reduced from the cost of fixed assets. When this was put to the ld. AR, he fairly submitted that in case if this matter is to be verified by the ld. AO, he has been instructed to state, that assessee is willing to do so. Primafacie on reading note No.3(a) to the income tax depreciation schedule enclosed in page 56 of the factual paper book, we find that Rs.519.65 million representing foreign exchange gain relatable to acquisition of fixed assets seem to have been adjusted with the cost of fixed assets as per Section 43A of the Act. However, in order to avoid doubts, we deem it fit and appropriate to remand this issue to the file of the ld. AO for the limited purpose of verification of the fact as to whether this foreign exchange gain of Rs.519.65 million had been reduced from the cost of fixed assets or not. If it is found to be reduced, then the addition made by the ld. AO need to be deleted. With these directions, the ground No.IV is allowed for statistical purposes.

5. The ground No.V raised by the assessee is challenging the disallowance made u/s.14A of the Act.

5.1. We have heard rival submissions and perused the materials available on record. At the outset, we find that assessee had not earned any exempt income during the year. The ld. AO however, disregarded the same and observed that since assessee had made huge investments in various companies, disallowance u/s.14A of the Act need to be made and accordingly, he applied the third limb of Rule 8D(2) of the Rules and worked out the disallowance at Rs.6,94,050/-, which was upheld by the ld. CIT(A).

5.2. We hold that in the absence of any exempt income there cannot be any disallowance u/s.14A of the Act. The ld. DR vehemently argued and also filed written submissions on the ground that as per the amendment made in Finance Act 2022 on the provisions of Section 14A of the Act, disallowance u/s.14A of the Act would apply even when there is no exempt income derived by the assessee. He also argued that the said amendment need to be construed as retrospective in operation. Reliance in this regard was placed on the decision of Guwahati Tribunal in the case of Williamson Financial Services Ltd in ITA No.154-156/Gau/2019 for A.Y.2012-13 to 2014-15 and ITA No.159/Gau/2019 for A.Y.2009-10 dated 06/07/2022 in support of his contentions. But we find that the Co-ordinate Bench of this Tribunal in a very elaborate order rendered in the case of K. Raheja Corporate Services Pvt. Ltd., in ITA Nos. 2521-2527/Mum/2021 for A.Yrs.2012-13 to 2017-18 respectively dated 17/06/2022 had elaborately considered the meaning of expression "for the removal of doubts" incorporated in the explanation in the amendment brought in Section 14A of the Act by Finance Act 2022 and had held that the said amendment need to be construed only prospectively. It is also pertinent to note that the said decision of Mumbai Tribunal relied upon supra has considered various Hon'ble Supreme Court decisions and had arrived at the conclusion in favour of the assessee. In any case, we further find that recent decision of the Hon'ble Delhi High Court in the case of PCIT vs. M/s. Era Infrastructure (India) Ltd., in ITA No.204 of 2022 dated 20/07/2022 had categorically held that the amendment bought in Finance Act 2022 is prospective in operation. For the sake of convenience, the relevant order is hereby reproduced:-

> *"Present Income-tax Appeal has been filed challenging the Order passed by the Income-tax Appellate Tribunal ('ITAT') in ACIT v. Era Infrastructure (India)*

Ltd. [ITA No. 798/Del/2018, dated 10th March, 2021] for the Assessment Year 2013-14.

***2.** Learned Counsel for the Appellant states that ITAT has erred in law in deleting the disallowance of Rs. 3,61,53,268/- made by the Assessing Officer under Rule 8D of Income-tax Rules, 1962 read with section 14A of the Income-tax Act, 1961 ('the Act').*

***3.** He submits that the ITAT erred in relying on the decision of this Court in Pr. CIT v. IL&FS Energy Development Company Ltd. [2017] 84 taxmann.com 186/250 Taxman 174/399 ITR 483 (wherein it has been held that no disallowance under section 14A of the Act can be made if the assessee had not earned any exempt income), as the revenue has not been accepted the said decision and has preferred an SLP against the said decision.*

***4.** Learned counsel for the petitioner also submits that in view of the amendment made by the Finance Act, 2022 to section 14A of the Act by inserting a non obstante clause and an explanation after the proviso, a change in law has been brought about and consequently, the judgments relied upon by the authorities below including IL&FS Energy Development Co. Ltd. (supra) are no longer good law. The amendment to Section 14A of the Act is reproduced hereinbelow:—*

> *'Amendment of section 14A.*
> *In section 14A of the Income-tax Act,—*
>
> *(a) in sub-section (1), for the words "For the purposes of, the words "Notwithstanding anything to the contrary contained in this Act, for the purposes of shall be substituted;*
>
> *(b) after the proviso, the following Explanation shall be inserted, namely:—*
>
> *"[Explanation.-For the removal of doubts, it is hereby clarified that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where the income, not forming part of the total income under this Act, has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such income not forming part of the total income.]"'*
>
> ***5.** However a perusal of the Memorandum of the Finance Bill, 2022 reveals that it explicitly stipulates that the amendment made to section 14A will take effect from 1st April, 2022 and will apply in relation to the assessment year 2022-23 and subsequent assessment years. The relevant extract of Clauses*

4, 5, 6 & 7 of the Memorandum of Finance Bill, 2022 are reproduced hereinbelow:

"4. In order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to insert an Explanation to section 14A of the Act to clarify that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where exempt income has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such exempt income.

5. This amendment will take effect from 1st April, 2022.

6. It is also proposed to amend sub-section (1) of the said section, so as to include a non-obstante clause in respect of other provisions of the Income-tax Act and provide that no deduction shall be allowed in relation to exempt income, notwithstanding anything to the contrary contained in this Act.

7. This amendment will take effect from 1st April, 2022 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years." (emphasis supplied)

6. *Furthermore, the Supreme Court in Sedco Forex International Drill. Inc. v. CIT [2005] 149 Taxman 352/279 ITR 310 has held that a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. The relevant extract of the said judgment is reproduced hereinbelow:*

'9. The High Court did not refer to the 1999 Explanation in upholding the inclusion of salary for the field break periods in the assessable income of the employees of the appellant. However, the respondents have urged the point before us.

10. In our view the 1999 Explanation could not apply to assessment years for the simple reason that it had not come into effect then. Prior to introducing the 1999 Explanation, the decision in CIT v. S.G. Pgnatale [(1980) 124 ITR 391 (Guj.)] was followed in 1989 by a Division Bench of the Gauhati High Court in CIT v. Goslino Mario [(2000) 241 ITR 314 (Gau.)]. It found that the 1983 Explanation had been given effect from 1-4-1979 whereas the year in question in that case was 1976-77 and said: (ITR p. 318)
"[I]t is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question has (sic) somehow remained pending on 1-4-1979, cannot be cogent reason to make the Explanation applicable to the cases of the present assessees. This fortuitous circumstance cannot take away the vested rights of the assessees at hand. "

11. The reasoning of the Gauhati High Court was expressly affirmed by this Court in CIT v. Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] . These decisions are thus authorities for the proposition that the 1983 Explanation expressly introduced with effect from a particular date would not effect the earlier assessment years.

12. In this state of the law, on 27-2-1999 the Finance Bill, 1999 substituted the Explanation to Section 9(1)(ii) (or what has been referred to by us as the 1999 Explanation). Section 5 of the Bill expressly stated that with effect from 1-4-2000, the substituted Explanation would read:

"Explanation.-For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for—

(a) service rendered in India; and

(b) the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment, shall be regarded as income earned in India."

The Finance Act, 1999 which followed the Bill incorporated the substituted Explanation to Section 9(1)(ii) without any change.

13. The Explanation as introduced in 1983 was construed by the Kerala High Court in CIT v. S.R. Patton [(1992) 193 ITR 49 (Ker.)] while following the Gujarat High Court's decision in S.G. Pgnatale [(1980) 124 ITR 391 (Guj.)] to hold that the Explanation was not declaratory but widened the scope of Section 9(1)(ii). It was further held that even if it were assumed to be clarificatory or that it removed whatever ambiguity there was in Section 9(1)(ii) of the Act, it did not operate in respect of periods which were prior to 1-4-1979. It was held that since the Explanation came into force from 1-4-1979, it could not be relied on for any purpose for an anterior period.

14. In the appeal preferred from the decision by the Revenue before this Court, the Revenue did not question this reading of the Explanation by the Kerala High Court, but restricted itself to a question of fact viz. whether the Tribunal had correctly found that the salary of the assessee was paid by a foreign company. This Court dismissed the appeal holding that it was a question of fact. (CIT v. SR Patton [(1998) 8 SCC 608] .)

15. Given this legislative history of Section 9(1)(ii), we can only assume that it was deliberately introduced with effect from 1-4-2000 and therefore intended to apply prospectively [See CIT v. Patel Bros. & Co. Ltd., (1995) 4 SCC 485, 494 (para 18) : (1995) 215 ITR 165]. It was also understood as such by CBDT which issued Circular No. 779 dated 14-9-1999 containing Explanatory Notes on the provisions of the

Finance Act, 1999 insofar as it related to direct taxes. It said in paras 5.2 and 5.3.

"5.2 The Act has expanded the existing Explanation which states that salary paid for services rendered in India shall be regarded as income earned in India, so as to specifically provide that any salary payable for the rest period or leave period which is both preceded and succeeded by service in India and forms part of the service contract of employment will also be regarded as income earned in India.

5.3 This amendment will take effect from 1-4-2000, and will accordingly, apply in relation to Assessment Year 2000-2001 and subsequent years".

16. The departmental understanding of the effect of the 1999 Amendment even if it were assumed not to bind the respondents under section 119 of the Act, nevertheless affords a reasonable construction of it, and there is no reason why we should not adopt it.

17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139 : 1980 SCC (Tax) 67].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of UP., (1981) 2 SCC 585, 598 : AIR 1981 SC 1274, 1282 para 24]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P.) Ltd., (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".'

(emphasis supplied)

***7.** The aforesaid proposition of law has been reiterated by the Supreme Court in M.M. Aqua Technologies Ltd. v. CIT [2021] 129 taxmann.com 145/282 Taxman 281/436 ITR 582. The relevant portion of the said judgment is reproduced hereinbelow:—*

"22. Second, a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in Sedco Forex International Drill Inc. v. CIT, (2005) 12 SCC 717 as follows :

17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of UP., (1981) 2 SCC 585]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24; Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352; CIT v. Podar Cement (P.) Ltd., (1997) 5 SCC 482]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".

18. There was and is no ambiguity in the main provision of section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in SG. Pgnatale [(1980) 124 ITR 391 (Guj.)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

19. When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively." (emphasis supplied)

8. *Consequently, this Court is of the view that the amendment of section 14A, which is "for removal of doubts" cannot be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood.*

9. *Though the judgment of this Court has been challenged and is pending adjudication before the Supreme Court, yet there is no stay of the said judgment till date. Consequently, in view of the judgments passed by the Supreme Court in Kunhayammed v. State of Kerala [2000] 113 Taxman 470/245 ITR 360 and Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association [1992] 3 SCC 1, the present appeal is dismissed being covered by the judgment passed by the learned predecessor Division Bench in IL & FS Energy Development Co. Ltd. (supra) and Cheminvest Ltd. v. CIT [2015] 61 taxmann.com 118/234 Taxman 761/378 ITR 33 (Delhi).*

> ***10.*** *Accordingly, the appeal and application are dismissed. However, it is clarified that the order passed in the present appeal shall abide by the final decision of the Supreme Court in the SLP filed in the case of IL & FS Energy Development Co. Ltd. (supra)."*

5.3. Respectfully following the same, we direct the ld. AO to delete the disallowance made u/s.14A of the Act. Accordingly, the ground No.V raised by the assessee is allowed.

6. The ground No.VI raised by the assessee is challenging the disallowance of Revenue sharing license fees amounting to Rs.415,08,45,362/-.

6.1. We have heard rival submissions and perused the materials available on record. The ld. AO observed that assessee had debited license fee amounting to Rs.4150.84 million in its profit and loss account. The ld. AO observed that assessee was claiming depreciation on license fee and deduction u/s.35ABB of the Act. This payment is made by the assessee to Government authorities to carry on the business of telecom service provider. The ld. AO observed that assessee had claimed license fees as deduction u/s.35ABB of the Act by amortising the expenditure over the period of license. He also observed that the assessee had to pay license fees on revenue sharing basis from A.Y.2000-01 onwards. This amount of Revenue sharing license fee was initially capitalised and depreciation was claimed on the same. However, subsequently the assessee started claiming this expenditure u/s.37(1) of the Act as deduction. The ld. AO observed that for the same category of expenditure, the assessee is claiming deduction u/s.35ABB of the Act on amortisation basis and also deduction u/s.37(1) of the Act thereby leading to double deduction. Accordingly, he disallowed the claim of Rs.415.08

Crores in addition to disallowing the claim of depreciation u/s.32 of the Act amounting to Rs.4,99,08,190/-. The ld CIT(A) followed the order passed by his predecessor for A.Y.2007-08 and partly allowed the claim of the assessee by allowing depreciation on the revenue sharing license fee paid.

6.2. We find that revenue sharing license fee is a fixed fee payable by the assessee to department of telecommunications, Government of India. Now, the short question is whether the said payment would be revenue expenditure eligible for deduction or alternatively eligible for amortisation u/s.35ABB of the Act or eligible for depreciation when it is capitalised.

6.3. We find that this is a recurring issue in the case of the assessee. We find that this Tribunal in A.Y.2007-08 in ITA Nos. 4445 and 4418/ Mum/2013 for A.Y.2007-08 and 1977 and 1853/Mum/2013 for A.Y.2006-07 dated 27/05/2016 had allowed deduction as Revenue expenditure in respect of revenue sharing license fee paid by the assessee. We further find that for the A.Y.2007-08 and 2006-07 in assessee's own case, the very same issue was agitated by the revenue before the Hon'ble Jurisdictional High Court which was disposed of in Income Tax Appeal No.741 of 2017 dated 13/01/2020 by the Hon'ble High Court in favour of the assessee. Similarly, the very same issue in the case of the assessee for A.Y.2003-04 in Income Tax Appeal No.1551/2013 dated 11/04/2016 was decided in favour of the assessee by the Hon'ble High Court by allowing it as Revenue expenditure u/s.37(1) of the Act.

6.4. With regard to allegation levelled by the ld. DR that assessee had made double deduction, the ld. AR duly clarified that assessee had claimed this deduction on hybrid model, because for one circle which was taken over by the assessee from another company, that company was claiming deduction on amortisation basis u/s.35ABB of the Act. This was continued by the assessee even after takeover of the said company in respect of that one circle alone. In respect of other circles operated by the assessee, the assessee had been consistently claiming deduction as revenue expenditure u/s.37(1) of the Act. Accordingly, he submitted that there is absolutely no double deduction claimed by the assessee at all. This fact was submitted before the ld. CIT(A) by the assessee but no finding has been given by the ld. CIT(A) in this regard. Hence, in the interest of justice and fair play, we remand this issue to the file of the ld. AO for limited purpose on verification of the fact as to whether the assessee has claimed double deduction in respect of this expenditure for the same circle where the assessee is operating its telecom services. If it is found that there is no double deduction claimed by the assessee, the assessee would be eligible for deduction as revenue expenditure u/s.37(1) of the Act which would be in tune with the decisions rendered by the Hon'ble Jurisdictional High Court in assessee's own case for A.Yrs. 2003-04, 2006-07 and 2007-08 referred to supra. With these observations, the ground No.VI raised by the assessee is allowed for statistical purposes.

7. The ground No.VII raised by the assessee was stated to be not pressed by the ld. AR at the time of hearing. Hence, the same is dismissed as not pressed.

8. The ground No.VIII raised by the assessee is challenging disallowance on proportionate deduction of Rs.5,87,487/- u/s.35DD of the Act in respect of legal fees incurred on amalgamation.

8.1. We have heard rival submissions and perused the materials available on record. With regard to this issue, the ld. AR stated that assessee had got relief in A.Y.2007-08 pursuant to the orders passed by the ld. AO for A.Y.2007-08 while giving effect to the Tribunal order. This claim is only remaining 1/5th of the total legal fees claimed by the assessee which was incurred in A.Y.2004-05 being the first year. The present assessment year i.e. A.Y.2008-09 would be the 5th year of claim and accordingly, we direct the ld. AO to grant deduction of the remaining 1/5th portion of Rs.5,87,487/- being the legal fees incurred on merger expenses u/s.35DD of the Act in tune with orders passed for the earlier years. Accordingly, the ground No.VIII raised by the assessee is allowed.

9. The ground No.IX is challenging the disallowance of compensation cost of ESOP amounting to Rs.3,75,90,000/- while computing book profit u/s.115JB of the Act.

9.1. We have heard rival submissions and perused the materials available on record. We have already held vide ground No.III hereinabove that the compensation cost of ESOP would be allowable as revenue expenditure for the assessee company on merits. Hence, the said expenditure is not be eligible to be added back for computing the book profit u/s.115JB of the Act, as we have already held that the said expenditure is not contingent or notional in nature. Accordingly, the ground IX raised by the assessee is allowed.

10. The ground No.X raised by the assessee is challenging the disallowance u/s.14A of the Act while computing book profits u/s.115JB of the Act.

10.1. We have heard rival submissions and perused the materials available on record. We have already held vide ground No.V above that no disallowance u/s.14A of the Act could be made in the instant case as there was no exempt income claimed by the assessee. The said decision would hold good for this ground also as admittedly Clause 'f' of Explanation 1 to Section 115JB(2) of the Act would come into operation only if there is exempt income credited in the profit and loss account. Accordingly, the ground No.X raised by the assessee is allowed.

11. The ground No.XI raised by the assessee is general in nature and does not require any specific adjudication.

Let us take up the Revenue appeal in ITA No.2273/Mum/2014 for A.Y.2008-09.

12. The ground No.1 raised by the Revenue is common with ground No.VI raised by the assessee. The decision rendered hereinabove for ground No.VI of assessee's appeal would hold good for ground No.1 of the Revenue appeal. Hence, the ground No.1 raised by the Revenue is dismissed.

13. The ground No.2 raised by the Revenue is challenging the deletion of disallowance of interest paid on borrowed funds in respect of interest free loans / advances to subsidiary company.

13.1. We have heard rival submissions and perused the materials available on record. During the year under consideration, the assessee paid interest of Rs.4,38,12,50,000/- on interest bearing loans. The assessee had advanced an interest free loans to its subsidiaries to the tune of Rs.27,21,60,000/-. The ld. AO observed that the lending to subsidiary companies is not meant for business purpose of the company and accordingly, proceeded to disallow proportionate interest paid on borrowed funds as not utilised for the purpose of business u/s.36(1)(iii) of the Act and made disallowance of Rs.1,82,34,720/-. The ld. CIT(A) held that the facts of this year are similar to A.Y.2007-08 and by following the order of his predecessor for A.Y.2007-08 deleted the said disallowance.

13.2. The details of advance given to subsidiary companies are as under:-

Sr. No.	**Company Name**	**(Rs. In Million)**
1.	Aditya Birla Telecom Ltd., (ABTL)	260.60
2.	Idea Cellular Services Ltd., (ICSL)	10.77
3.	Idea Cellular Infrastructure Services Ltd., (ICISL)	0.79
	Total	**272.16**

13.3. The assessee pleaded that the subsidiary companies also are engaged in the business of telecommunication and by making the aforesaid investments, the assessee continues to remain wholly engaged in the telecommunication business.

13.4. The ld. DR vehemently argued that the aspect of commercial expediency was never proved by the assessee in the instant case and hence, the decision relied by the ld. CIT(A) on the Hon'ble Supreme Court decision in the case of SA Builders vs.CIT reported in 288 ITR 1 would not come into operation at all.

13.5. Per contra, the ld. AR submitted that a sum of Rs.260.60 (million) advanced by the assessee to Aditya Birla Telecom Ltd., (ABTL). It was submitted that ABTL was having telecom circle license in Bihar and Jharkhand. They were also engaged in telecommunication business. Assessee is also engaged in telecommunication business. Hence, commercial expediency is proved beyond doubt. The other two advances are given to assessee own group companies which are engaged in the same business. In any case, he submitted that this issue has been decided in favour of the assessee by the Tribunal for A.Y.2007-08 in ITA Nos. 4445 and 4418/Mum/2013 for A.Y.2006-07 dated 27/05/2016 wherein this interest disallowance was deleted by the Tribunal. It is also pertinent to note that this Tribunal order has been upheld by the Hon'ble Jurisdictional High Court in PCIT vs. Idea Cellular Ltd., in ITA No.741/Mum/2017 dated 13/01/2020 for A.Y.2007-08 and in Income Tax Appeal No.417 of 2017 dated 22/04/2019 for A.Y.2006-07. In view of the same, the ground No.2 raised by the Revenue has no legs to stand and hence, dismissed.

14. The ground No.3 raised by the Revenue is challenging the deletion of disallowance on account of club entrance fees amounting to Rs.37,79,021/-.

14.1. We have heard rival submissions and perused the materials available on record. We find that assessee had debited expenses on account of club entrance fees paid to various clubs amounting to Rs.37.79,021/- and claimed the same as revenue expenditure u/s.37(1) of the Act. The ld. AO disallowed the same on the ground that it is capital in nature as it is giving enduring benefit to the assessee. The ld. CIT(A) by following the order passed by his predecessor for A.Y.2007-08 deleted the disallowance.

14.2. We find that these amounts were paid for membership of various clubs in order to enable the Senior Executives to socialise and develop contacts with various persons for promoting the assessee's business. The membership of any club, in our considered opinion, does not bring in any enduring benefit to the club member. We find that this Tribunal for A.Yrs. 2006-07 and 2007-08 in assessee's own case vide this order dated 27/05/2016 had deleted the disallowance. It is also pertinent to note that the Revenue though challenged the Tribunal order passed for A.Y.2006-07 and 2007-08 dated 27/05/2016 before the Hon'ble Jurisdictional High Court, chose not to raise any question of law with regard to this issue of disallowance of club expenses. This goes to prove that the Tribunal order for A.Yrs.2006-07 and 2007-08 dated 27/05/2018 wherein the club expenses was allowed as Revenue expenditure had attained finality. Hence, the ground No.3 raised by the Revenue has no legs to stand and hence, dismissed.

15. The ground No.4 raised by the Revenue is challenging the action of the ld. CIT(A) in bringing the ld. AO to consider the claim of the assessee to allow further expenditure in the sum of Rs.14,49,91,563/- being the expenditure made by the assessee during the course of assessment proceedings and not in the return of income.

15.1. We have heard rival submissions and perused the materials available on record. During the year under consideration, the assessee had outsourced information technology services to IBM India Private Limited ("IBM") which included software support services, data centre operation services, vendor management, administrative services, training & communication and IT help desk services

15.2. At the time of filling of ROI of the captioned Assessment Year, the assessee has erroneously claimed only Rs. 192,60,80,504/- out of Rs 207,10,72,067/- in respect of the said expenses. After that, the assessee realized that the assessee has claimed short deduction of such expenses. So, the assessee has claimed the balance expenses of Rs. 14,49,91,563/- related to such expenses at the time of assessment proceedings under section 143(3) of the Act by filling letters to the AO since the time of revising the ROI under section 139(5) of the Act had expired.

15.3. The assessee had submitted the details of expenses incurred by making payment to IBM vide letter dated 02/12/2010 to the ld.AO. The assessee had also filed the copy of the agreement entered with IBM vide letter dated 22/12/2010 to the AO. Further, the assessee made detailed submissions on the admissibility of expenditure vide letter dated 23/12/2010 to the ld. AO during the assessment proceedings.

15.4. The AO disallowed the foregoing expenditure on the alleged ground that the claim cannot be admitted during the assessment proceedings following the decision of Goetze (India) Ltd. Vs. CIT (284 ITR 323) (SC).The ld. CIT(A) directed ld. AO to consider the claim of the assessee and allow the same on proper verification of relevant vouchers, invoices, genuineness of services, payment and in accordance with the provisions of section 37 of the Act.

15.5. As it could be seen from the above that out of total payment of Rs.207,10,72,067/- paid by the assessee pursuant to an agreement entered into with IBM, the ld. AO had already allowed a sum of Rs.192,60,80,504/-. One of the main grievance of the ld. AO that the additional claim of Rs.14,49,91,563/- was not made by way of a valid return but instead the claim was made by way of a letter during the course of assessment proceedings. This aspect has already been addressed by the Hon'ble Jurisdictional High Court in the case of CIT vs. Pruthvi Brokers & Shareholders Ltd., reported in 349 ITR 336 wherein any claim made by the assessee even by way of a letter could be entertained by the Revenue even if it is not supported by way of a valid return. In the instant case, the assessee had duly explained that the time limit for filing revised return u/s.139(5) had expired and hence, it could not have made the said claim by way of a revised return. However, the entire details of the additional claim of Rs.14,49,91,563/- were duly filed before the ld.AO by the assessee by way of a separate note together with all the supporting documents. These documents are also enclosed in pages 514-527 of the paper book filed before us. The assessee also filed revised computation of income before the ld. AO after making the aforesaid claim. Moreover, we find that the ld. CIT(A) had only directed the ld.AO to consider the claim of the assessee only after verification of relevant vouchers, invoices, genuineness of services and if satisfied, allow the deduction u/s.37 of the Act. Hence, there could be no grievance of the Revenue in this regard. The ld. AR also pointed out that the ld. PCIT on the very same issue sought to invoke revision proceedings for A.Y.2011-12 vide show-cause notice u/s.263 of the Act dated 05/08/2015 which is enclosed in pages 500 and 501 of the factual paper book. Subsequently, the ld. AR also placed on record the copy of the revision order u/s.263 of the Act passed by the ld. PCIT for A.Y.2011-12 dated 18/12/2015 wherein this issue was dropped by the ld. PCIT and he chose to treat the order of the ld.AO as erroneous and prejudicial to the interest of the Revenue in respect of other issues. This goes to prove that there is nothing wrong apparently in the claim made by the assessee with regard to liability of expenses and its business nexus thereon. As stated earlier, there is absolutely no grievance that could be present in the instant case for the Revenue as the ld. CIT(A) had only directed the ld.AO to examine the allowability of the expenses based on extensive verification with supporting documents. However, it is a fact that none of the ld. AO had not given any factual finding with regard to the allowability of these additional claim of expenses. This aspect requires factual verification by the ld. AO and hence we deem it fit and appropriate to remand this issue to the file of ld. AO for denovo adjudication in accordance with law. Accordingly, the ground No.4 raised by the Revenue is allowed for statistical purposes.

16. The ground No. 5 & 6 raised by the Revenue are general in nature and does not require any specific adjudication.

17. In the result, appeal of the Revenue in ITA No.2273/Mum/2014 is partly allowed for statistical purposes.

18. To sum up, both the appeals of the assessee as well the revenue are partly allowed for statistical purposes.

Order pronounced on 12/10/2022 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(VIKAS AWASTHY)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 12/10/2022

KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai