IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A': NEW DELHI

BEFORE,
SHRI G. S. PANNU, VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.7743/Del/2018
(ASSESSMENT YEAR 2014-15)

Bando (India) Private Limited Plot No.436 IMT Manesar, Sec-8 Gurugram-122050 Haryana PAN-AACCB2994D	Vs.	DCIT Circle-1(1) Gurugram
(Appellant)		**(Respondent)**

Assessee by	Sh. Arun Kishore, CA & Sh. Alok Suri, CA
Department by	Sh. Kanv Bali, Sr. DR & Shri Om Prakash, Sr. DR

Date of Hearing	05/07/2024
Date of Pronouncement	11/07/2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal of the Assessee arises out of the order of the Learned Commissioner of Income Tax (Appeals)-2, Gurugaon [hereinafter referred to as 'Ld. CIT(A)'] in Appeal No.617/2016-17 dated 20/09/2018 against the order passed by Deputy Commissioner of Income Tax, Circle-1(1), Gurugaon (hereinafter

referred to as the 'Ld. AO') u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') on 23/12/2016.

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

"1. (i) That the order of the Ld. CIT(Appeals)-2 (hereinafter called CIT(A)) dated 20.09.2018 confirming the addition of Rs.4,20,67,880/- made by DCIT Circle 1(1) (hereinafter called AO), is illegal, unjust, opposed to facts and suffers from the vice of arbitrariness.

(ii) That each Ground of Appeal is without prejudice to each other.

2. (i) That on facts and circumstances of the case and in law, CIT(A) has erred in confirming the addition of Rs.4,20,67,880/- in pursuance of a time barred order not delivered within the statutory time limit.

(ii) That non delivery of order and by sending it to a incorrect address, when the correct address was available on IT database, ITR filed and in other documents, such crucial error is not covered within the ambit of section 292B of the Act.

(iii) That the case laws relied upon in this connection have not been dealt with.

3. (i) That on facts and circumstances of the case and in law, CIT (A) has grossly erred in confirming the addition towards the provision for exchange fluctuation as per past practice and in accordance with mandatory Accounting Standard 'AS 11'.

(ii) That the Ld. CIT(A) and Ld. AO have both omitted to consider that the provision for exchange fluctuation of Rs.4,20,67,880/- comprised of:

(a) Rs.3,31,37,560/- as reversal of income booked for such provision in AY 2013-14.

(b) Rs.89,30,320/- towards CY reinstatement of foreign currency loan provision. ***Total Rs.4,20,67,880/-***

4. (i) That on facts and circumstances of the case and in law, the Ld. CIT(A) has erred by applying section 43A of the Income Tax Act, which is not applicable on provisions. Section 43A gets triggered, if there is a change in the rate of exchange at the time of making payment.

(ii) That the Ld. CIT(A) and Ld. AO have erred in adopting the provision for reinstatement of foreign currency loans as loss due to foreign exchange fluctuation on ECB loans paid during the year.

5. That on facts and circumstances of the case and in law, the ld. CIT(A) and the Ld. AO have both erred in not following the "Principle of Consistency". During last year, provision of income of Rs.3,31,37,560/- for foreign exchange fluctuation was accepted by the department.

6. That on facts and circumstances of the case and in law, the Ld. CIT(A) and the Ld. AO have both erred in treating the provision of Rs.4,20,67,880/- as a Capital Expenditure, without allowing depreciation on the said Capital Expenditure during the current year and in subsequent years.

7. That net income of the appellant be reduced by Rs.4,20,67,880/-."

3. Heard and perused the record. At the outset, we observed that **ground no.1** is general in nature.

4. As with regard to the **ground No. 2**, the contention of learned Authorized Representative (AR) is that the assessment order was issued on 23 December 2016 but appellant did not receive the same till 13 February 2017. Ld. AR has submitted that service of notice was on wrong address and same is as good as no service or defective service. He submitted that the assessment under section 143(3) of the Act is complete only when the order is made within the time stipulated u/s 153 of the Act and when the demand is served simultaneously. Relying Section 282 of the Act along with Rule 127

of IT Rules and referring to Section 27 of the General Clauses Act 1897 it was submitted that the assessment was barred, as there was no valid service of the assessment order.

5. On the other hand, as with regard to the controversy of time barring assessment, at the time of hearing, the Ld. Department Representative (DR) had produced the dispatch register which showed that there was dispatch entry however the address mentioned was wrong qua the house number only. Ld. DR has relied Pune Bench order in **CIT vs. Privileged Investment Private Limited (2017) 395 ITR 147 (All),** to submit that the notices if not returned same is to considered as not served.

6. We have given thoughtful consideration to the issue and in our considered opinion there is no dispute of assessment order being passed on 23 December 2016 before time barring date. If there was any discrepancy in mentioning the address due to which the demand notice along with the assessment order was not served on the assessee that can only help the assessee to claim that the period of limitation for filing the appeal would be from the date

when assessee actually receives the demand notice or assessment order. There is no force in the contention of learned AR that for the purpose of section143(3) read with section 153 of the Act, the assessment order shall be considered to be passed beyond the limit prescribed, for the only reason that though assessment order was passed before the time barring date but was not served upon the assessee, due to inadvertent mistake in mentioning the house number. In fact, it is for such purposes the act provides that discrepancy in notices will not affect the proceedings. We find no error in the findings of the learned CIT(A). The ground no. 2 has no substance.

7. **Ground No. 3 to 6** and the additional ground number (i) to (v) are arising out of common set of circumstances. The facts necessary for disposal of these grounds are that during the year the assessee claimed expenses on account of foreign exchange fluctuation of Rs.6,42,33,238/-and the Assessing Officer has disallowed Rs.4,20,57,880 representing foreign exchange fluctuation loss on reinstatement of the ECB loans borrowed near the end of FY 2011-12. The learned Authorized Representative has submitted that

reinstatement of foreign exchange borrowing is a mandatory requirement as per accounting standards AS11. He submitted that assessee is regularly following the same system of accounting in the previous years and subsequent years. He submitted that even otherwise the CIT(A) has fallen an error in invoking section 43A. Firstly CIT(A) had powers to change the addition made under section 37 by the Assessing Officer to one under section 43A and secondly section 43A is not applicable on the same is applicable when any fluctuation loss of income arises at the time of payment of foreign currency loss used for capital goods imported.

8. The Learned Departmental Representative, however, has defended the order of CIT(A) by submitting that reinstatement has been done in the balance sheet therefore the same give rise to capital loss. The order dated 29/10/2020 of Pune Bench in the case of Aesseal India Pvt. Ltd. Vs. ITO (ITA No. 2203 and 2202/Pun/2017) is relied by learned Departmental Representative to contend Section 43A is applicable.

9. We have given thoughtful consideration to the matter on record and the submissions made. It comes from the order of Assessing Officer that he considered disallowance u/s 37 of the exchange fluctuation only for the reason that ECB loan was utilized for purpose of acquiring capital asset which has enduring benefit. Contrary to the same CIT(A) has made the disallowance by relying section 43A. We are in agreement with learned Authorized Representative that disallowance under section 37 and under section 43A of the Act, both operate in different spheres. Section 43A is a deeming provision for adding or deducting, the fluctuation loss or profit, from the cost of asset. Disallowance under section 37 is however for the reasons that capital expenditures are specifically disallowed.

10. Thus, we are of the opinion that the additional grounds raised have substance, more so as it does not appear from the order of CIT(A) that any notice was given to the assessee to contest the addition to the cost of asset under section 43A.

11. Even otherwise there was merely reinstatement of losses as per accounting standards and there was no actual payment or remittance so as to invoke Section 43A. It also comes admittedly that the issue has some sort of consistency. The details provided by the learned Authorized Representative are being reproduced below;

Assessment Year	Exchange Fluctuation Income	Exchange Fluctuation Expense	As per Income Tax Department
2013-14	3,31,37,560/-	NIL	Accepted u/s 143(3)
2014-15	NIL	4,20,67,840/-	Disallowed u/s 37 as of Capital Nature
2015-16	39,89,836/-	NIL	Accepted
2016-17	NIL	2,11,48,524/-	Accepted u/s 143(3)
2017-18	1,62,55,612/-	NIL	Accepted
2018-19	98,33,396/-	NIL	Accepted u/s 143(3)
Total	6,32,16,404/-	6,32,16,404/-	

11.1 The aforesaid go to show that except in the present assessment year otherwise the reinstatement of income or loss from fluctuation of currency has been accepted as per the accounting done by the assessee.

12. In the light of aforesaid we are inclined to accept and sustain the grounds No.3 to 6 and additional grounds.

13. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the Open Court on11/07/2024.

Sd/-	Sd/-
(G.S.PANNU)	**(ANUBHAV SHARMA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 11/07/2024
PK/Ps
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI