Dcit, New Delhi vs M/S Eicher Motors Ltd.,, New Delhi on 4 January, 2016

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B', NEW DELHI)

BEFORE SHRI N. K. SAINI, ACCOUNTANT MEMBER
AND SHRI KULDIP SINGH, JUDICIAL MEMBER

I.T.A. No. 2561 /Del/20 13
Assessment year : 2009-10

DCIT, Circle 11 (1), New Delhi, Vs. M/s. Eicher Motors Ltd.
3rd Floor, Select City Walk,
A-3, Distt. Centre, Saket,
New Delhi - 110017
GIR / PAN:AAACE38820

I.T.A. No. 2386/Del/20 13
(Assessment Year 2009-10)

M/s. Eicher Motors Ltd.,
3rd Floor, Saket City Walk,
A-3, Distt. Centre, Saket,
New Delhi - 110 017
GIR I PAN:AAACE3882D

V s. DCTT, Circle 1 1(1),
New Delhi

(Appellant) (Respondent)
Department by : Shri Ravi Jain, CIT DR
Assessee by Shri Ajay Vohra, Sr. Adv.
Shri Gaurav Jain, Adv..
Ms. Bhavita Adv.

Date of hearing: 27.10.2015
Date of pronouncement:04.01.2016

ORDER

PER KULDIP SINGH, JM:

Since, in both the aforesaid cross appeals, identical grounds have been raised and even the issues involved are identical qua the Assessment year 2009-10, the same are taken up together for disposal with the concurrence of authorized representatives of the parties, to avoid repetition of discussion.

2. I.T.A. No. 25611DeIl2013:

The appellant, DCIT, Circle 11 (1), New Delhi (hereinafter referred as 'the Revenue') by filing the present appeal sought to set aside the impugned order dated 27.02.2013 passed by Ld. CIT(A) XIII, New Delhi qua the assessment year 2009-10 on the grounds inter alia that:

"1. On the facts and circumstance of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 6,52. 42, 288/- made under section 35(2AB) of income Tax Act.

2. On the facts and circumstance of the case and in law, the Id. CIT(A) has erred in deleting the addition of Rs.82,49, 192/- made under section i4A read with Rule 80 of Income Tax Rules, 1962.

3. On the facts and circumstance of the case and in law. The Id. CIT(A) has erred in deleting the addition of Rs. 40,00, 000/- treating it as unascertained liability.

4. On the facts and circumstance of the case and in low (he Id. CIT(A) has erred in deleting the addition of Rs.39.35.00,000/- made on account of non compete fee treating it as business income. "

3. I.T.A. No. 2386/De1/2013:

The appellant, M/s. Eicher Motors Ltd., (hereinafter referred as 'the assessee'), by filing the present appeal, sought to set aside the impugned order dated 27.02.20l3 passed by Ld. CIT(A) XIII, New Delhi qua the assessment year 2009-10 on the ground that:

"That the learned Commissioner of Income Tax (A)-XIII. New Delhi has grossly erred on facts and in law in confirming the disallowance of notional administrative expenses of Rs. 20,24,169/- UIS 14.4 of the Income Tax Act allegedly relating to dividend income. "

4. Briefly stated, the facts of this case are: during the processing of return of income filed by the assessee qua the assessment year 2009-10, the case was subjected to scrutiny under CASS and consequently, notices u/s 143(2) and 142(1) were issued to the assessee and in response thereto, Shri Ashok Aggarwal, CA/ AR appeared from time to time, filed necessary details and the case was also discussed with him. The assessee company is engaged in the business of manufacturing and sale of commercial vehicles components including gears, motorcycles and motorcycles spares etc. During the assessment proceedings, it has come on record that the assessee has paid an amount of Rs.1,13,00,000/- to group concern as service charges, hence, it was called upon to explain the actual nature of expenses, nature of services being rendered by group concern, basis of determination of quantum and justification, as to whether it is paid at fair market value of the services. The assessee company filed comprehensive reply. The Assessing Officer considered the same and made out that Section 40A(2)(b) of the Act is attracted, which provides that an expenditure by way of payment to

the person referred to in clause (b) is liable to be disallowed in computation of business profits to the extent such expenditure is considered to be excessive and unreasonable having regard to the fair market value of the goods and services/ facilities etc. In this case also, the assessee has failed to substantiate its working as to how the expenses under different heads like Finance and Accounts, Taxation and Payroll, administration, building rent and maintenance, information technology, internal audit and senior management, have been apportioned between VECV (group concern) and the assessee.

5. In some heads, 10% expenses allocated to Assessee Company and in some other heads, it went up to 75% of the total expenses. The assessee has not derived any scientific formula based on the actuals. Even the assessee has gone by the mixed system where no justification is regarding quantification of the fair market value of the servi.ces on account or such service charges are paid to associated concerns and as such, payments appear to be excessive. Consequently, Assessing Officer made an addition to the tune of Rs.33,00,000/-.

6. During assessment proceedings, it has further come on record that the assessee has claimed deduction of Rs.8,92, 70,1021- on account or research and development expenditure u/s 35/35(2AB) @ 150% of the total expenses claimed to be incurred under nomenclature weighted deduction. On inquiry, the assessee submitted the details of expenses and the Assessing Officer after considering applicability of Section 35 I 35(2AB), disallowed the deduction of Rs.6,52,42,288/- for lack of supporting evidence and consequently, made an addition of Rs.6,52,42,288/-.

7. During assessment proceedings, it has also come out on record that the assessee company has received an amount of Rs.39.35 crores as non compete fee from a concern named M/s. AB Volvo which is claimed to be on account of a non compete agreement whereby the assessee agreed to transfer its exclusive right to conduct commercial vehicle business in favour of AB Volvo. The assessee was called upon to explain as 0 why the provisions of section 28(va) of the Act should not be applied while treating the receipt of non compete fee as business receipt. The assessee filed comprehensive reply. While considering the issue of non compete fee received for an amount of Rs.39,35,00,000/- from AB Volvo as capital receipt in view of the proviso (1) to Section 28(va) of the Act, it is found that the assessee has tried to cover its case under the proviso (I) to Section 28(va) of the Act. However, the aforesaid proviso is not applicable in the case of the assessee as this case falls under clause (b) of Section 28(va) of the Act. Since the assessee sold its entire commercial business to AB Volvo subsequently second consideration to be received ~y the assessee, proviso (1) to Section 28(va) would be attracted. In the present case, the assessee had received Rs.39,3S,00,0001- on account of transfer of business, the commercial receipt in the eyes of law mentioned in clause (b) to Section 28(va) of the Act and consequently, made the addition of Rs.39,35,00,000/-.

8. During the Assessment Year under consideration, the assessee claimed to have earned dividend income of Rs.6,39,00,000/-. On calling upon the assessee to explain as to why expenses attributable to in earning of dividend income, should not be disallowed u/s 14A of the Income tax Act, 1961 and furnish the working of disallowance in view of Rule 80 of the I T Rules, assessee submitted that neither interest nor any administrative expenses relate to earning of dividend and as such

disallowance u/s 14A cannot be made.

9. The Assessing Officer considered the matter and came to the conclusion that in view of the provision of Sub-section (2) of Section 14A and Rule 8D of I. T. Rules, disallowed the expenses to the tune of Rs.l,02,73,361/- and consequently made the addition of Rs.l,02,73,36 1/-.

10. During the year under assessment, assessee made provision for warranty at Rs.l.57 crores and debited it to the P & L account. The assessee was called upon to explain, as to why the excess provision of Rs.l.57 crores should not be disallowed being not an ascertained liability. The assessee filed comprehensive submissions dated 09.09.201 I. The Assessing Officer considered the same and came to the conclusion that assessee has failed to furnish scientific basis for making such a provision but has made the same purely on estimate basis and as such, is not an ascertained liability. So, the amount of provision for warranty in excess of actual warranty, came to an amount of Rs.0.40 crores, is disallowed and made addition of Rs.40,00,000/-

11. The assessee carried the matter in appeal before Ld. CIT(A) who has partly allowed the appeal. Feeling aggrieved, the Revenue as well assessee have challenged the impugned order by way of cross appeals before the Tribunal.

12. We have heard Authorized Representatives of both the parties, gone through material placed on record in the light of facts and circumstances of the case and orders of tax authorities below.

l3. I.T.A. No. 2561/Del/2013:

> Ground No.1: Whether, "on the facts and circumstance of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.6,52,42,2881- made under section 35(2AB) of Income Tax Act." Ld. D.R. challenging the impugned order contended that since the assessee has failed to bring on record as to which new variants for domestic market have been introduced, the Assessing Officer has rightly made the addition by invoking the provisions contained u/s 3 S(2AB) of the Act.
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> 14. On the other hand, Ld. A.R. repelled the arguments advanced by Ld. D.R. by contending that since the Assessing Officer himself has admitted that the assessee has an approved R&D, addition cannot be made.
>
> 15. While dealing with the issue under consideration, the Assessing Officer returned the findings to reach at the conclusion that deduction of Rs.6,52,42,288/- is being disallowed, which are to the following effect:
>
> "1 have considered the submission of the assessee and given a careful thought. Section 35(2AB) provides for a weighted deduction in respect of expenditure on in house research and development facility subject to the following:
>
> 1) The tax payer is a company.
> 2) It is engaged in the business of bio technology or in the

business of manufacture or production of any drugs, pharmaceuticals, electronics equipments, chemicals or any other article or thing notified by the Board i.e. manufacture or production of helicopter or aircraft or computer software or automobile including automobile components.

3) It incurs an expenditure on scientific research and such expenditure is of capital nature or revenue nature.

4) The above expenditure is incurred on in house research and development facility up to March 31, 2012.

5) On the application of the company in Form 3CK the research and development facility is approved by the prescribed authority.

If all the conditions are satisfied then a sum equal to one and a half times of the expenditure so incurred shall be allowed as deduction. Here, it is pertinent to mention that all the above conditions are to be satisfied in totality. During the year as per assessee's own submission. research and development has been carried out in its three R&D centre in the following manner:-

Sr. No.	Title and scope of R&D Project	Name of Project leader	Year in which started	Remarks
1	Bullet Electra Twinspark	S.M. Hameed	2009	New variant of bullet with UCE Twinspark
2	Bullet 350 Twinspark	-do-	2009	-do-
3	Classic Chrome 350&500	-do-	2009	New variants for domestic market

As regards expenses incurred on R&D in respect of title and scope of R&D project mentioned at Sr. No.1 and 2 are concerned, these are specifically related to New Variants of Bullet with UCE Twins Park which is being started during the year under consideration. However, as regards the claim of expenses to be incurred on third title mentioned at Sr. No.3 above, it is mentioned as New Variants for domestic market. The assessee has not been able to specifically prove as to which New variants and as to how these are new variants for domestic market. The proposed objectives of scientific research contemplated by the assessee are the following:-

(i) Environment related - To bring down the noise level, intake and exhaust system are redesigned. To reduce environmental pollution on account of unburnt gases.

(ii) Safety related - To prevent starting of vehicles when side stand is 'ON', LED brake lamps etc.

(iii) Customer related ergonomically redesigned seat, handle bar and switch controls, foot rests, carburetor redesign, engine management system etc. As has been

discussed above, the expenses incurred for R&D mentioned at Sr. No.1 and 2 are quite specific and are in conformity with the proposed objectives of scientific research contemplated by the assessee, however, the expense pertaining to work relating to 3rd work are general in nature, and are not in conformity with the proposed objectives of scientific research, as it is not supported by any documentary evidence, accordingly not eligible for weighted deduction. The intention of law, in giving weighted deduction to companies is to encourage the research and development in specified areas so as to discourage import of R & D and related technology which may help the country in becoming self-reliant in these fields. To avail this deduction/benefit, assessee has to prove beyond doubt the fulfillment of all conditions with supporting evidences. The assessee has not submitted quantum of actual expenses incurred for this work so that excess claim of deduction could be allowed.

Accordingly, deduction for R&D is worked out as: Deduction U/s 35. As per tax audit Report: Rs.195, 726,863/-. "

Less :Allowable Capital expenditure U/s 35: Rs.24,027,8/4/- Less: Allowable Revenue expenditure U/s 35: Rs. 106,456, 761/- Additional Weighted Deduction claimed: Rs. 130.484.575/-

Rs. 65,242.288/-

Accordingly, excess claim of deduction of Rs. 6,52,42,288/- is being disallowed and added to the income of the assessee. f am satisfied that assessee has furnished inaccurate particulars of income. Penalty u/s 271(l)(c) initiated.

16. During appeal before Ld. CIT(A), the issue raised in ground No. 1has been discussed in para 6.2 page 22 of the impugned order and decided that capital of revenue expenditure incurred by the appellant as claimed, were for in house R&D activities for its centre at Pithapur and Chennai which have been duly approved for development of scientific and industrial research. The expenditure was incurred for development of new variants of MGC and also made improved design and allowed the weighted deduction u/s 35(2AB) of the Act and expenditure incurred during the year.

17. Undisputedly, the appellant was having R&D centre at Pithapur and Chennai duly approved by department of Scientific and Industrial Research. The Assessing Officer disallowed the weighted deduction u/s 35(2AB) on the sole ground that the assessee has not been able to specifically prove as to which new variant and as to how these are new variant for domestic market has been developed. When the Assessing Officer has specifically not denied that the amount has been spent for R&D and has failed to appreciate the documentary evidence brought on record, the deduction should not have been disallowed by deciding the issue summarily. More so, assessee has brought

on record details of revenue and capital expenditure incurred on R&D during the previous year relevant to the year under assessment, which has been duly certified by the Assessing Officer himself in sub-para 6 of para 6 of the assessment order. The Assessing Officer, without returning any finding on the revenue and capital nature of expenditure, certified report of tax auditors certifying the amount of R&D expenditure, proceeded to disallowed the deduction u/s 35(2AB).

18. Ld. CIT(A) during appellate proceedings, has also not preferred to call upon any remand report from the Assessing Officer regarding his opinion that details of revenue and capital expenditure incurred on R&D during the relevant period and report of tax auditors certifying the amount of R&D expenditure rather proceeded to delete the addition by allowing deduction u/s 35(2AB) of the Act. Even the Assessing Officer has himself admitted that the assessee has approved R&D centre to carry out the R&D activities. So, we are of the view that the matter is required to be restored to the Assessing Officer to decide afresh after providing opportunity or being heard to the parties on ground No.1.

Accordingly, ground No.1 is determined in favour of the assessee for statistical purpose.

19. Ground No.2: of appeal No.25611Del/2013 and ground No.1 of appeal No.2386/Del/2013:

Whether, "On the facts and circumstance of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs.82.49,192/- made under section 14A read with Rule 80 of Income Tax Rules. 1962."

Bare perusal contained in Section 14A goes to prove that Section 14A is applicable only when the Assessing Officer at the outset has returned the finding that the assessee has actually incurred expenses which have proximate nexus with the earning of exempt dividend income and not otherwise. So, the onus is on the Assessing Officer to find proximate/ distinct nexus of the expenses with the earning of exempt income before rejecting the claim of the assessee and computing disallowance u/s 14A of the Act.

20. Ld. D.R. challenging the impugned order contended that the Assessing Officer has rightly made disallowance u/s 14A of the Act and Rule 8D of I. T. Rules and relied upon the order of the Assessing Officer.

21. On the other hand, Ld. A.R. contended that Ld. CIT(A) has erred in disallowing the nominal administrative expenses of Rs.20,24, 169/- u/s 14A of the Act allegedly relating to dividend income and the remaining part of the same allowed u/s 14A of the Act. Ld. A.R. relied upon the judgement cited as CIT Vs Hero Cycles Ltd. 323 ITR 518 (P&H) and CIT Vs Gujarat State Fertilizers and Chemicals Ltd., 358 ITR 323 (Guj.).

22. Admittedly, assessee company has received dividend income of Rs.6.39 crores from the investment made in various mutual funds, foreign companies, exempt u/s 10(34) of the Act. The Assessing Officer by applying provision contained u/s 14A of the Act read with Rule 80, has disallowed Rs. l ,02,73,361/- as expenses relating to earning exempt income consisting of disallowance of expenditure of Rs.25,94,361/- and administrative expenses of Rs. 76,79,000/-.

23. It is settled principle of law that to apply the provisions contained u/s 14A of the Act for the determination of amount of expenditure incurred in relation to exempt income, the Assessing Officer is mandatorily required to return a finding that he is not satisfied with the claim of the assessee in respect of such expenditure and therefore, he has not returned findings that as to whether the expenditure incurred are actual expenditure and not imagined expenditure.

24. Hon'ble Punjab & Haryana High Court in case cited as CIT Vs Hero Cycles Ltd., 323 ITR 518 held that disallowance u/s 14A requires finding of incurring the expenditure and where, it was found that for earning exempt income, no expenditure had been incurred, disallowance u/s 14A could not stand. Operative part of the judgement in case of Hero Cycles Ltd. (supra) is reproduced as under for ready reference:

> "DEDUCITON-DISALLWOANCE OF EXPENDITLR.L IN RELATION TO INCOME WHICH DOES NOT FORM PART OF TOTAL INCOME-DIVIDEND INOCME-DISALLWONCE NO PERMISSIBLE WHERE NO NEXUS BETW3EEN EXPNEDITURE INCURRED AND INCOME GSAENERATED-1NCOME TAX ACT, 1961, S.14A.
>
> The assessee was engaged in manufacture of Cycles and parts of two wheelers in multiple units. It earned dividend income. which was exempted under section /0(34) and (35) of the Income tax Act, 1961. The Assessing Officer made an inquiry whether any expenditure was incurred for earning this income and as a result of the inquiry made addition by way of disallowance under section 14A(3), which w partly upheld by the CIT(A). The Tribunal held that there was no nexus between the expenditure incurred and the income generated. Therefore, it held that merely because of the assessee had incurred interest expenditure on funds borrowed in the main unit it would not ipso facto invite the disallowance under section 14A, unless there was evidence to show that such interest bearing funds had been invested in the investments which had generated the "tax exempt dividend income ".

On appeal:

> Held, dismissing the appeal, that the expenditure on interest was set off of against the income from interest and the investment in the shares and funds were out of the dividend proceeds. In view of this finding of fact, disallowance under section 14A was no sustainable. Whether, in a given situation, any expenditure was incurred which was to be disallowed, was a question of/act. The contention of the Revenue that directly or indirectly some expenditure 3was always incurred which must be

> disallowed under section 14A and the impact of expenditure so incurred could not be allowed to be set off against the business income which may nullify the mandate of section 14A, could not be accepted. Disallowance under sect ion 14A required finding of incurring of expenditure where it was found that for earning exempted income no expenditure had been incurred, disallowance under section 14A could not stand. Consequently, the disallowance was not permissible. "

25. Similarly, Hon'ble Gujarat High Court, in the judgement cited as CIT Vs Gujarat State Fertilizers and Chemicals Ltd. 358 ITR 323 (Guj.) held that:

> "when from the facts on record, the employment of section 14A of the Income tax Act, 1961, is not found correct, there does not arise any question of determining the amount of expenditure in the absence of rule 8D of the Income tax Rules, 1962, on the basis of a reasonable and acceptable method of apportionment. "

26. Hon'ble Supreme Court in the case cited as CIT Vs Wallfort Share and Stock Brokers 326 ITR 01 has held that there must be proximate relationship of expenditure with the exempt income for the purpose of making disallowance claimed u/s 14A of the Act.

27. Hon'ble Jurisdictional High Court in the judgement cited as Maxopp Investment Ltd. Vs CIT, 347 ITR 272 stretched the scope of the provisions of Section 14A and the powers vested with the Assessing Officer and held that the expression expenditure 'incurred' refers to actual expenditure and not to some imagined expenditure. Provisions of Section 14Aread with Rule 8D of I T Rules, can be applied for the Assessment Year 2008-09 for the rejection of claim of assessee for not having incurred any expenditure in relation to earning the exempt income with cogent reasons.

28. In the light of law laid down by Hon'ble Supreme Court and Hon'ble High Court referred to above, the question arises for determination in this case is, 'as to whether the Assessing Officer has satisfied himself before invoking the provisions contained u/s 14A read with Rule 8D of I T Rules that assessee has incurred expenses having proximate nexus with earning or exempt dividend income and that Assessing Officer has rejected the claim of assessee having not incurred any expenditure in relation to earning the exempt income with cogent reason. Both the aforesaid condition precedents have not been complied with by the Assessing Officer before invoking the provisions contained u/s 14A read with Rule 8D of I T Rules.

29. Ld. CIT(A) while passing the impugned order, thrashed the law on the subject thread bare but has assumed the powers of Assessing Officer in deciding the matter and proceeded to partly allow the appeal of the assessee except for disallowance of Rs.20,24, 169/- against Rs.1,02,73,361/- made by the Assessing Officer. Ld. CIT(A) has not preferred to call for any remand report directing the Assessing Officer to record his satisfaction and cogent reasons before invoking the provisions contained u/s 14A read with Rule 8D of I. T Rules. So, we are of the considered view that the matter is required to be restored to the file of Ld. CIT(A) to decide afresh after providing opportunity of being heard to the parties. Consequently, ground No.2 of the appeal No.2561/del/1013 and ground No.1 of appeal 2386/Del/2013 are decided accordingly.

30. Ground No.3:

> It is a matter of record that during the year under assessment, provisions for guarantee of Rs.l.57 crores have been made and debited to P & L account. The Assessing Officer disallowed this amount as provisions for warranty in excess and actual warranty claimed amounting to Rs.40 crores and added the same to the total income of the assessee on the ground that no scientific basis for making such provisions, has been furnished and that the provisions has been made purely on the basis of estimation and as such, is not ascertained liability.

31. Undisputedly, assessee is engaged in the business of manufacturing and sale of commercial vehicles, tractors, two wheelers and gears. Ld. A.R. contended that various products of the company are sold along with warranty and assessee is under obligation to replace any component bearing manufacturing defect free of cost and at the end of the relevant previous year, assessee had made aggregate provisions for warranty at Rs.7,38,00,000/-.

32. Ld. D.R. relied upon the order passed by Assessing Officer. However, Ld. A.R. relied upon the order passed by L. CIT(A) and contended that the assessee only claimed regarding deduction of amount earmarked for provision for warranty, has been allowed by the Revenue during the Assessment Years 2002-03, 2003-04, 2006-07 and 2007-08 and no appeal has been filed by the Department against Ld. CIT(A)'s order. Ld. A.R. also relied upon the decision delivered by Income tax Appellate Tribunal Delhi Bench 'B', New Delhi in assessee's own case entitled DCIT Vs M/s. Eicher Motors Ltd. in I.T.A. No. 3560/Del12008 order dated 18.09.2009. Ld. A.R. also relied upon the judgment of Hon'ble Supreme Court in the case entitled Rotork Controls India Pvt. Ltd. Vs CIT, 314 ITR 62 (S.C.). The ratio of judgment (supra) is that estimated provisions for warranty are allowable for deduction. Operative part of the judgement (supra) is reproduced below for facility of reference:

> "Held, reversing the decision of the Hon'ble High Court, that the valve actuators, manufactured by the assessee, were sophisticated goods and statistical data indicated that every year some of these were found defective; that valve actuator being a sophisticated item no customer was prepared to buy a valve actuator without a warranty. Therefore, the warranty became an integral part of the sale price: in other words, the warranty stood attached to the sale price of the product. In this case, the warranty provisions had to be recognized because the assessee had a present obligation as a result of past events resulting in an outflow of resources and a reliable estimate could be made of the amount of obligation. Therefore, the assessee had incurred a liability during the assessment year which was entitled to deduction under section 37 of the Income tax Act, 1961.
>
> The present value of a contingent liability, like the warranty expense, if properly ascertained and discounted on accrual basis can be an item of deduction under section 37. The principle of estimation of the contingent liability is not the normal rule. It would depend on the nature of the business, the nature of sales, the nature of

the product manufactured and sold and the scientific method of accounting adopted by the assessee. It would also depend upon the historical trend and upon the number of articles produced.

A provision is a liability which can be measured only by using a substantial degree of estimation. A provision is recognized when: (a) an enterprise has a present obligation as a result of a past event: (h) it is probable that an outflow of resources will be required to settle the obligation, and (c) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognized.

The principle is that if the historical trend indicates that a large number of sophisticated goods were being manufactured in the past and the facts show that defects existed in some of ht items manufactured and sold, then provision made for warranty in respect of such sophisticated goods would be entitled to deduction from the gross receipts under section 37. "

33. The coordinate bench of Income tax Appellate Tribunal by relying upon the judgement cited as Rotork Controls India Ltd. (supra) in the assessee's own case for the Assessment Year 2002-03 held that assessee had estimated the provisions for warranty on the basis of past history. The estimate of warranty made by the assessee on the basis of past history cannot be treated as a provision for any ascertained liability and allowed the provision for warranty as deduction. Following the law laid down by Hon'ble Supreme Court in the judgement (supra), decision of coordinate bench in the assessee's own case, we find that there is no infirmity or perversity in the findings returned by Ld. CIT(A) in allowing the ascertained liability as allowable expenditure u/s 3 7(1) of the Act. So, ground No.3 is determined in favour of the assessee.

34. Ground No.4:

Undisputedly, assessee has received an amount of Rs.39,35,00,000/- as non compete fee from M/s. AB Volvo on the basis of non compete agreement vide which assessee agreed to transfer its exclusive right to conduct commercial vehicle business in favour of AB Volvo. It is not disputed that this amount of non compete fee has been received by the assessee and the same has been offered to tax under the head 'long term capital gain'. The Assessing Officer made an addition of Rs.39,35,00,000/- on the ground that the assessee's case falls under clause (b) of Section 28(va) which is termed as license and in similar nature. Hence, proviso to clause (a) to Section 28(va) is not applicable. Relevant portion or the assessment order passed by Assessing Officer is reproduced as under:

"I have considered the submission of the assessee and given a careful thought. While considering the issue of Non Compete lee received for an amount of Rs. 39,35,00,000/- from AS Volvo as capital receipt in view of proviso (I) to section 28 (va) of IT Act, however, on perusal of clauses of agreement it is seen /170/ the

assessee has somehow tried to bring its case under the proviso (I) to section 28 (va) which reads as:

"(va) any sum, whether received or receivable. in cash or' kind under an agreement for-

(a) Not carrying out any activity in relation to any business; or Provided that sub clause (a) shall not apply to-

(i) Any sum, whether received or receivable in cash or kind, on account of transfer of the right to manufacture, produce or process any article or thing or right to carryon any business which is chargeable under the head "Capital Gains ":

The above proviso is applicable only in cases where clause

(a) is applicable, however the said proviso is not applicable in those cases which fall under clause (b) of section 28 (va) of IT Act.

In this case the assessee sold its entire commercial vehicle business to Volvo subsequently, for separate consideration to be received by the assessee, however the assessee has separated non competent fee transaction from the main transaction as it was executed one month before the main transaction, if the assessee would have sold its entire business including the non compete transaction at one occasion then the proviso of section 28 (va)(a) would have been applicable and automatically proviso (I) to section 28 (va) would have become operational. But here in instant case, the assessee has received the amount of Rs. 39,35, 00, 000/- on account of transfer of business of commercial rights in the nature of license as inaugurated in clause (b) to section 28 (va) of the IT Act. The assessee has further tried to include the transaction in clause (a) so that the assessee may avail the benefit of proviso (1) mainly to reduce the tax liability under the head capital gain. In this connection the Hon'ble Supreme Court in has given the judgment on the initiation of taxing statutes in the case of CIT vs Kasturi & Sons Ltd. 237 ITR 24. At page no. 29 the Hon'ble Court has ruled it as under:

"The principle that a taxing statute should be strictly constitute is well settled. In principle of statutory interpretation by Justice GP Singh six edition 1966, it is stated, The well established rule in the familiar words of Lord Wenslery reaffirmed with lord Halsbory one Lord Symonds means the subject is not to be taxed without clew' words for that purpose and also that every act of parliament must he read according to the natural construction of its words. In a classic passage, Lord Cairns stated the principle thus. if the person sought to be taxed comes within the latter of the law he must be taxed however great the hardship may appear in the judicial mind to be. On the other hand, if the crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject in free, however, apparently within the spirit of law the case might otherwise appear to be in other words, if there be admissible in any statute, what is called an equitable construction certainly, such a construction is not

> admissible in a taxing statute where you can simply adhere to the words of the statute. In a taxing Act one has to look merely at what is clearly said. There is no presumption as to tax. Nothing is to be read nothing is to be implied. One can only look fairly at the language read. "

35. Now, the question arises for determination in this case is, as to whether the non compete fee of Rs. 39,35, 00, 0001- received by the assessee company from A B Volvo is taxable under the head 'capital gain' or not u/s 28BA". The Assessing Officer relied upon the judgement cited as CIT Vs Kasturi & Sons, 237 ITR 24 wherein Hon'ble Supreme Court has held that the principle that has been taken by the statute should be strictly construed is well settled and proceeded to decide the matter against the assessee by holding that the assessee's case falls under clause

(b) of Section 28(va) which is termed as license or in the similar nature. Hence, proviso to clause (a) to Section 28(va) is not applicable. To proceed further, the provisions contained u/s 28(va) are reproduced as under for facility of reference:

> "(va) any sum, whether received or receivable, in cash or kind under an agreement for-
>
> (a) Not carrying out any activity in relation to any business: or Provided that sub clause (a) shall not apply to-
>
> (i) Any sum, whether received or receivable in cash or kind. on account of transfer of the right to manufacture produce or process any article or thing or right to carryon any business, which is chargeable under the head "Capital Gains ":

36. Bare perusal of clause (a) of Section 28(va) goes to prove that any amount, the amount ofRs.39,35,00,000/- received as non compete fee by the assessee company from A B Volvo on account of transfer of right to manufacture in this case, produce and process any article or thing and right to carry out any business, is chargeable under the head 'capital gain'.

37. The Hon'ble Supreme Court in the judgement cited as Guffic Chem. P. Ltd. Vs CIT and CIT Vs Mandalay Investment P. Ltd.(20

11) 332 ITR 602 (S.C.) decided the substantial question of law that 'as to whether the amount received by assessee pursuant to non competition agreement entered into by the assessee with other company, is to be treated as capital receipt and not revenue receipt '. The Hon'ble Supreme Court decided the issue in para 5and 6 of the judgement which are reproduced as under:

> "Decision:
>
> 5. The position in law is clear and well sell led. There is a dichotomy between receipt of compensation by an assessee for the loss of agency and receipt of compensation attributable to the negative/restrictive covenant. The compensation received for the

loss of agency is a revenue receipt whereas the compensation attributable to a negative/restrictive covenant is a capital receipt.

6. The above dichotomy is clearly spelt out in the judgement of this court in Gillanders' case (supra) in which the facts were as follows. The assessee in that case carried on business in diverse fields besides acting as managing agents, shipping agents, purchasing agents and secretaries. The assessee also acted as importers and distributors on behalf of foreign principals and bought and sold on its own account. Under an agreement which was terminable at will the assessee acted as a sole agent of explosives manufactured by Imperial Chemical Industries (Export) Ltd. That agency was terminated and by way of compensation the Imperial Chemical Industries (Export) Ltd., paid for fist three years after the termination of the agency two fifths of the commission accrued on its sales in the territory of the agency of the appellant and in addition in the third year full commission was paid for the sales in that year. The Imperial Chemical Industries (Export) Ltd. took a formal undertaking from the assessee to refrain from selling or accepting any agency for explosives."

38. Now adverting to the case at hand, it is undisputed fact that the assessee company was engaged in the business of manufacture and sale of commercial vehicles since 1986 along with other business of manufacturing and sale and engineering services and had acquired considerable knowledge and expertise in the field of commercial vehicle business. The assessee company entered into an agreement with MIs. A B Volvo to transfer its exclusive right to conduct commercial vehicles business in favour of M/s. AB Volvo. Operative part of the agreement dated 26.05.2008 is reproduced as under for facility of reference:

"Further, clause 3. I and 3.1.1 is reproduced as under:

3.1 In consideration of this Agreement including the payment of the consideration for the transfer of the exclusive right to carry on the CV business in the favour of the company and exclusion of the other Transaction Documents, EML: undertakes to Volvo that it shall not, and shall cause and procure that none of its Connected Persons shall. without the prior written consent of Volvo either along or jointly with, though (which includes by way of ownership of an)' shares or any direct or indirect Control) or on behalf of or in conjunction with (whether as director, partner, consultant, manager, employee, agent or otherwise) any Persons, direct or otherwise) any Persons, directly or indirectly: 3.1.1. with effect from the date of this Agreement, up to the Termination Date and for a further period of 3 (three) years from the Termination Date.

(a) carryon or be engaged or concerned or interested in the development and / or manufacture and / or sale and / or distribution of and / or provisions of after sales services of trucks and / or busses; or

(b) induce, attempt to induce, engage or employ. or solicit or contact with a view to the engagement or employment by any Person, any employee, officer or manager of or any person who has been an

employee, officer or manager of the Company in either case during the term of this Agreement;"

39. Cursory look at the operative clauses of the agreement entered into between the assessee and AB Volvo and VECE apparently proved that there was a negative/restrictive covenant between the assessee company and M/s. AB Volvo that assessee company shall not carry out and be engaged and carry the interest in development/.manufacture/sale/distribution/provision of aforesaid services and track of the business or induce, attempt to induce, engage or employ, or solicit or contact with a view to the engagement or employment by any person, any employee, officer or manager of, or any person who has been an employee during the terms of agreement. It is a complete embargo on the assessee company.

40. Following the law laid down by Hon'ble Supreme Court in the judgement of ONGC Ltd. VSs CIT & Another, Civil Appeal No.731 of 2007, we are of the considered view that the amount of Rs.39,35,00,000/- received by the assessee company as non compete fee, is a component attributable in a negative / restrictive covenant and as such, is a capital receipt as has been held by Ld. CIT(A) vide impugned order. So, finding no illegality or perversity in the findings of Ld. CIT(A), Ground No.4 is determined against the Revenue.

41. In view of the findings above, both appeals under consideration are partly allowed for statistical purposes.

42. Order pronounced in the open court on 04th Jan., 2015.

Sd./-	Sd./-
(N. K. SAINI)	(KULDIP SINGH)
ACCOUNTANT MEMBER	JUDICIAL MFMBFR

Date: 04th Jan., 2015
Sp

Copy forwarded to:-
1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.

5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi. True copy.

By Order (ITA T, New Delhi).

S.No.	Details	Date	Initials	Designation
1	Draft dictated on			Sr. PS/PS
2	Draft placed before author	4,7,9/12,		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second			AM/AM

	Member	
5	Approved Draft comes to the Sr. PS/PS	Sr. PS/PS
6	Kept for pronouncement	Sr. PS/PS
7	File sent to Bench Clerk	Sr. PS/PS
	Date on which the file goes to Head	
	Clerk	
9	Date on which file goes to A.R.	
10	Date of Dispatch of order	