IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad
(Through Video Conferencing)
Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri Laxmi Prasad Sahu, Accountant Member

ITA No.1249/Hyd/2017		
Assessment Year: 2012-13		
HSBC Electronic Data Processing India P Ltd Hyderabad PAN:AAACH8235M	Vs.	ACIT, Circle 2(2) Hyderabad
(Appellant)		(Respondent)
ITA No.1381/Hyd/2017		
Assessment Year: 2012-13		
Dy. CIT, Circle 2(2) Hyderabad	Vs.	HSBC Electronic Data Processing India P Ltd Hyderabad PAN:AAACH8235M
(Appellant)		(Respondent)
Assessee by:	Sri Rajan Vora,	
Revenue by:	Sri Rajendra Kumar,DR	
Date of hearing:	06/04/2021	
Date of pronouncement:	16/04/2021	

ORDER

Per Smt. P. Madhavi Devi, J.M.

Both are cross appeals for the A.Y 2012-13 against the order of the CIT (A)-7, Hyderabad, dated 1.3.2017.

2. Brief facts of the case are that the assessee company which is engaged in rendering of ITeS and BPO services to its AE's, filed its return of income on 28.11.2012 declaring total income of Rs.458,11,74,170/- under normal provisions of I.T. Act

and Rs.425,46,44,130/- u/s 115JB of the Act. During the assessment proceedings u/s 143(3) of the Act, pursuant to selection of the assessee's return of income for scrutiny under CASS, the Assessing Officer required the assessee to furnish certain details. The details were submitted by the assessee.

3. During the course of assessment proceedings, from the P&L A/c of the assessee, the Assessing Officer observed that the assessee has credited Rs.7,01,48,671/- towards forex gain under the head "other income" and the assessee had shown Rs.49,11,07,448/- towards loss on 'Mark to Market on foreign exchange forwards'. The Assessing Officer also observed that the assessee has debited/reduced Rs.49,11,07,448/- towards 'unrealized hedging loss' to arrive at the net Forex gain of Rs.7,01,48,671/-. The assessee was therefore, asked to justify the allowability of such unrealized hedging loss in view of the CBDT instruction No.3 of 2010. The assessee furnished its reply vide letter dated 2.2.2016. The Assessing Officer, however, was not convinced with the assessee's contentions. He held that the loss on forward contracts is not to be allowed as per the above CBDT instructions. He accordingly disallowed the same and brought it to tax.

3. Further, he also observed that the assessee has incurred expenditure of Rs.2,86,26,000/- on the issue of ESOPs. The Assessing Officer, inspite of taking note of the decision of the Hon'ble Special Bench of ITAT in the case of Biocon Pharmaceuticals Ltd, observed that the Department's appeal in the case of Biocon Pharmaceuticals Ltd is pending for adjudication before the Hon'ble Karnataka High Court. Thus, he disallowed the said expenditure of Rs.2,86,26,000/- and brought

it to tax. Aggrieved, the assessee preferred an appeal before the CIT (A), who partly allowed the same by deleting the disallowance of expenditure on the issue of ESPPs. Against the confirmation of the addition of forward hedging loss, the assessee is in appeal before us, while against the deletion of the addition of the disallowance of ESPPs expenditure, the revenue is in appeal before us.

4. As far as the Revenue's appeal is concerned, the following grounds have been raised by the Revenue:

> *"1) In the facts and circumstances of the case, whether the CIT(A) is correct in holding that discount on issue of ESOP (Employee Stock Options) is allowable as deduction in computing the income under the head profits and gains of business.*
>
> *2) Whether the Ld. CIT(A) is correct in giving relief by following the decision of the Bengaluru Special Bench Decision in the case of M/s Bio Con India Ltd Employees Welfare Trust, ignoring the binding nature of decision of the Jurisdictional ITAT decision in the case of Medha Servo Drivers Limited, where in it was held that the discount on issue of ESOPs is not a deductible expenditure uls 37(1) of the Income Tax Act, 1961.*
>
> *3) Any other ground that may be urged at the time of hearing".*

5. The learned Counsel for the assessee submitted that the Hon'ble Karnataka High Court has confirmed the decision of the Special Bench of the Tribunal at Bengaluru in the case of Biocon Ltd and therefore, the Revenue's appeal is liable to be dismissed. Since the issue is covered by the judgement of the Hon'ble Karnataka High Court in the case of Biocon Ltd, dated 11.11.2020 in ITA 653 of 2013, the Revenue's appeal is dismissed.

6. The following grounds are raised by the assessee in its appeal:

> *"Based on the facts and circumstances of the case and in law, the learned Assessing Officer (" AO") grossly erred in:*
>
> *1. a) Disallowing the unrealized hedging loss on forward contracts of Rs. 49,11,07,448/-.*
>
> *b) Without prejudice to above, following an inconsistent approach by not excluding the unrealized forex gain of Rs. 33,35,31,167 from the taxable income;*
>
> *2. Non consideration of TDS of Rs. 8,25,60,213 relating to HSBC Operations and Processing Enterprise (India) Private Limited which was merged with HDPI pursuant to the order of Hon'ble Mumbai High Court;*
>
> *The Appellant craves, to consider each of the above grounds of appeal without prejudice to each other and craves leave to add, alter, delete or modify all or any of the above grounds of appeal".*

7. As regards Ground No.1(a), the learned Counsel for the assessee submitted that this issue is covered by the decision of the Coordinate Bench of this Tribunal in the assessee's own case for the A.Y 2014-15. Further he placed reliance upon the following other decisions:

a) ITAT Mumba*i in the case of Lupin Ltd in ITA No.7274/M/2014 dated 26.10.2016*

b) ITAT Hyderabad in the case of Kesoram Industries Ltd in ITA No.1195/Hyd/2019, dated 21.10.2020

c) ITAT Kolkata in the case of Speciality Restaurants Ltd in ITA No.1318/Kol/2017 dated 30.11.2018.

8. The learned DR however, supported the orders of the authorities. Having regard to the rival contentions and the material on record, we find that the issue is covered in favour of the assessee by the order of this Tribunal in the assessee's own case for A.Y 2014-15 and the relevant paras are reproduced hereunder:

"31. As regards ground No.15 against the disallowance of forex loss on forward contracts, the learned Counsel for the assessee placed reliance upon the decision of the Hon'ble Supreme Court in the case of Woodward Governor, reported in (2009) 312 ITR 254 (S.C). The learned DR, on the other hand, relied on the CBDT Circular No.03/2010 dated 23.3.2010.

32. Having regard to the rival contentions and the material on record, we find that the Hon'ble Supreme Court in the case of Woodward Governor India (P) Ltd has held that the loss suffered by an assessee on account of foreign exchange difference as on date of Balance Sheet is an item of expenditure u/s 37(1) of the Act. Respectfully following the same, this ground of the assessee is allowed".

9. The Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India (P) Ltd, reported in (2009)179 Taxmann 326 (SC) has held as under:

"10. As stated above, on facts in the case of M/s Woodward Governor India P. Ltd., the Department has disallowed the deduction/debit to the P&L account made by the assessee in the sum of Rs. 29,49,088.00 being unrealized loss due to foreign exchange fluctuation. At the very outset, it may be stated that there is no dispute that in the previous years whenever the dollar rate stood reduced, the Department had taxed the gains which accrued to the assessee on the basis of accrual and it is only in the year in question when the dollar rate stood increased, resulting in loss that the Department has disallowed the deduction/debit. This fact is important. It indicates the double standards adopted by the Department.

11. The dispute in this batch of civil appeals centers around the year(s) in which deduction would be admissible for the increased liability under Section 37(1).

12. We quote hereinbelow Section 28(i), Section 29 Section 37(1) and Section 145 of the 1961 Act, which read as follows:

Profits and gains of business or profession:

Section 28 :

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

(i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year."

Income from profits and gains of business or profession, how computed:

Section 29:

"The income referred to in section 28 shall be computed in accordance with the provisions contained in sections 30 to 43D." General:

Section 37 :

"(1) Any expenditure (not being expenditure of 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".

Explanation.- For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure."

(emphasis supplied) Method of Accounting:

Section 145:

"(1) Income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall, subject to the provisions of sub-section (2), be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

(2) The Central Government may notify in the Official Gazette from time to time accounting standards to be followed by any class of assessees or in respect of any class of income. (3) Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee, the Assessing Officer may make an assessment in the manner provided in section 144."

13. As stated above, one of the main arguments advanced by the learned Additional Solicitor General on behalf of the Department before us was that the word "expenditure" in Section 37(1) connotes "what is paid out" and that which has gone irretrievably. In this connection, heavy reliance was placed on the judgment of this Court in the case of Indian Molasses Company (supra). Relying on the said judgment, it was sought to be argued that the increase in liability at any point of time prior to the date of payment cannot be said to have gone irretrievably as it can always come back. According to the learned counsel, in the case of increase in liability due to foreign exchange fluctuations, if there is a revaluation of the rupee vis-`-vis foreign exchange at or prior to the point of payment, then there would be no question of money having gone irretrievably and consequently, the requirement of "expenditure" is not met. Consequently, the additional liability arising on account of fluctuation in the rate of foreign exchange was merely a contingent/notional liability which does not crystallize till payment. In that case, the Supreme Court was considering the meaning of the expression "expenditure incurred" while dealing with the question as to whether there was a distinction between the actual liability in presenti and a liability de futuro. The word "expenditure" is not defined in the 1961 Act. 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". In Sections 30 to 36, the expressions "expenses incurred" as well as "allowances and depreciation" has also been used. For example, depreciation and allowances are dealt with in Section

32. Therefore, Parliament has used the expression "any expenditure" in Section 37 to cover both. Therefore, the expression "expenditure" as used in Section 37 may, in the circumstances of a particular case, cover an amount which is really a "loss" even though the said amount has not gone out from the pocket of the assessee.

14. In the case of M.P. Financial Corporation v. CIT reported in 165 ITR 765 the Madhya Pradesh High Court has held that the expression "expenditure" as used in Section 37 may, in the circumstances of a particular case, cover an amount which is a "loss" even though the said amount has not gone out from the pocket of the assessee. This view of the Madhya Pradesh High Court has been approved by this Court in the case of Madras Industrial Investment Corporation Ltd. v. CIT reported in 225 ITR 802. According to the Law and Practice of Income Tax by Kanga and Palkhivala, Section 37(1) is a residuary section extending the allowance to items of business expenditure not covered by Sections 30 to 36. This Section, according to the learned Author, covers cases of business expenditure only, and not of business losses which are, however, deductible on ordinary principles of commercial accounting. (see page 617 of the eighth edition). It is this principle which attracts the provisions of Section 145. That section recognizes the rights of a trader to adopt either the cash system or the mercantile system of accounting. The quantum of allowances permitted to be deducted under diverse heads under Sections 30 to 43C from the income, profits and gains of a business would differ according to the system adopted. This is made clear by defining the word "paid" in Section 43(2), which is used in several Sections 30 to 43C, as meaning actually paid or incurred according to the method of accounting upon the basis on which profits or gains are computed under Section 28/29. That is why in deciding the question as to whether the word "expenditure" in Section 37(1) includes the word "loss" one has to read Section 37(1) with Section 28, Section 29 and Section 145(1). One more principle needs to be kept in mind. Accounts regularly maintained in the course of business are to be taken as correct unless there are strong and sufficient reasons to indicate that they are unreliable. One more aspect needs to be highlighted. Under Section 28(i), one needs to decide the profits and gains of any business which is carried on by the assessee during the previous year. Therefore, one has to take into account stock-in-trade for determination of profits. The 1961 Act makes no provision with regard to valuation of stock. But the ordinary principle of commercial accounting requires that in the P&L account the value of the stock-in- trade at the beginning and at the end of the year should be entered at cost or market price, whichever is the lower. This is how business profits arising during the year needs to be computed. This is one more reason for reading Section 37(1) with Section 145. For valuing the closing stock at the end of a particular year, the value prevailing on the last date is

relevant. This is because profits/loss is embedded in the closing stock. While anticipated loss is taken into account, anticipated profit in the shape of appreciated value of the closing stock is not brought into account, as no prudent trader would care to show increase profits before actual realization. This is the theory underlying the Rule that closing stock is to be valued at cost or market price, whichever is the lower. As profits for income-tax purposes are to be computed in accordance with ordinary principles of commercial accounting, unless, such principles stand superseded or modified by legislative enactments, unrealized profits in the shape of appreciated value of goods remaining unsold at the end of the accounting year and carried over to the following years account in a continuing business are not brought to the charge as a matter of practice, though, as stated above, loss due to fall in the price below cost is allowed even though such loss has not been realized actually. At this stage, we need to emphasise once again that the above system of commercial accounting can be superseded or modified by legislative enactment. This is where Section 145(2) comes into play. Under that section, the Central Government is empowered to notify from time to time the Accounting Standards to be followed by any class of assessees or in respect of any class of income. Accordingly, under Section 209 of the Companies Act, mercantile system of accounting is made mandatory for companies. In other words, accounting standard which is continuously adopted by an assessee can be superseded or modified by Legislative intervention. However, but for such intervention or in cases falling under Section 145(3), the method of accounting undertaken by the assessee continuously is supreme. In the present batch of cases, there is no finding given by the AO on the correctness or completeness of the accounts of the assessee. Equally, there is no finding given by the AO stating that the assessee has not complied with the accounting standards.

15. For the reasons given hereinabove, we hold that, in the present case, the "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure under Section 37(1) of the 1961 Act".

10. Therefore, respectfully following the judgment of the Hon'ble Supreme Court, the addition of Rs. 49,11,07,448/- on a/c of unrealized hedging loss on forward contracts made by the Assessing Officer and confirmed by the CIT (A) is deleted.

11. Ground No.1(b) is only an alternative argument taken by the assessee and therefore, needs no adjudication at this stage.

12. As regards Ground No.2, the learned Counsel for the assessee submitted that the assessee does not wish to press this ground. Accordingly, this ground of appeal is rejected as not pressed.

12.1 Further, the assessee vide letter dated 18.11.2019, filed on 22.11.2019 has raised the following additional grounds of appeal:

> *"Based on the facts and circumstances of the case and in law:*
>
> *Deduction in respect of education cess and secondary and higher secondary education cess paid under section 37(1) of the Income-tax Act, 1961 ('Act')*
>
> *3. The Appellant prays that' the education cess and higher secondary education cess on income tax paid for the year under consideration ought to be allowed as a deduction under Section 3 7(1) of the Act while computing the total income.*
>
> *Restricting the rate of Dividend Distribution Tax ('DDT') paid on dividend distributed to the Nonresident shareholders as per the Applicable Double taxation avoidance agreement ('DTAA')*
>
> *4. The Appellant prays that the DOT paid under section 115-0 (@ 16.223%) of the Act on dividends declared and paid by the Appellant to its non-resident shareholders HSBC Holdings BY Netherlands, UK (a tax resident of United Kingdom), HSBC Finance, Netherlands (a tax resident of United Kingdom) and HSBC Group Nominees UK Limited (a tax resident of United Kingdom), is in excess of the rate provided under Article 11 under the India - United Kingdom DTAA (i.e. 15%), and thus the tax paid over and above the rate provided in the DT AA is eligible for refund.*
>
> *The Appellant craves leave to add, alter, delete or modify the above ground of appeal".*

12.2 The assessee has made the following submissions in support of his prayer for admission of additional grounds:

> *"To*
> *The Hon'ble Members of the*
> *Income-tax Appellate Tribunal,*
> *A Bench, Hyderabad 2-*

Re: M/S HSBC Electronic Data Processing India Private Limited ('HDPI' or 'Appellant') Assessment Year 2014-15 - AAACH8235M

Sub: Request for permitting to file additional grounds of appeal.

Appeal fixed on 26 November 2019.

ITA No: 1249/Hyd/17 (Assessee Appeal)

Assessment Year: 2012-13

Dear Sir/ Madam,

The Appellant has filed an appeal before the Hon'ble Income Tax Appellate Tribunal (' IT A T or 'Tribunal') challenging the order dated 01 March 2017 passed by the Learned Commissioner of Income-tax (Appeals) - 7, Hyderabad ['Ld. CIT(A)'] under Section 250 of the Income Tax Act, 1961 ('the Act') for AY 2012-13 against the assessment order passed by Learned Assistant Commissioner of Income Tax, Circle 2(2), Hyderabad ('Ld. AO') under Section 143(3) of the Act.

In the above preferred appeal, the Appellant has raised grounds challenging the additions sustained by the Ld. CIT(A). The Appellant further wishes to raise additional grounds of appeal as under:

1. Additional ground to claim deduction of education cess paid on income tax for the year. With regard to the additional ground relating to deduction of education cess, it is submitted that the Appellant out of abundant caution had not claimed the said deduction in the return of income for the year under consideration in the absence of clarity in respect of the said issue. However, recently, the Hon'ble Rajasthan High Court, vide order dated 31 July 2018, in the case of CIT vs. Chambal Fertilisers and Chemicals Ltd. (ITA No. 52 of 2018) and subsequent decisions of Hon'ble Pune Tribunal in case of Bajaj Allianz General Insurance Company Ltd (ITA No 1111, I 112/Pn/2017) dated 24 July 2017 and Hon'ble Mumbai Tribunal in case of Tata Steel Ltd (ITA No 5616,4043/M/2012) dated 12 September 2019, has held that education cess is allowable as an expenditure while computing the total income.

In light of the above judicial development, the Appellant wishes to file an additional ground of appeal for claiming deduction as an expense under section 3 7(1) of the Act in respect of education cess paid on income-tax.

2, Additional ground to restrict and refund the Dividend Distribution tax ('DDT') on dividend distributed/ paid to

non-resident shareholders in terms of applicable Double Taxation Avoidance Agreement ('DTAA')

With regard to additional ground relating to claim of refund on account of excess of DOT paid as applicable as per Treaties on dividend paid to non-resident, the Appellant could not claim the same in the return of income filed on 28 November 2012 or during the course of assessment proceedings concluded on 29 February 2016 or during proceedings before Ld. CIT(A) concluded on 1 March 2017.

Subsequently, the Hon'ble Supreme Court in the case of Union of India vs. Tata Tea Co. Ltd. (85 taxmann.com 346) vide order dated 20 September 2017 and Godrej & Boyce Manufacturing Company Ltd vs. DCIT (81 axmann.com 111), has held that the dividend distribution tax under section I 15-0 is a tax on "dividend income" paid by the company.

Further, the Hon'ble Mumbai Tribunal in case SGS India Private Ltd (ITA No 2467/Mum.l2014) dated 3 July 2017 has admitted the additional ground raised by the taxpayer company in respect of refund of DOT paid in excess of Treaty rate as applicable on the dividend paid to foreign shareholders.

Accordingly, in view of the above, the Appellant wishes to file an additional ground before your Honours to claim refund of excess DOT paid on dividend distributed to foreign shareholders as tabulated below:

S.No	*Name of the shareholder*	*Amount of dividend paid (NUR)*	*DDT paid (INR)*
1	*HSBC Holdings BV Netherlands, UK*	*3,596,281,936*	*583,406,837*
2	*HSBC Finance, Netherlands*	*832*	*135*
3	*HSBC Group Nominees UK, Ltd*	*100,582,456*	*16,316,989*

Your Honours would appreciate that additional grounds can be raised at appellate stages, if the facts in connection with the issues raised, are on record.

In support of the said proposition, the Appellant relies on the following judicial precedents in this regard.

a) National Thermal Power Co. Ltd. Vs. CIT 229 ITR 383 (SC)

b) Jute Corporation of India Ltd. 187 ITR 688 (SC).

c) Ahmedabad Electricity Co. Ltd. 199 ITR 351 (Born) FB)

d) M/s Wheels India Ltd (ITA No 251/Mds/20 1 0) dated 14 March 2014

e) All Cargo Global Logistics Ltd. vs. DCIT - IT AT Special Bench- ITA No. 5018/Mum/20 I 0 dated 21 May 2012.
In view of the above, we request your Honours to kindly consider our additional grounds of appeal and decide on merits".

12.3 However, these grounds being legal and not raised either before the Assessing Officer or the CIT (A), we deem it fit and proper to admit the same and remand the same to the file of the Assessing Officer for examination of the issues raised therein in accordance with law.

13. In the result, assessee's appeal is partly allowed for statistical purposes.

14. To sum up, Revenue's appeal is dismissed and assessee's appeal is partly allowed.

Order pronounced in the Open Court on 16th April, 2021.

Sd/-	**Sd/-**
(LAXMI PRASAD SAHU) **ACCOUNTANT MEMBER**	**(P. MADHAVI DEVI)** **JUDICIAL MEMBER**

Hyderabad, dated 16th April, 2021.
Vinodan/sps
Copy to:

S.No	Addresses
1	HSBC Electronic Data Processing India P Ltd Plot Nos.3 & 4, Survey No.64, Hitech City, Hyderabad 500081
2	ACIT/Dy. CIT, Circle 2(2) 5th Floor, Signature Towers, Kondapur, Hyderabad 84
3	CIT (A)-7, Hyderabad
4	Pr. CIT – 2, Hyderabad
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order