<u>आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ</u> "ए" <u>मुंबई</u>

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

BEFORE HON'BLE S/SHRI JOGINDER SINGH (JM), AND RAJESH KUMAR,(AM)

आयकर अपील सं./I.T.A. No.946 and 723/Mum/2013

(निर्धारण वर्ष / Assessment Year :2007-08 and 2008-09)

M/s Aptech Limited, A-65 MIDC, Marol, Andheri (E), Mumbai-400093	**<u>बनाम</u>**/ Vs.	Dy.Commissioner of Income Tax, 8(1), R No.260-C, 2nd floor, Aayakar Bhavan, M K Road, Mumbai-400020
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.1227 and 1228/Mum/2013

(निर्धारण वर्ष / Assessment Year :2007-08 and 2008-09)

Dy.Commissioner of Income Tax, 8(1), R No.260-C, 2nd floor, Aayakar Bhavan, M K Road, Mumbai-400020	**<u>बनाम</u>**/ Vs.	M/s Aptech Limited, A-65 MIDC, Marol, Andheri (E), Mumbai-400093
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.1271/Mum/2014

(निर्धारण वर्ष / Assessment Year :2009-10)

M/s Aptech Limited, A-65 MIDC, Marol, Andheri (E), Mumbai-400093	**<u>बनाम</u>**/ Vs.	Dy.Commissioner of Income Tax, 8(1), R No.260-C, 2nd floor, Aayakar Bhavan, M K Road, Mumbai-400020
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.2003/Mum/2014

(निर्धारण वर्ष / Assessment Year :2009-10)

Dy.Commissioner of Income Tax, 8(1), R No.260-C, 2nd floor, Aayakar Bhavan, M K Road, Mumbai-400020	**बनाम**/ Vs.	M/s Aptech Limited, A-65 MIDC, Marol, Andheri (E), Mumbai-400093
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN. :AADCA0602L

अपीलार्थी ओर से / Assessee by:	Shri S C Tiwari and Rutuja N Pawar
प्रत्यर्थी की ओर से/Respondent by	Shri A Ramchandran

सुनवाई की तारीख / Date of Hearing : 26.7.2016
घोषणा की तारीख /Date of Pronouncement : 6.10.2016

आदेश / O R D E R

Per RAJESH KUMAR, Accountant Member:

These are six cross-appeals filed by the respective parties. Cross-appeals for the assessment years 2007-08 and 2008-09 are directed against the order passed by the ld. CIT(A)-16, dated 16.11.2012. The cross-appeals for the assessment year 2009-10 are directed against the order dated 24/12/2013 passed by the ld.CIT(A)-16. Since, the appeals before us relate to the same assessee, therefore, for the sake of convenience, they are clubbed together, heard together and disposed of by this consolidated order.

2. **I.T.A. No.946/Mum/2013 (BY ASSESSEE)**

Grounds of appeal taken by the assessee are reproduced below :

1.1 On facts and in the circumstances of the case, the learned CIT(A) erred in law and on facts in upholding the contention of the learned

Assessing Officer that the Courseware of Rs.5,02,29,679/- is not eligible for depreciation at the rate of 60%.

1.2 On facts and in the circumstances of the case. the learned CIT(A) erred in law and on facts in upholding the contention of the learned Assessing Officer that the Courseware is eligible for depreciation @ 15%.

1.3 On facts and in the circumstances of the case the learned CIT(A) erred in law and on facts in upholding the disallowance of Rs.1,67,76,003/- made by the learned Assessing Officer being 20% or full depreciation of Rs.8,38,80,014/- claimed on computers, software and courseware as depreciation attributable to course ware.

2. On facts and in the circumstances of the case the learned CIT(A) erred in law and on facts in upholding the disallowance of 10% of Rs.1,04,80,500/- i.e Rs.10,48,050/- made by the learned Assessing Officer of expenses incurred on account of Lucknow School project

3. On facts and in the circumstances of the case the learned CIT(A) (A) erred in law are on facts in upholding the disallowance made by the learned Assessing Officer of ESOP charges of Rs.11,06,563/-

4. On facts and in the circumstances of the case the learned CIT(A) on facts in upholding the disallowance by the learned Assessing Officer u/s 40(a)(ia) or the Act or hire charges to the extent or Rs.4,46,593/-.

5. On facts and in the circumstances of the case the learned CIT(A) erred in law and on facts in upholding the disallowance by the learned Assessing Officer of provision of rebate amounting to Rs.2,50,00,000/-.

6. On facts and in the circumstances of the case the learned CIT(A) erred in law and on facts in upholding the disallowance by the learned Assessing Officer of provision for leave encashment to the extent of Rs.19,00,418/- (Rs.40,71,369/-being disallowance made by the learned Assessing Officer and confirmed by CIT(A) less Rs.21.70,951/70 being the leave encashment actually paid by the appellant during the year and directed by the CJT(A) to learned Assessing Officer to verify and allow the claim to such extent.)

7.1. On facts and in the circumstances of the case the learned CIT (A) erred in law and on facts in upholding the contention or the learned Assessing Officer that disallowance u/s 14A of the Act could be computed by applying the provisions of rule 8D of the Income Tax Rules. 1962 for assessment year 2007-08..

7.1.1 On facts and in the circumstances of the case the learned CIT(A) erred in law and on facts in upholding the contention or the learned assessing officer that the Investments of the appellant as on 01-04-2006 were Rs.63.97.33,668/- and R.s.10,00,000 as claimed by the appellant and as on 31.03.2007 were of Rs.82.52.36,269/- and not Rs.23,88,60,346/- as claimed by the Appellant and therefore the average investment were or Rs.73.24.84.968/- and Rs.11,99,30,173 as claimed by the appellant.

7.1.2 On facts and in the circumstances of the case the learned err (A) erred in law and on facts in upholding the contention of the learned assessing officer that the total assets of the appellant as on 1.4.2006 were Rs.142.10,95,818/- and not Rs.150,19,18,020/- as claimed by the appellant and as on 31.03.2007 were of Rs.172,33,26,035/- and not 1,76,74,75,925/- as claimed by the appellant and therefore, the average total assets were of Rs.157,22,10,927/- and not Rs.163,46,96,973/- as claimed by the appellant.

7.2 On [acts and in the circumstances of the case the learned CIT(A) erred in law and on facts in upholding the contention of the learned Assessing Officer that while computing deduction u/s 14A of the Act, . gross interest paid of Rs. 2,56,81,429/-is to be taken as amount of expenditure by way of interest and not the net interest of Rs.2,37,19,435/-. (Interest Paid R.s 2.56,81,429/- (-) Rs 19,61,994/-- being interest received)

8. On facts and in the circumstances of the case the learned CIT(A) erred in law and on facts in upholding the addition by the learned Assessing Officer u/s 68 of the Act to the extent of Rs.5,15.396/- on the basis of inadequate ITS information available with the department.

9. The order of the Commissioner (Appeals) being contrary to law, evidence and facts of the case should be set aside, amended or modified in the light of grounds deduced above.

10. Each ground of appeal hereinabove is independent and without prejudice to each other."

3. Facts of the case are that the assessee-firm filed its return of income for the assessment year 2007-08 on 30.11.2007 declaring total income at Rs.NIL after setting off of earlier years brought forward business losses and

unabsorbed depreciation. The said return was revised on 26.9.2008 declaring a loss of Rs.3,14,06,293/- which was processed u/s 143(1) of the Act. Thereafter, scrutiny proceedings were initiated against the assessee and statutory notices under section 143(2) and 142(1) were issued and served upon the assessee.

4. The issue raised in ground no.1 is against the confirmation of deletion of Rs.1,67,76,003/- by the ld.CIT(A) upholding the order of the AO that the assessee was not entitled to depreciation at the rate of 60% on the courseware of Rs.5,02,29,679/- and actually allowing the depreciation at the rate of 15%. Thus, the disallowance has arisen because of reduction in the rate of depreciation from 60% to 15% on cost of courseware.

5. During the course of assessment proceedings, the AO found that the assessee has claimed depreciation at the rate of 60% whereas as a matter of fact, the assessee was entitled to depreciation at the rate of 15%. Accordingly, the assessee was issued show notice which was replied by the assessee by stating that the company operated various types of coursewares for training and e-learning which were customized. The assessee imparts training using various software like JAVA, Dotnet, C Language, C++, flat scripting etc. The assessee developed its own courses for e-learning and training which are developed into computer software called courseware. The ld. AR submitted that the assessee has to offer customized e-learning training as per the requirements of each individual customer and these are marketed

as " tailor made product" customized as per the requirement of each customer . There was continuous process of enhancement, upgradation and production new courses in the form of new courseware as these are required to be tuned to the changing requirements of training and e-learning of customers of the assessee. The these specific purposed software developed by the assessee for training and e-learning were called courseware. The AO not finding reply of the assessee as convincing came to the conclusion that the courseware were not software and therefore not entitled to high depreciation at the rate of 60% as was allowable on the computer hardware and software. The AO accordingly restricted the depreciation to 15%, thereby disallowing a sum of Rs.1,67,76,003/- on account of excess depreciation . The ld. CIT(A) confirmed the action of the AO by observing and holding as under :

> *"5.3 The Assessing Officer's order, submissions made for the appellant and material on record have been considered. As per the Act and IT. Rules computer software means any programme recorded in the specified or other information storage device. It means a computer programme, and not merely a manual or set of instructions.*
>
> *As per Wikipedia, Computer software is a collection of computer programs and related data that provides the instructions for telling a computer what to do and how to do it. Software refers to one or more computer programs and data held in the storage of the computer. In other words, software is a set of programs, procedures, algorithms and its documentation concerned with the operation of a data processing system, Program software performs the function of the program it implements, either by directly providing instructions to the digital electronics or by serving as input to another piece of software.*
>
> *Other explanations state that Software is a generic term for organized collections of computer data and instructions, often broken into two major categories: system software that provides the basic non-task-*

specific functions of the computer, and application software which is used by users to accomplish specific tasks, System software is responsible for controlling, integrating, and managing the individual hardware components of a computer system so that other software and the users of the system see it as a functional unit without having to be concerned with the low-level details such as transferring data from memory to disk, or rendering text onto a display. Generally, system software consists of an operating system and some fundamental utilities such as disk formatters, file managers, display managers, text editors, user authentication (login) and management tools, and networking and device control software, Application software, on the other hand, is used to accomplish specific tasks other than just running the computer system. Application software may consist of a single program, such as an image viewer; a small collection of programs (often called a software package) that work closely together to accomplish a task, such as a spreadsheet or text processing system; a larger collection (often called a software suite) of related but independent programs and packages that have a common user interface or shared data format, such as Microsoft Office, which consists of closely integrated word processor, spreadsheet, database, etc.; or a software system such as a database management system, which is a collection of fundamental programs that may provide some service to a variety of other independent applications, Software is created with programming languages and related utilities, which may come in several of the above forms: single programs like script interpreters, packages containing a compiler, linker and other tools; and large suites (often called Integrated Development Environments) that include editors, debuggers, and other tools for multiple languages.

Merely by using the term software does not imply that it would come within the ambit of the specific definition under the Act. The appellant has used the term courseware, which is basically a manual for trainers/ trainees which has been digitized and is being used for training their students/ trainers. Merely because the course content is on a soft copy it does not mean that it can be held to be computer software. The Assessing Officer's action in denying depreciation at the higher rate as claimed is therefore found correct and is confirmed."

6. Aggrieved by the order of ld.CIT(A), the assessee is in appeal before us. The ld. AR submitted before us that the CIT(A) was grossly erred in holding that the coursewares were basically manuals/programmes for

trainers /trainees which could not be taken to mean that these training manual consisted of computer softwares. The ld. CIT(A) held that these courseware were only readable with software. The ld. AR submitted that these courseware were developed on customized basis which were not used as standard educational tools or method for training and e-learning. Each course was designed as per the customer's requirement independently by taking into account the nature of business and its training and e-learning requirements. The ld. AR submitted that in I T Rules, 1962, the computer software was treated as definite asset under the head plant and machinery and software was eligible for depreciation at the rate of 60%. The ld. AR also distinguished the difference between the hardware and software. Anything that can be stored electronically is computer software and machines used to run the software is called hardware. Thus, following the same analogy of electronically storage of data as software , the coursewares (softwares) which were used for training and education by the assessee for its customers were nothing but computer softwares. These education softwares were a kind of computer software the primary purpose of which was teaching and self learning. Therefore, the ld. AR submitted that the coursewares were eligible for depreciation at the rate of 60%. The ld. AR also submitted that the depreciation has been allowed at the rate of 60% for the assessment years 2004-05 to 2013-14 which were scrutinized and assessments were framed u/s 143(3) of the Act.

7. On the other hand, the ld. DR relied on the orders of authorities below and submitted that coursewares in no way consisted of the software and therefore the assessee was not entitled to depreciation at the rate of 60%. The ld. DR submitted that these courses were consisted of educational manuals used for training and therefore could not be said or treated as softwares. The ld. DR prayed that the order of ld. CIT(A) be upheld by dismissing the appeal of the assessee.

8. We have considered the rival submissions, perused the materials placed before us including the orders of authorities below. We find that the assessee is engaged in the business of imparting computer training and education on customized basis as per the requirements of the customers. The assessee developed various types of educational software/special courses keeping in view of the requirements of each institution/customer and these courses are designed and developed keeping in view of the requirements which varies from customer to customer, from industry to industry and these courses when combined with the software were called coursewares. In our view these courses are nothing but specially designed computer softwares meant for training and e-learning. We find that the ld. CIT(A) has wrongly held that these courses are basically manual which are used by the assessee in training institutes and mere fact that these manuals were on software could not be taken to mean that these are computer softwares. We further find that the department has allowed depreciation to the assessee at

the rate of 60% in the previous and succeeding years even in the assessments framed u/s 143(3) of the Act and thus, the department cannot be allowed to take different view in the different assessment years qua the same assets which are nothing but specialized software or customized training softwares which are eligible for depreciation at the rate of 60% as per the Income Tax Rules and the same was correctly depreciated at the rate of 60% by the assessee. Accordingly, we set aisle the order o ld.CIT(A) and direct the AO to allow the deprecation at the rate of 60%. The ground raised by the assessee is allowed.

9. The issue raised in the second ground of appeal is qua the confirmation of disallowance of Rs.10,48,050/- by the ld. CIT(A) as made by the AO at the rate of 10% of Rs.1,04,80,500/- being the expenditure incurred on Lucknow School Project. During the course of assessment proceedings, the AO found that the percentage of expenses in relation to revenue is increased substantially and disproportionately from financial year 2003-04 and therefore the assessee was asked to produce vouchers etc in order to justify such steep hike in the expenses which were 55% in the financial year 2003-04 and 75% in the financial year 2006-07. The AO disallowed 10% of the expenditures claimed for the reasons that the assessee failed to produce any bills and vouchers or failed to give any justification for the said steep rise in the expenses and thus worked out disallowance at Rs.23,34,728/- being 10% of Rs.2,33,47,380/-. The ld.

CIT(A) confirmed the disallowance to the extent of Rs.10,48,050/- by holding that the AO had wrongly taken the figure of Rs.2,33,48,380/- which were the total of expenses from the financial years 2004-05 to 2006-07 and thus sustained the disallowance at the rate of 10% of the total expenses incurred in respect of Lucknow School project after calling remand report from the AO who admitted in the remand report dated 20.11.2011 that the disallowance was wrongly calculated by taking wrong figure of expenses. The ld. CIT(A) rejected the submissions and pleas of the assessee that these expenses were actually incurred for the business of the assessee wholly and exclusively and the books of account were audited as per the Companies Act, 1956 and also as per the Income Tax Act, 1961.

10. The ld. AR submitted before us that the increase in expenses was bonafide and therefore there was no justification in making adhoc disallowance. The ld. AR submitted that the payments were duly vouched and audited and were made through account payee cheques. The ld. AR finally submitted that the expenditures incurred by the assessee for its business could not be disallowed on the basis of mere conjecture and surmises and it was a settled law that the disallowance of expenditure on adhoc basis could not be sustained which was made without any reasons and justification. Finally ld AR prayed that the disallowance be deleted by setting aside the order of the ld. CIT(A) on this issue.

11. The ld. DR relied on the orders of authorities below.

12. We have carefully considered the rival submissions and perused the material placed before us including the orders of authorities below. We find that the assessee has incurred expenses on Lucknow school project which have been increased by 25% over the last three years. The reasons cited by the assessee for such increase was that the expenses which were as per terms as agreed in the memorandum of agreement and accordingly the assessee made payments through banking channels as agreed. We find merit in the submissions of the ld. AR that mere increase in expenditure was not sufficient ground for disallowance on estimation basis which is no basis in our opinion and is not justified particularly when these expenses were incurred in terms of agreement between the assessee and franchisees. The ld. CIT(A) has not given any cogent and solid reasons to support the addition made by AO. The assessee was maintaining proper bills and vouchers which were subject of various types of audit . We therefore of the view that the adhoc disallowance at the rate of 10% when the assessee is maintaining books of accounts which audited and supported with bills and vouchers and the payments were made by account payee cheques as per the agreements with franchisees can not be sustained especially when the AO took the total expenses of three years and thereby making disallowance of Rs.23,34,738/- in a casual manner. In view of these facts and the manner in which adhoc disallowance was made, we are inclined to set aside the order of the ld. CIT(A) and direct the AO to delete the addition.

13. The issue raised in the third ground of appeal is with regard to the confirmation of disallowance of Rs.11,06,563/- by the ld. CIT(A) which was made by the AO in respect of ESOP charges. During the course of assessment proceedings, the AO found that the assessee has claimed ESOP charges to the tune of Rs.11,06,563/- which the AO found to be of capital nature and accordingly issued show cause notice dated 14.9.2009. As per the AO, the assessee did not reply to the show cause notice and as a result of which he treated the said expenditure as capital in nature as being incurred for issue of equity shares which were issued to the eligible employees. Aggrieved by the order of the AO, the assessee preferred an appeal before the ld. CIT(A).

14. The ld CIT(A) also dismissed the appeal of the assessee on this issue by upholding the order of AO by rejecting the various submissions and arguments of the assessee which have been incorporated 7.2 of the appeal order. The assessee submitted before the CIT(A) that ESOP expenses were wrongly treated by the AO as expenses incurred to increase the share capital whereas as a matter of fact employees stock options were given at a discounted price as against the prevailing market price and the difference was amortised and written off on straight line basis over vesting period and included the same under the head of "Salaries and Other Allowances" and therefore these were actually incurred on employees and have been treated as such after following the procedure laid down by the regulator SEBI. As

such these were not of capital nature and not incurred as share issue expenses. However the CIT(A) not convinced with the submissions of the assessee dismissed the ground raised by the assessee by giving detailed findings as incorporated in para 7.3 of the appeal order by holding as under.-

"…..

The circumstances in the present case in appeal are similar, options have been offered by the company to its employees and vesting period and period over which options can be exercised has been mentioned, however loss remains notional in absence of anything to show that options were actually exercised. Thus the claims remain a contingent liability which is not allowable under the Act

In these circumstances and in view of the above discussion both on facts " and law the assessing officer's action in not allowing deduction is confirmed. ."

15. The AR vehemently submitted before us that the ESOP charges are not of capital in nature as these were neither incurred on issue of shares nor were of contingent nature as held by the ld CIT(A). The ld. AR submitted that the ESOP charges amounting to Rs.11,06,563/- were not incurred for the purpose of increasing the share capital and thus facts were grossly misunderstood by the AO. The ld. CIT(A) upheld the action of the AO by holding that the same were contingent in nature. The ld.AR further submitted that the employees of the company were given stock option at discounted price vis a vis the prevailing market price and the said discount was written off on straight line basis over the vesting period, and the amount written off each year used to be shown under the head salary and allowances as these were incentives given to the employees and accordingly treated as

expenditure incurred on employees in the respective period over the vesting period and thus, these were not incurred on capital account or were not of contingent nature. The ld. AR submitted that the assessee has followed the procedure as they drawn from SEBI with regard to the employee's stock option scheme. The ld AR further submitted that the deduction of the said expenses by amortising and writing off over the vesting period were allowable as revenue expenditure as held by the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. v. CIT (1997) 225 ITR 802 (SC). These expenditures were incurred for the benefit of the employees and these options were not transferable. It was also argued that the guidelines issued by the SEBI and ICAI have been followed in giving accounting treatment to these expenses. The ld. Counsel submitted that Special Bench of the Bangalore Tribunal in the case of Biocon Ltd. Vs Deputy Commissioner of Income-tax (LTU), Bangalore [2013] 25 ITR(T) 602 (Bangalore - Trib.) have set at rest all the doubts with regard to the treatment of ESOP charges. The Special Bench held that the objective of stock employees option was not to raise share capital but simply the mode of compensating the employees. The Special Bench of the Tribunal further held that issue of shares at an discounted price on a future date in view of the services satisfactorily rendered by the employees was nothing but an expenditure u/s 37(1) of the Act. It was further held that the expenditures is incurred on the date of vesting of option. Further the ld.AR relied on the decision of the Hon'ble Madras High Court in the case of CIT v. PVP

Ventures Limited (2013) 90 DTR 340 (Mad.)(HC) and the decision of Hon'ble Delhi High Court in the case of CIT Vs LEMON TREE HOTELS LTD in ITA 107/2015 dated 18.8.2015 which fully endorsed the view that ESOP charges is allowable as revenue expenses. It was submitted by the ld.AR that the assessee's ESOP Scheme 2004 and it's accounting in the books of account of the assessee were made on the vesting date of exercising of option by the employees and also submitted that the amount of options which left for the want of exercise of option by the employees have been duly written back in the books of accounts of assessee as per the SEBI guidelines and offered the same for taxation.

16. The ld. DR on the other hand relied on the orders of the authorities below and prayed that the ground of the assessee be dismissed accordingly.

17. We have heard the rival contentions and perused the material on record including the case laws relied by the ld.AR. We find that the assessee has floated the scheme for the entitled Employees as Stock Option Scheme 2004 and issued shares to the employees at a discounted price as compared to the prevailing market rate and the difference shown between the issue price and the market price was amortised and written off over the vesting period on straight line method. The said scheme was floated to remunerate the employees of the assessee and primary objective of the whole exercise was not to raise share capital but incentivise for consistent and strenuous effort of the employees during the vesting period. Under the said scheme,

the assessee did not incur any expenses to issue shares at the discounted prices but granted only option to the employees which will be exercised at a later date during the vesting period and only at that point of time the company increase its capital by issue of shares at discounted price and therefore the incident or event of granting option does not cast any liability on the company. We are not in agreement with the objection of the AO that the said expenditure was incurred by the company to increase share capital of the company and thus, constituted the capital expenditure nor with opinion and conclusion drawn by the ld.CIT(A) that the liability is contingent in nature, whereas the arguments advanced by the ld.AR are quite convincing that the scheme was floated to reward the employees of the company and the difference between the discounted price and prevailing market price was amortised over the vesting period. The case of the assessee finds strong support from the number of the decisions referred and relied upon by the ld.AR. In the case of Biocon Ltd (supra), the Special Bench of the Bangalore Tribunal has held that discount on issue of shares to the employee stock option is allowable deduction in computing the income in the profit and loss account of business or profession and the same was on account of ascertained liability and not contingent liability. It was also held that by issuing shares at discounted price under the scheme ESOP is simply one of the motive to compensate the employees for their services and is part of the remuneration . In the case of PVP Ventures Limited (supra), the Hon'ble Madras High Court has held that the assessee had to follow SEBI

guidelines and by following such directions the assessee has claimed ascertained amount as eligible for deduction arising on account of Employees Stock Option Plan. In the case of LEMON TREE HOTELS LTD (supra) the Hon'ble Delhi High Court upheld and fully endorsed that ESOP was an allowable expenses. In view of the facts as discussed above and the ratio laid down in the various decisions, we are of the view that the assessee has rightly written off ESOP charges of Rs. 11,06,563/- and therefore, the order of the ld. CIT(A) is wrong and cannot be sustained. Accordingly, we set aside the order of ld.CIT(A) and direct the AO to delete the disallowance of Rs.11,06,563/-.

18. The issue raised in grounds of appeal no.4 is against the upholding the disallowance of Rs. Rs.4,46,593/-by the learned CIT(A) as made by Assessing Officer u/s 40(a)(ia) or the Act.

19. We have considered the rival submissions and perused the material on record including the order of ld. CIT(A) and AO. We find that the AO made the disallowance of entire hire charges of Rs.36,75,372/- by referring the provisions of section 40(a)(ia) or the Act as amended with effect 1.4.2015 which was reduced by the first appellate authority to Rs.4,46,593/- after calling the remand report dated 20.11.2011 which is reproduced by the ld.CIT(A) at page 19 of the impugned order. It was also submitted before the ld. CIT(A) that the said amount comprised of expenditures incurred by the staff for hiring vehicle out of transport advances given to them on behalf

of the assessee. The ld. CIT(A) upheld the disallowance on the ground that the payment exceeding Rs.20,000/- in each instance and aggregate of payments to each employee/payee exceeding Rs.50,000/. The ld. AR vehemently submitted before us that the ld. CIT(A) has not specified the provision under which the assessee was liable to deduct the tax at sources from these payment by referring to page 617 of the paper book. The ld. AR also submitted that these expenses were incurred by employees out of their tour advances while they were on tour. Looking into the facts and circumstances of the case, we find that the assessee had incurred these expenses through employees out of their travelling advances for hiring motor vehicles during the course of their employment and the expenditures incurred by them out of travelling advances. In our view, the same are not liable for deduction u/s 40(a)(ia) of the Act as it is the settled law that re-imbursement to the employees is not laible to the provisions of TDS . Accordingly, we direct AO to delete the addition.

20. The issue raised in the fifth ground of appeal is against the upholding the disallowance of Rs.2,50,00,000/- by the ld. CIT(A) being the provisions for rebate.

21. The brief facts of the case are that the assessee entered into a contract with Directorate of Education, Delhi for imparting computer education and also supplying the related accessories in the government and government aided schools in the National Capital region of Delhi. The

assessee raised the bills to the Directorate of Education and Directorate of Education withheld certain payments on the ground of delayed installation of infrastructure, non performance of infrastructure and faculty absenteeism etc. The assessee reduced the amount billed and raised to Delhi Government by way of a provisions of rebate to the extent the amount withheld for deficiency in the services by the assessee. The AO disallowed the amount of Rs.2,50,00,000/- on the ground that the assessee did not submit details of all these expenses and same were in the nature of contingent liability. Before the ld.CIT(A), during the course of appellate proceedings it was submitted that the assessee did not make any provision for anticipated liability but short payment received from Directorate of Education, Government of Delhi was provided on actual basis. It was also submitted that the said withholding of the amount were still not received in the subsequent years and there were no dispute pending for recovery against the customer qua the said amount. The ld. CIT(A) held that the amount written off by the assessee as a provision of rebate but it was claimed as bad debt. The ld. CIT(A) further noted that under the provisions of section 36(1)(vii) of the Act the deduction for debts written off can be allowed only where the said amount have been claimed as income by the assessee which had been included as income of the assessee in the earlier years. Since the assessee did not fulfilled the primary condition laid down in the above section, the ld.CIT(A) upheld the disallowance made by the AO.

22. We have heard the rival contentions and perused the material placed before us including the orders of authorities below. The ld. AR argued before us that the provision of rebate of Rs,2,50,00,000/- represented that part of billed amount due from Govt of Delhi but not accepted by the Directorate of Education of Delhi Government. The ld.AR submitted that in the mercantile system of accounting there is no accrual of income if the billed amount was not accepted by the customers. The ld. Counsel in defence of his argument relied upon the decision in the case of :

a) CIT Vs. Bharat Petroleum Corporation Ltd. (1993) 202 ITR 492 (Cal)
b) CIT V/s Kerala State Drugs and Pharmaceutical Lts 192 ITR 1 (Ker);
c) CIT V/s Sikaria Sons and co. 216 ITR 440(Gau);
Indian Overseas Bank V/s CIT 183 ITR 200(Mad)

The ld.counsel further submitted that the assessee fulfilled all the conditions enumerated under section 37(1) of the Act. The ld. Counsel also submitted that Rs.2,50,00,000/- was part of the billed amount which was already treated and included in the assessee's income by referring to the ledger account of the Directorate of Education in the books of account of the assessee which is submitted at page 621 to 628 of the paper book. The similar provisions for rebate were made in earlier years qua the amount billed but not acknowledged by the Directorate of Education Delhi. The provisions for rebate of Rs.3,00,00,000/- for the assessment year 2006-07 and Rs.10,80,00,000/- for the AY 2010-11 were allowed by the revenue in the assessment proceedings completed u/s 143(3) of the Act. Finally the ld. AR

prayed that since the assessee has already credited the billed amount in its books of accounts and treated as income after raising bills on the Directorate of Education, Delhi, which was partly admitted by the customer and therefore the AR of the assessee submitted that part of the amount which was not acknowledged by the customer is allowable as genuine business loss and therefore prayed for the deletion of disallowance which stands allowed by the department in the succeeding and preceding years.

23. The ld. DR heavily relied on the orders of the authorities below by submitting that the provision for rebate was wrongly claimed by the assessee to set off the profit which was of contingent in nature and did not satisfy the conditions laid down u/s 36(1)(vii) of the Act and prayed for upholding the appellate order of ld.CIT(A).

24. Considering the facts of the case that the Directorate of Education, Government of Delhi to whom the assessee rendered services of computer education , training and installation of infrastructure for imparting training denied the part payment of the billed amount for rendering the deficient services to customer and the said amount was never received by the assessee in subsequent years and no litigation was pending by the assessee against such customers in any court of law and therefore the said amount was not recovered as being denied by the customers for the reasons stated above. We find that the provision of rebate which is a kind of de-recognizing the revenue which was already credited in the books of accounts of the

assessee as is clear from the ledger account of the Directorate of Education, New Delhi Government in the books of assessee. In our view provisions of rebate was rightly claimed by the assessee upon the same being denied by the person from whom it was receivable and also satisfies the conditions as laid down in section 36(1)(vii) of the Act particularly when the similar deductions were allowed by the department in the earlier and succeeding years. We also find that the assessee's case find strong support from the decisions cited above in which it has been held that merely showing all the bill is not accrual of income unless the bills amount are accepted by the customers. In the case of Bharat Petroleum Corpn. Ltd. (supra), it was held that merely raising the claim of bill does not create any legally enforceable right to receive the same. It was also held that the amount cannot be treated as assessee's income as the assessee has not acquired any legal right to raise the same as the customer did not accept or settle the same. In the case of Commissioner of Income-tax v. Kerala State Drugs & Pharmaceuticals Ltd (supra), it was held that mere entries made in the accounts did not represent any income accrued or received by the assessee. That excess amount credited in the books of the assessee was not assessable as its income. It was also held that the amount of supplementary bill disputed by the buyer which was ultimately set aside by the Hon'ble High Court several years back and later cannot be charged to tax in the year of raising of the such supplementary bills. Accordingly, we hold that the orders of ld. CIT(A) is not

correct and accordingly set aside the same and direct the AO to delete the disallowance of Rs. 2,50,00,000/-.

25. The issue raised in the ground no.6 is qua the upholding the disallowance of Rs.19,00,418/- being difference between the provision for leave encashment and the amount actually paid on that account as made by the AO by holding that the clause (i) of section 43B of the Act.

26. The brief facts of the case are that the assessee has provided an amount of Rs.40,71,369/- as provision for leave encashment. The AO during the course of assessment proceedings issued show cause notice to the assessee to explain as to why the provisions should not be disallowed. In reply to the show cause notice, the assessee submitted that the said provisions were made on the basis of actuarial report which was liability of the assessee and was accordingly provided. However, the AO not finding the reply convincing rejected the same by stating that the said provision is covered by the provisions of section 43B(f) of the Act and therefore not admissible. Accordingly, the AO disallowed Rs.40,71,369/-. The ld. CIT(A) partly allowed the claim of the assessee by allowing the relief to the extent of Rs.21,17,905/- being actual payment of leave encashment by rejecting the submissions of the assessee that the decision of the Hon'ble Supreme Court in the case of Bharat Earth Movers reported in 245 ITR 428 by observing that the said judgment covers the case of the assessee; that the amount provided by the assessee in respect of future liability would be allowable

subject to the fulfillment of certain conditions which the assessee has not satisfied and therefore the provisions were sustained to the extent of Rs. Rs.19,00,418/-.

27. We have carefully considered the rival submissions and perused the material placed before. We find that in the case of "Exide Industries Ltd" the Hon'ble Supreme Court has admitted the Special Leave Petition on the identical issue vide its order dated 8.5.2009 in SLP" (Civil No.22889/2008) allowing to file appeal by the revenue. We further find that the co-ordinate bench of the Tribunal in ITA No.5457/Mum/2013 (supra) following the decision of the Hon'ble Apex Court directed the AO to keep recovery of tax and interest in abeyance till the decision of the Supreme Court in SLP" (Civil No.22889/2008) of the department in the case of "Exide Industries Ltd" and it was further ruled by the Co-ordinate Bench that it would be open to the department to recover the outstanding demands in case the appeal of the department is allowed by the Apex Court. The operative part of the decision is reproduced below :

> *"9. In view of the observations of the Hon'ble Supreme Court, in our view, it will be proper to dispose of this appeal in the light of the order of the Hon'ble Supreme Court dated 08.05.2009 passed in the case of "CIT vs. Exide Industries Ltd." (supra). We therefore dispose of the present appeal with a direction that the assessee will pay the tax as if section 43B(f) is on the statute book, however, till the decision of the Hon'ble Supreme Court in the case of "CIT vs. Exide Industries Ltd." (supra), the Revenue will not recover the penalty and interest which may accrue till the decision of the appeal by the Hon'ble Supreme Court in the case of "Exide Industries Ltd." It would be open to the Department to recover the outstanding interest demand in case the Civil Appeal of the Department in the case of "Exide Industries Ltd."*

(supra) is allowed by the Hon'ble Supreme Court. Subject to our above observations, the matter is restored to the file of the AO to be adjudicated afresh as per the decision of the Hon'ble Supreme Court in the case of "Exide Industries Ltd." (supra)"

We find that the facts of the case before us is identical as decided by the coordinate bench in the decisions(supra) and therefore by following the decision of the bench respectfully , we restore the matter back to the file of the AO by setting aside the order of CIT(A) and decide the issue accordingly. The ground raised by the assessee is allowed for statistical purposes.

28. Grounds of appeal no.7 is with respect to disallowance made u/s 14A by the ld. CIT(A) by applying the provisions of section 14A r.w.r.8D of the Rules.

29. The brief facts of the case are that during the course of assessment proceedings, the AO noted that the assessee has received a dividend income of Rs.2,67,21,188/- from M/s Bejing Aptech Jade Bird Information Technology Co. Ltd. The AO also observed that the assessee made investments of Rs.23,85,10,346/- in the subsidiary companies in India and these subsidiary companies did not declare dividend during the year. According to the AO the investments made by the assessee in the subsidiary companies in India were with the motive to earn dividend income which would be exempt from tax as and when declared by the subsidiary companies. Accordingly the AO held that the interest paid by the assessee on the borrowed capital which was utilized to finance investments in the

subsidiary companies was not allowable and computed the disallowance by application of provisions of section 14A read with rule 8D of the Rules by relying on the decision of the Hon'ble Special Bench of ITAT, Delhi in the case of Cheminvest Ltd V/s ITO (2009) 121 ITD 318 (Delhi) (SB) and the M/s. Daga Capital Management Pvt. Ltd. (2008) reported in 26 SOT 603. Finally the AO computed the disallowance at Rs.1,56,27,270/- by applying the ratio laid down on the decision of Special Bench of the Delhi Tribunal on account of interest paid.

30. During the course of appellate proceedings, the ld. CIT(A) directed the AO to recalculate the disallowance by excluding the investment made in the foreign companies on the ground that the dividend received from the investment with foreign companies is not exempt from the tax and is taxable. During the year dividend received from foreign company Rs.2,67,28,188/- was shown in the profit and loss account as taxable income. It was also submitted before the ld. CIT(A) that no disallowance was required to be made under section 14A r.w.r.8D in respect of investments made in subsidiary companies on which no dividend was received during the year by relying on the case of S A Builder reported in 188 ITR 1 (SC). However, the ld. CIT(A) upheld the disallowance subject to re-working of the same by relying on the decision of Cheminvest Ltd (supra).

31. We have carefully considered the rival submissions and perused the material on the issue. It was argued by the ld.AR that the disallowance made

u/s 14A r.w.r.8D was made primarily by relying on the decision of the decision of the Special Bench of the Tribunal Delhi in the case of Cheminvest Ltd V/s ITO (2009) 121 ITD 318 (Delhi) (SB) which is no longer applicable as the same was reversed by the Hon'ble Delhi High Court as reported in (2015) 378 ITR 0033 (Del) wherein it has been held that no disallowance can be made on the notional basis on exempt income and has to be restricted the actual income claimed in the assessment year. The second limb of argument of the ld.AR was that the total investments made in the subsidiary companies were to the tune of Rs.23,85,10,386/- whereas the share capital of the assessee company were Rs.43,15,11,170/- by drawing our attention to page 57 of the paper book which is the copy of audited balance sheet as on 31.3.2007 and thus submitted that no interest disallowance is called for as the assessee's own fund were sufficient to cover the investment in the shares in subsidiary companies by strongly relying on the decision in the case of Hon'ble Bombay High Court in the case of SBI DHFL Ltd reported in 376 ITR 296 (Bom) and in the case of CIT V/s HDFC Bank Ltd reported in 383 ITR 529 (Bom). Considering the facts of the case and in the light of the various decisions cited above, we find that the assessee has made investment in the subsidiary companies during the year which is a finding of fact recorded by the authorities below. It is also clear from the copy of audited balance sheet as on 31.3.2007 that the assessee's own funds were sufficient to meet the investment in the subsidiary company. Moreover, the investments made in the subsidiary companies were primarily made not with the objective of

earning dividend but made out of strategic considerations to which the provisions of section 14A cannot be applied as has been held in the case of Commissioner of Income-tax v.Oriental Structural Engineers (P.) Ltd. 2013] 32. taxmann.com 210 (Delhi), Garware Wall Ropes Ltd Vs. Addl. CIT (2014)(*65 SOT 86*)(*Mum*). and in the case of M/s JM Financial Limited V/s Addl CIT(ITA No.4521/M/2012. We, therefore, following the ratio laid down in the above decisions, delete the disallowance made u/s 14A by setting aside the order of ld.CIT(A) and directing the AO accordingly.

33. Ground no.8 is in respect of upholding the addition of Rs. Rs.5,15,396/- by the AO made u/s 68 of the Act on the basis of ITS information available with the department.

34. Brief facts of the case are that the AO during the course of assessment proceedings observed from the ITS details that assessee has received fees for professional/technical and other services amounting to Rs.1,73,41,224/- and asked the assessee to reconcile the same. However, the assessee could not reconcile the same and was not able to explain whether the same was offered for taxation or not. Accordingly the AO added to the total income of the assessee an amount of Rs.1,73,41,224/- u/s 68 of the Act by holding that the same as unexplained cash receipts in the hands of the assessee.

35. Before the ld. CIT(A), the ld.AR submitted that the assessee has filed necessary details and reconciled statement as per ITS information and filed vide letter dated 28.12.2009 which is placed at pages 195/296 of Vol 1 of

the assessee's paper book which was filed before the AO only on 30.12.2009 due to the reasons beyond the control of the assessee whereas the AO completed the impugned assessment on 29.12.2009. It was also submitted that the entire addition has been made by the AO which has resulted in double assessment of the same amount of income. It was also submitted before the FAA that the AO has granted credit of tax deducted at source vide order passed u/s 154 of the Act after verifying the receipt duly accounted for and accordingly the ld. CIT(A) held that the ground raised by the assessee was rendered infructuous in view of the rectification application and order thereon by the AO however the ld.CIT(A) sustained the disallowance to the extent of Rs.5,15,396.

36. We have considered the rival submissions on the issue. It was vehemently argued before us by the ld.AR that some items of ITNS aggregating amount Rs.5,15,396/- could not be reconciled in absence of information. The ld. Counsel drew our attention to the page 719 to 750 of the paper book by pointing out that the amount of Rs.5,15,396/- is made up of so many parties with whom the assessee never had any business dealings and it was also submitted that the assessee has not even claimed credit of TDS deducted by the parties on the said amount. The ld. AR submitted that since the assessee was not aware of the fact and the assessee had never rendered any services to those parties and therefore, the same could not be treated as income of the assessee on the basis of mere ITNS information

without making any inquiries from those parties when the assessee has disowned transactions. The ld.AR prayed that the addition was required to be deleted as there is no proper enquiry or verification on the part of the AO and addition was made just by rejecting an ITNS information.

37. The ld. DR relied on the orders of authorities below.

38. It is clear from the above that there are some un-reconciled entries in ITNS amounting to Rs.5,15,396/- pertaining to several parties with whom the assessee has stated not to have any business or other dealings and could not be reconciled. The AO made addition on the basis of merely ITNS information without making any other further verification of ITNS information available with the AO and therefore, the addition as made by the AO and sustained by the ld.CIT(A) was not justified when the assessee has completely disowned the transactions with the said parties. The information as contained in the ITNS are filed by the third parties and the AO could have enquired from those parties whose information was available, however the AO simply proceeded to add the unaccounted amount without doing any inquiry. Accordingly, we direct the AO to delete the addition.

I.T.A. No.1227/Mum/2013 (BY Revenue)

39. Grounds of appeal taken by the revenues are as under :

1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not upholding the AO's view that the brand building expenses are capital in nature and hence not deductible as revenue expenditure."

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding brand building expenditure as revenue in nature merely because the said expenditure comprises advertising expenses etc, without appreciating that the said expenditure has not been incurred for the purpose of the business of the year under consideration only."

3. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding brand building expenditure as revenue in nature, without considering the fact that admittedly, the assessee had incurred the said expenditure for the creation of a brand, which is a capital asset of enduring nature and intended to be used for revenue generation over several years/beyond the relevant assessment year."

40. The sole issue raised in the grounds of appeal is against the deletion of addition by the ld.CIT(A) to the tune of Rs.1,01,60,695/- by the ld. CIT(A) by holding that the brand building expenses were of revenue in nature as against the finding of the AO that such expenses were of capital nature.

41. Brief facts of the case are that the assessee has debited an amount of Rs.1,01,60,495/- to the profit and loss account towards brand building expenses. The AO found that these expenses are capital in nature and therefore issued noticed dated 14.9.2009 calling upon the assessee as to why the such expenses should not be treated as capital expense and ultimately disallowed the same and added the same to the total income of the assessee.

42. The assessee filed reply vide letter dated 6.11.2009 submitting therein that these expenses were in the form of retainer-ship fees, marketing expenses, art work charges for CD's designs for leaflets, brochures, colour prints, campaign illustrations etc. Thus, these were incurred in the normal course of business as routine expenses. It was submitted before the AO that

these expenses do not give any benefit of enduring nature and were incurred for existing and running business. In support of these contentions, the assessee relied on number of decisions which were reproduced by the AO at page 6 of the assessment order. Finally, the AO disallowed these expenses under the head "brand building expenses" by observing that that the brand building expenses were not routing expenses and not incurred in the ordinary course of business of the assessee and observed that these expenses were incurred for building a brand name/image of the assessee from which the assessee got enduring benefit over the period of time. However, the AO allowed depreciation at the rate of 25% thereby making an addition of Rs.76,21,871/-. Aggrieved by the order of the AO, the assessee preferred an appeal before the ld.CIT(A)

43. Before the ld. CIT(A), the assessee submitted that these expenses is debited under the head Brand building expenses were in the nature of marketing/advertising incurred in the normal course of business and incurred in the normal course of business thereby not creating any fixed assets nor resulted into any value addition to existing fixed assets. The brand building expenses incurred did not provide any benefit of enduring nature. These expenses were recurring in nature and were incurred for running and operation of business of the assessee in order to increase the sales by effective advertising and marketing thereby enable the assessee to do business more effectively and profitably while creating no fixed benefit of permanent nature. In defence of argument, the ld.AR relied on number of

decisions including the decision of the Hon'ble Apex Court in the case of Empire Jute Co. Ltd. reported in 124 ITR (SC).

44. The ld.CIT(A) after considering the submissions of the assessee and the case law deleted the addition by observing and holding as under :

> *" 3.3 The Assessing Officer's order, submissions made for the appellant and material record have been considered. The expenses incurred are marketing expenses for marketing the brand and promotion of its corporate image. The expenses cannot be said to be addition to fixed assets or capital, although they may be providing advantage of enduring nature. No asset has been produced as a result of the expenditure, at best it can be treated as deferred revenue expenditure since the expense incurred would provide some enduring advantage I the years. In these circumstances the addition made by the Assessing Officer is deleted. Accordingly the Assessing Officer when giving appeal effect will also make suitable adjustment to the depreciation granted on the premises of taking the expenditure to be capital expenditure."*

45. We have considered the rival submissions on the issue. We find that the assessee has incurred expenses on marketing/advertising and retainer-ship etc. for running and operation of business more profitably and efficiently which did not result in the creation of fixed asset or creation of any benefit of enduring nature in favour of the assessee and thus observation and findings of the AO was not correct and the ld. CIT(A) has rightly deleted the addition made by the AO after considering the submissions of the assessee and by recording the findings of facts that the expenditure incurred were of revenue in nature expended for day to day running and operation of assessee's business. We are of the opinion that the order passed by the ld.CIT(A) is correct and does not require any interference from

our part and accordingly we uphold the same on this issue by dismissing the appeal of revenue.

I.T.A. No.723/Mum/2013 (by assessee)

Grounds of appeal taken by the assessee are reproduced below :

"1 The l.d CIT(A) erred in law and on facts and in the circumstances of the case in confirming the disallowance of ESOP expenses of Rs.3,64,49,900/-

2. The l.d CIT(A) erred in law and on facts and in the circumstances of the case in confirming the disallowance u/s 14A of the Act read with rule 8D(2) of Rs.38,72,836/-,

2.1. The l.d CIT(A) erred in law and on facts and in the circumstances of the case in confirming the disallowance u/s 14A of the Act ignoring the fact that the appellant had not incurred any expenditure on interest and in fact had earned net interest of Rs.48,63,712/-

3. The l.d CIT(A) erred in law and on facts and in the circumstances of the case in confirming the disallowance of provision for leave encashment of Rs.44,94,048/- (correct amount Rs.4,94,098/)

4. The l.d CIT(A) erred in law and on facts and in the circumstances of the case in confirming the disallowance of Rs.1,04,08,418/-.

5. Each ground of appeal hereinabove is independent and without prejudice to each other ;

6. The CIT(A) order being contrary to law, evidence and facts of the case should be set aside amended or modified in the light of the ground deduced above"

46. Grounds of appeal raised by the assessee in this appeal bearing Ground No.1,2 and 3 are identical to that of appeal filed by the assessee bearing ITA No.946/Mum/2013, therefore, and our decision taken therein by

us would be applied to these grounds as well. The grounds raised by the revenue are dismissed.

47. The issue raised in the grounds of appeal no.4 is against the confirmation of disallowance of Rs.1,04,08,418/- as made by the AO on account of writing off advances.

48. The facts of the case are that during the course of assessment proceedings, the AO observed that the assessee has written off some securities given for electricity/telephone connections aggregating to Rs.1,04,08,418/-. The assessee had written off the said advances as they were not recoverable and were adjusted against the company expenses against the outstanding bills of electricity and telephone. The AO came to the conclusion that these advances written off were not admissible expenses u/s 37 of the Act thereby rejecting the contentions of the assessee by holding that the these deposits were given for electric connections which were refundable and could be claimed as and when the assessee surrendered the connections to the concerned department and thus rejected the plea of the assessee that it could not be recovered or adjusted by the department concerned against the outstanding dues. Similarly the telephone advances were given for availing telephone facility which was written off by the assessee when the same could not be recovered from the telephone department or adjusted against the dues. Ultimately, the AO disallowed the whole some Rs. 1,04,08,418/- and added the same to the total income of the assessee.

49. Before the ld. CIT(A) the assessee submitted that the advances give to electricity department and telephone department were not recoverable. When the assessee was not able to get refund of deposits as the franchises operating form the (rented) premises had committed default in the payment of bills and violated the conditions for allotment of connections. Similarly, in the case of telephone deposits the department has adjusted the outstanding bills and penalty against the security deposits and cancelled these connections. It was also submitted that these amounts were written off as a matter of commercial exigency as pursuing recovery proceedings would have proved expensive as the cost of litigations would have been more than the amount recoverable. Ultimately, the ld. CIT(A) rejected the contentions of the assessee and dismissed the appeal on this ground by observing and holding as under :

> *"7.3. The assessment order, submissions made for the appellant and materials on record have been considered. The benefit of the provision of section 36(1)(vii) deduction for debts written off can be allowed only where the said amounts have been claimed as income by an assessee. In the present case in appeal the deposits made are not shown to have been included as income of the assessee in earlier year/so For section 36(1)(vii) to be applied first the appellant must show that the amounts now written off were included as income In its accounts, and only then can it be treated as a bad debt and write off allowed without having to show that it is irrecoverable etc. The primary requirement of the amounts having been included as income has not been fulfilled and hence deduction u/ s 36(1)(vii) is not allowable.*
>
> *As regards the plea that the amount be allowed as a business loss, losses incidental to business are allowable as deduction despite there being no specific provision for the same. If there is a direct and proximate nexus between the business operation and the loss or its is incidental to, then the loss is deductible. The parameters for claim of business loss and the bad debts are different. In order to claim business*

loss, the appellant has to produce sufficient evidences as to how and under what circumstances, it has incurred such losses. However, the appellant has, neither in the present appeal proceedings nor before the Assessing Officer adduced sufficient evidences to support its claim for such business loss, and has made statements regarding why it would not be cost effective to pursue refund of the deposits. Therefore. the claim cannot be entertained and is accordingly rejected. In the result the ground is dismissed."

50. We have considered the rival submissions and perused the material placed before us. The ld. AR submitted before us that these telephone and electricity deposits were made throughout India in number of towns and cities wherever these deposits were made by SSI Limited which the assessee had taken over. It was also submitted that the assessee's business mostly consisted on carrying out business activity all over India for which the assessee has entered into the large number of franchisee agreement. These advances were given by franchisee on behalf of the assessee for obtaining electricity and telephone connections. Out of these, in good number of cases, the franchisee could not pay their telephone and electricity bills and as result the of substantial part of these advances were consumed by way of adjustments of these deposits by the departments against the electric and telephone bills. The ld. AR also argued that these deposits were made in the ordinary course of business of the assessee and assessee could not recover at all from these franchisee. If in the subsequent years these advances were recovered the same would be chargeable to tax under section 40(1)(1). It was also argued by the ld.AR that the assessee's record were damaged and destroyed due to unprecedented flood in Mumbai in 2005 and were also

received due amount of compensation from ICICI Lombard against the insurance policy taken by the assessee which were furnished before the authorities below and also forming part of this record at pages at 235 to 272 of the paper book. Due to all these reasons the ld. AR submitted that it became impossible to seek refund from the department like electricity and telephone without having the receipts/documents. Lastly, the ld. AR prayed that since these advances were given in the ordinary course of business for day to day running of the business of the assessee and therefore the amount written off by the assessee Rs.1,04,98,418/- be deleted being out of business exigency of the assessee.

51. The ld. DR heavily relied on the orders of authorities below and objected to the submissions of the ld.AR. The ld. DR submitted that the deposits were given by the assessee for getting telephone and electric connections and could not be written off as business loss as those were not covered u/s 41 of the Act and therefore rightly disallowed by the AO and upheld by the ld. CIT(A) and requested for upholding the orders of the authorities below.

52. From the above facts, it is clear that the company has paid various advances for obtaining telephone and electric connections in the business premises in its franchisees as the assessee carried on the business of imparting education and training and rendering other services. These deposits were adjusted by the department concerned against the outstanding and pending bills of electricity and telephone, when the franchisees failed to

make the payments and the same could not be recovered for the reasons stated above in large number of cases. We also find merit in the arguments of the ld.AR that the record of the assessee were destroyed in flood in 2005 and the deposits could not be claimed due to damage and destructions of record of the assessee. In our opinion, the said writing off advances given in the ordinary course of business which has direct nexus of the operation of business of the assessee and the amount of advances were written off out of business exigency and is therefore business loss. Accordingly, we set aside the order of the ld.CIT(A) and direct the AO to delete the disallowance.

ITA No.1228/Mum/2013 (by the revenue)

53. The revenue has taken the following grounds of appeal:

"1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not upholding the AO's view that the brand building expenses area capital in nature and hence not deductible as revenue expenditure."

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding brand building expenditure as revenue in nature merely because the said expenditure comprises advertising expenses etc, without appreciating that the said expenditure has not been incurred for the purpose of the business of the year under consideration only."

3. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A)erred in holding brand building expenditure as revenue in nature, without considering the fact that admittedly, the assessee had incurred the said expenditure for the creation of a brand, which is a capital asset of enduring nature and intended to be used for revenue generation over several years/beyond the relevant assessment year."

4. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A)erred in deleting the addition of Rs.2,12,854/- as unexplained cash receipt, ignoring the fact that the assessee had failed

to reconcile the ITS details and to show that the said receipt did not pertain to it"

54. Grounds of appeal raised by the revenue in this appeal bearing Ground No.1,2, 3 and 4 are identical to that of appeal filed by the assessee bearing ITA No.946/Mum/2013. Therefore out decisions in ITA No.946/Mum/2013 would mutatis mutandis apply to these grounds as well. Accordingly these grounds are dismissed.

I.T.A. No.1271/Mum/2014(by the assessee)

55. Grounds of appeal taken by the assessee read as under :

"1. The Learned CIT(A) erred in law and on facts and in the circumstances of the case in confirming the disallowance of ESOP expenses of Rs.1,49,21,324/-.

2. The Learned CIT(A) erred in law and on facts and in the circumstances of the case in confirming the disallowance u/s 14A of the Act read with Rule 8D(2) of Rs.32,91,7S8/-.

2.1 The Learned CIT(A) erred in law and on facts and in the circumstances of the case in holding that in the formula given in rule 8D, it is the interest paid and not net interest which is to be considered for computing disallowance under section 14A of the Act.

2.2 The Learned CIT(A) while holding that in the formula given in rule 8D, it is the interest paid and not net interest which is to be considered for computing disallowance under section 14A of the Act erred-

(a) in placing reliance on the decision of ITAT Ahmadabad in Advance Finstock Pvt Ltd and not following the decision of the co-ordinate Mumbai Bench in the case of Morgan Stanley Securities P. Ltd. which is binding on her and;

(b) In not following the decision of the jurisdictional Bombay High Court in the case of Godrej & Boyce wherein at para 24 it was held

"that the basic principle of taxation is to tax net income. This principle applies even for the purposes of Section 14A

and expenses towards nontaxable income must be excluded"; and

(c) in not following the basic principle of law that if there are contrary decisions in any matter, the decision which is in favour of the assessee is to be followed.

3. The Learned CIT (A) erred in law and on facts and in the circumstances of the case in confirming the disallowance of provision for leave encashment of Rs.22,11,564/-.

4. The order of the Commissioner (Appeals) being contrary to law, evidence and facts of the case should be set aside, amended or modified.

5. Each ground of appeal hereinabove is independent and without prejudice to each other.

6. The appellant craves leave to reserve to itself the right to add, to alter or amend annul any of the grounds of appeal at or before the time of hearing and to produce such further evidences, documents and papers as may be necessary.

56. The issue raised in grounds of appeal bearing Ground No.1,2 and 3 have already been decided by us in ITA No.946/Mum/2013, therefore, our decision in ITA No.946/Mum/2013 would mutatis mutandis apply to these grounds as well. Accordingly, appeal of the assessee is allowed.

57. **ITA No. 2003/Mum/2014 (by revenue)**

58. Grounds of appeal taken by the revenue read as under :

"1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.l0,90,275/- on account of brand building expenses relying on the decision of the CIT(A) in assessee's own case for A.Y. 2008-09 and not upholding the Assessing Officer's view that the brand building expenses are capital in nature and hence not deductible as revenue expenditure."

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding brand building expenditure as revenue in

nature merely because the said expenditure comprised of advertisement expenses etc.,without appreciating that the said expenditure had not been incurred for the purpose of business of the year under consideration only."

3. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding brand building expenditure as revenue in nature, without considering the fact that admittedly, the assessee had incurred the said expenditure for the creation of a brand, which is a capital asset of enduring nature and intended to be used for revenue generation over several years/beyond the relevant assessment year."

59. We have already decided the issues raised in these grounds in appeal no.1227/Mum/2013 and therefore our finding in ITA NO.1227/Mum/2013 would mutatis mutandis apply to these grounds as well. Accordingly, the appeal of the revenue is dismissed.

60. In sum and substance, the ITA No.946/Mum/2013 filed by the assessee is partly allowed for statistical purposes, appeal bearing ITA No.1227/Mum/2013 filed by the revenue is dismissed, ITA No.723/Mum/2013 by the assessee is allowed, appeal bearing ITA No.1228/Mum/2013 by the revenue is dismissed, appeal being ITA No.1271/Mum/2014 filed by the assessee is allowed and appeal bearing ITA No.2003/Mum/2014 filed by the revenue is dismissed.

The above order was pronounced in the open court on 6th Oct, 2016.

घोषणा खुले न्यायालय में दिनांकः 6th Oct, 2016 को की गई ।

Sd	sd
(JOGINDER SINGH)	(RAJESH KUMAR)
Judicial Member	**Accountant Member**

मुंबई Mumbai: 6th Oct, 2016.

व.नि.स./ SRL , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai