# M/S Volvo India Pvt. Ltd.,, vs Acit, Bangalore on 8 May, 2019

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

IT(TP)A No.1537/Bang/2012
Assessment year : 2008-09

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| M/s. Volvo India Pvt. Ltd.,<br>Yelchenahalli Village,<br>Tavareker Post, Hoskote,<br>Bangalore - 562 122.<br>PAN: AAACV 6747N | Vs. | The Assistant Commissioner of Income Tax (LTU),<br>Bangalore. |
| APPELLANT | | RESPONDENT |

Appellant by : Shri Ajay Vohra, Sr. Advocate &
Ms. Tejasvi Jain, CA
Respondent by : Shri Pradeep Kumar, CIT(DR)(ITAT), Bengaluru.

Date of hearing : 30.04.2019
Date of Pronouncement : 08.05.2019

ORDER

Per N V Vasudevan, Vice President This is an appeal by the Assessee against the order dated 18.12.2012 of the Assistant Commissioner of Income Tax (ACIT), Large Tax Payer Unit ( LTU), Bangalore, passed u/s.143(3) r.w.s. 144C of the Income Tax Act, 1961 ("the Act) in relation to assessment year 2008-09.

2. The Assessee is a company engaged in the business of Manufacture/dealing in tractors, trailers, bus-chassis and trading in construction equipments. The various issues that emanate from the draft order of assessment against which the Assessee filed objections before the IT(TP)A No.1537/Bang/2012 Dispute Resolution Panel (DRP), the order of DRP and the final order of assessment are discussed with reference to the individual grounds of appeal raised by the Assessee challenging various additions made to the total income declared by the Assessee in its return of income. The Assessee has also filed applications for admitting additional grounds of appeal vide application dated 14.1.2016 and another additional ground of appeal dated 22.11.2018 filed in the registry on 4.1.2019.

3. Before we deal with the grounds of appeal raised by the Assessee, we need to first consider the Assessee's application dated 22.11.2018 for admission of the following additional ground of appeal because it is a preliminary issue challenging the impugned order as one passed beyond the period of limitation and therefore non est in law:-

> "That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation and therefore, is liable to be quashed."

4. The aforesaid additional ground of appeal raises a purely legal issue which does not require any fresh investigation into facts; facts already being on records. The aforesaid additional ground of appeal is therefore admitted for adjudicated on merits in view of the discretion conferred on the Tribunal under Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 and the decision of the Hon'ble Supreme Court decision in the case of National Thermal Power Co. Ltd. vs. CIT : [1998] 229 ITR 383 (SC) wherein it was held that any legal ground which can be decided on the basis of facts already available on record should be admitted for adjudication. Further the additional ground seeks to raise purely a question of law viz., that the order passed by the AO is beyond the period of IT(TP)A No.1537/Bang/2012 limitation. The aforesaid additional ground is therefore admitted for adjudication.

5. As far as the merits of the additional ground of appeal raised by the Assessee as aforesaid is concerned, the following list of dates are material to adjudicate the aforesaid ground of appeal:

> Date Chart Date of filing Income Tax Return 30.09.2008 Date of passing the TPO order 31.10.2011 Date of passing the draft assessment 26.12.2011 Order Date of DRP directions 03.09.2012 Date of final assessment order under section 18.10.2012 143(3)/144C(13) Due date for passing final assessment order u/s 153(1) r.w.s 3rd proviso to the said 31.03.2012 section.

6. To adjudicate the addition ground, the relevant statutory provisions have to be seen.

Time limit for completion of assessments and reassessments.

153. (1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of--

> (a) two years from the end of the assessment year in which the income was first assessable ; or
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> (b) one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier IT(TP)A No.1537/Bang/2012 assessment year, is filed under sub-section (4) or sub-

section (5) of section 139, whichever is later :

> Provided that in case the assessment year in which the income was first assessable is the assessment year commencing on or after the 1st day of April, 2004 but before the 1st day of April, 2010, the provisions of clause (a) shall have effect as if for the words

"two years", the words "twenty-one months" had been substituted :

Provided further that in case the assessment year in which the income was first assessable is the assessment year commencing on or after the 1st day of April, 2005 but before the 1st day of April, 2009 and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA--

(i) was made before the 1st day of June, 2007 but an order under sub-section (3) of that section has not been made before such date; or

(ii) is made on or after the 1st day of June, 2007, the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words "thirty-three months" had been substituted:

Provided also that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1st day of April, 2009 or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA--

(i) is made before the 1st day of July, 2012, but an order under sub-section (3) of that section has not been made before such date; or

(ii) is made on or after the 1st day of July, 2012, IT(TP)A No.1537/Bang/2012 the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words "three years" had been substituted.

Reference to dispute resolution panel.

144C. (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible Assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,--

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,--

(i) the Dispute Resolution Panel; and

(ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if--

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153 or section 153B, pass the assessment order under sub-section (3) within one month from the end of the month in which,--

(a) the acceptance is received; or IT(TP)A No.1537/Bang/2012

(b) the period of filing of objections under sub-section (2) expires.

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:--

(a) draft order;

(b) objections filed by the assessee;

(c) evidence furnished by the assessee;

(d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;

(e) records relating to the draft order;

(f) evidence collected by, or caused to be collected by, it; and

(g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),--

(a) make such further enquiry, as it thinks fit; or

(b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

Explanation.--For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the IT(TP)A No.1537/Bang/2012 variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 or section 153B, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

The following sub-section (14A) shall be inserted after sub- section (14) of section 144C by the Finance Act, 2012, w.e.f. 1- 4-2013 :

(14A) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing IT(TP)A No.1537/Bang/2012 Officer with the prior approval of the Commissioner under sub-

section (12) of section 144BA.

(15) For the purposes of this section,--

(a) "Dispute Resolution Panel" means a collegium comprising of three Commissioners of Income-tax constituted by the Board 5 for this purpose;

(b) "eligible assessee" means,--

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

(ii) any foreign company.

6. It is not in dispute that the Assessee is an eligible Assessee and therefore the Assessment in the case of the Assessee is to be completed keeping in mind the statutory provisions of Sec.143(3), 144C and Sec.153 of the Act.

7. In so far as an eligible Assessee is concerned, the third proviso to Sec.153(1) lays down the period of limitation and it lays down a period of 3 years from the end of the relevant Assessment year as the time within which Assessment has to be completed. As per the third proviso the period of limitation in the case of the Assessee would end on 31.3.2012 i.e., three years from the end of the relevant AY, which is AY 2008-09 in this case. The order of assessment has however been passed in this case only on 18.10.2012.

8. It is the plea of the Revenue that in the case of an eligible Assessee the procedure to be followed is first to pass a draft assessment order as per the provisions of Sec.144C(1) of the Act which has a non-obstante clause. The Assessee has a right to file objection to the draft IT(TP)A No.1537/Bang/2012 assessment order or convey his acceptance to the proposals in the draft assessment order and the time limit for doing so is 30 days from the date of receipt of the draft assessment order. If the Assessee conveys his acceptance to the draft assessment order or does not file objections to the DRP within the time limit specified in Sec.144C(2), the AO has do pass final assessment order within one month from receipt of acceptance or expiry of period for filling objection to DRP and no such objection is filed (Sec.144C(3) of the Act). If objections are filed before DRP, the DRP shall issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment u/s. 144C(5). In terms of Sec.144C(12) directions u/s.144C(5) has to be issued on or before expiry of nine months from the end of the month in which the draft order is forwarded to the eligible assessee. Sec.144C(13) of the Act lays down the time limit for the AO to pass an order giving effect to the directions of the Tribunal and it reads thus:-

> "Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 or section 153B, the assessment without providing any further opportunity of being heard to the assessee, within one month from the

end of the month in which such direction is received."

9. According to the revenue, the non-obstante clause in Section 144C(13) of the Act, gives the AO, a time limit of one month from the end of the month in which direction is received by the AO and if that be so, the order of assessment passed on 18.10.2012 is within the period of limitation and is valid.

10. The contention of the Assessee on the other hand is that an assessment order passed by the assessing officer pursuant to the IT(TP)A No.1537/Bang/2012 directions of the DRP is under section 143(3) read with section 144C(13) of the Act. Such an order cannot be construed as having been passed independently and on a stand-alone basis under section 144C(13) of the Act. The further contention of the Assessee is that the time limit for completion of assessment in terms of section 153(1) of the Act is ordinarily 2 years from the end of the relevant assessment year. The said limit was enhanced to 3 years in case of an assessee wherein reference was made to the TPO (i.e., in the case of eligible assessee). It was submitted that the enhanced time limit of 3 years is provided in the statute in order to take care of the time that would be taken, inter alia, in the TPO passing the order, passing of draft assessment order, objections being filed before the DRP, disposal of objections by DRP and passing of assessment order. It was submitted that the provisions of section 144C do not, give a go bye to the limitation enshrined in section 153 of the Act and provisions of section 153 are not made subject to provisions of section 144C of the Act nor do provisions of the latter section override the former, notwithstanding the non- obstante clause in sub-sections (4) and (13) thereof. It was submitted that the non-obstante clause in Sec.144C(1) of the Act, is only with regard to the procedure to be followed in the case of eligible assessee requiring passing of a draft assessment order in case of an eligible assessee and should be read limited to the context, i.e., exception to the ordinary rule that there will be only one assessment order passed by the assessing officer on culmination of the assessment proceedings.

11. It was further submitted that the non-obstante clause in section 144C(4) of the Act curtailing the time limit to pass a final assessment order within one month, in case where the assessee does not make an application to the DRP, notwithstanding the time limit provided in section 153(1) of the Act is to curtail the limitation that would otherwise have been available to the assessing officer to pass the final assessment order. The IT(TP)A No.1537/Bang/2012 time limit of one month in section 144C(4) cannot be read as additional time provided to the assessing officer, over and above limitation in section 153 of the Act to pass the final assessment order in the case of an eligible assessee. It was submitted that for the same reason, the time limit of one month in section 144C(13) to pass the assessment order pursuant to the directions of the DRP cannot be construed as additional time available to the assessing officer, over and above the normal limitation in section 153 of the Act to pass the assessment order. It was submitted that the non- obstante clause(s) in sections 144C(1)/144C(4) / 144C(13) have to be read in context, limited to the purpose for which the same are created and are not intended to completely bypass provisions of section 153 of the Act or provide for additional time over and above the limitation contained in the said section. Our attention was also drawn to the scheme of section 144C that was introduced in the statute and that the Dispute Resolution Panel was constituted to expedite the dispute resolution process involving eligible assessees. In this regard, our attention was drawn to the Memorandum to the Finance (No. 2) Bill,

2009 while introducing the provisions of section 144C in the statute clarifying the legislative intent in the following terms:-

> "The dispute resolution mechanism presently in place is time consuming and finality in high demand cases is attained only after a long drawn litigation till Supreme Court. Flow of foreign investment is extremely sensitive to prolonged uncertainty in tax related matter. Therefore, it is proposed to amend the Income-tax Act to provide for an alternate dispute resolution mechanism which will facilitate expeditious resolution of disputes in a fast track basis"

12. It was submitted that if the non-obstante clause in sections 144C(4)/ 144C(13) of the Act is interpreted as allowing the assessing officer additional time over and above the limit provided under section 153(1) third IT(TP)A No.1537/Bang/2012 proviso, of the Act, the same would defeat the entire purpose of expediting the dispute resolution process, by enlarging the time available for completion of assessment to almost five years from the end of the relevant previous year (four years from the end of the relevant assessment year).

13. We have considered the submissions of the learned counsel for the Assessee. We however find similar issue has already been considered and decided against the Assessee by the ITAT Delhi Bench in the case of Honda Trading Corporation vs. CIT : (2015) 61 taxmann.com 233 wherein it was held that the provisions of section 144C override the provisions of section 153 of the Act. While rejecting the assessee's contention that the limitation in section 153 referred to passing of draft assessment order, the Tribunal held that:

> (i) Section 144C gives a complete go bye to section 153; and
>
> (ii) The Act does not contemplate any limitation for passing of draft assessment order, which can be passed within a reasonable time.

14. Though arguments were advanced that the aforesaid decision does not lay down the correct law, we are of the view that a co-ordinate Bench decision is binding on us, and we find no reason for not following the same. We therefore reject the additional ground raised by the Assessee on the question of limitation.

15. We shall now take up the grounds of appeal raised by the Assessee. Gr.No.1 raised by the Assessee in the grounds of appeal reads as follows:-

> "1. The impugned order of the Assessing Officer passed consequent t the order of the Dispute Resolution Panel (for short DRP) is not sustainable in the eyes of law as the same is passed without considering the explanations of the appellant in proper IT(TP)A No.1537/Bang/2012 prospective, the same is passed without proper application of mind."

This ground is general in nature and calls for no specific adjudication.

16. Gr.No.2 & 3 raised by the Assessee in the grounds of appeal reads as follows:-

> "2. The assessing Officer as well as DRP grossly erred in ignoring the plea of the appellant with regard to the exclusion of tele-communication charges that the payments were made to the service provider for connectivity within India and therefore the expenditure was not attributable to the delivery of article or things incurred in foreign exchange.
>
> 3. The Assessing Officer as well as the DRP further grossly erred in ignoring the above plea and also the alternative plea of the appellant that the issue was squarely covered by the decision of the High Court in the case of Tata Elxsi Ltd & Others in ITA No. 70/2009 dt. 30.08.2011 which was binding on them."

17. The Assessee was entitled to claim deduction u/s.10A of the Act on the profits derived from its Software Technology Parks of India (STPI) registered unit. Sec.10A(4) provides the methodology of computation of deduction u/s.10A of the Act and it lays down that the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking. Export turnover has been defined under Explanation 2 (iv) to Sec.10A as:-

> "export turnover" means the consideration in respect of export by the undertaking of articles or things or computer software received in, or brought into, India by the assessee in convertible IT(TP)A No.1537/Bang/2012 foreign exchange in accordance with sub-section (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India."

18. While computing the deduction u/s.10A of the Act, the AO noticed that during the relevant assessment year, the Assessee had incurred telecommunication charges amounting to Rs.9,44,90,784 in respect of STPI unit which was not reduced from the export turnover while computing deduction of Rs.8,00,47,585 under section 10A of the Income Tax Act, 1961. The AO therefore excluded the aforesaid sum from the export turnover without excluding them from the total turnover. As a result, the deduction claimed u/s.10A of the Act by the Assessee was allowed at a lesser sum than what was claimed by the Assessee. It was the plea of the Assessee in the appeal against the assessment order before the CIT(A) that at all times during the relevant previous year, it was engaged in development of computer software and not in rendering any technical services. Communication expenses were incurred not for export of computer software outside India and therefore the exclusion from export turnover as done by the AO was not correct. Without prejudice to its contention that the aforesaid sums should not be excluded from the export turnover while computing deduction u/s.10A of the Act, the Assessee has also made an alternate prayer that expenses that are reduced from the export turnover should also be reduced from the total turnover and in this regard has placed reliance on the decision of the Hon'ble Karnataka High Court in the

case of CIT v. Tata Elxsi Ltd [2012] 349 ITR 98 (Karn) wherein it was held that while computing deduction u/s.10A of the Act expenses that are reduced from the export turnover should also be reduced from the total turnover. The CIT(A) however upheld the order of the AO.

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19. Aggrieved by the order of CIT(A), the Assessee has raised Gr.No.2 & 3 before the Tribunal. The learned counsel for the Assessee submitted that section 10A of the Act seeks to allow deduction in respect of the profit derived by an assessee from the export of articles or things or computer software etc. in accordance with conditions provided therein. For the purpose of working out the profit from export, a formula has been provided whereby if the business is of a composite nature, meaning thereby, it includes both exports as well as domestic sales, the proportionate profit relatable to the export business is to be calculated by apportioning the profits of the business in the same proportion as the 'Export Turnover', as defined under clause (iv) of the Explanation 2 to section 10A of the Act, bears to the 'Total Turnover'. "Export Turnover" as defined in Explanation 2 to section 10A means the consideration in convertible foreign exchange excluding freight, telecommunication charges or insurance attributable to the delivery of computer software outside India and expenses incurred by an assessee in foreign exchange in providing the technical services outside India. The term "Total Turnover" has, however, not been defined for the purposes of section 10A of the Act. In view of the aforesaid definition, what needs to be excluded from the export turnover are, inter- alia, the telecommunication charges attributable to delivery of software outside India. It was submitted that in the present case, the telecommunication charges incurred by the Assessee relates to providing connectivity within India for accessing internet, intranet, servers located outside India. The servers are located in different countries and are connected through leased line of the respective countries. The delivery of software to the customer takes place at two stages - (i) uplinking the data, which occurs at the software developers place and; (ii) downlinking of data, which takes place at the customers premises. The telecommunication charges, pertain only to uplinking of data. The downlinking charges, on the other hand, are borne by the overseas entity for which it has to subscribe to IT(TP)A No.1537/Bang/2012 the respective country's leased line. It was therefore, submitted that the aforesaid telecommunication charges are incurred by the assessee for connectivity only within India and cannot by any stretch of imagination be attributable to delivery of software outside India. It was submitted that the Assessee did not incur any expenditure in foreign currency for providing technical services outside India so as to exclude it from the definition of export turnover. The learned DR relied on the order of the CIT(A).

20. We have considered the rival submissions. Taking into consideration the decision rendered by the Hon'ble High Court of Karnataka in the case of CIT v. Tata Elxsi Ltd [2012] 349 ITR 98 (Karn), we are of the view that communication charges should be excluded both from export turnover and total turnover. We are of the view that as of today, law declared by the Hon'ble High Court of Karnataka which is the jurisdictional High Court is binding on us. Moreover, the order of the Hon'ble Karnataka High Court has been upheld by the Hon'ble Supreme Court in the case of CIT v. HCL Technologies Ltd. in Civil Appeal No.8489-98490 of 2013 & Ors. dated 24.04.2018. In view of the acceptance of Gr.No.3, We are of the view that Gr.NO.2 that the expenditure in question ought not to be excluded from the Export Turnover is academic and therefore left open without any

decision.

21. Ground No.4 raised by the Assessee reads as follows:

> "4. The Assessing Officer as well as DRP erred in making the addition of Special Additional Duty of Customs at 4% to the tune of Rs.5,74,87,167/- without proper application of mind and without appreciating that the same had not accrued during the year to the appellant."

22. During the relevant assessment year 2008-09, the Assessee had shown as income in the profit and loss account a sum of Rs.5,74,87,167/-

IT(TP)A No.1537/Bang/2012 being refund of 'Special Additional Duty of customs'' ("SAD"). However in the computation of total income, the Assessee reduced the said sum from the taxable income taking a stand that the income in question did not accrue or arise to the Assessee during the previous year and therefore under the mercantile system of accounting followed by the Assessee, the said income should not be brought to tax in this year. The AO rejected the plea of the Assessee and brought the said sum to tax. On objection to the draft order of assessment making the aforesaid addition, the Assessee preferred objections before the DRP. The DRP set aside the issue for examination afresh by the AO.

23. Pursuant to the directions of the DRP, the Assessee vide letter dated 15th October 2012 , submitted before the assessing officer that the refund of SAD amounting to Rs.5,74,87,167 was sanctioned only in the subsequent years by the custom authorities who passed the necessary orders approving the claim on 6.7.2009 , 29.1.2009 and 5.3.2009 (the relevant orders are at pages 603-604 of the PB - Vol 1 / pages 2817- 2818 of the PB - Vol 4), and therefore as per the law laid down by the Supreme court in the case of E.D. Sasoon :26 ITR 27, Shoorji Vallabhdas and Co. : 46 ITR 144 and Ashokbhai Chimanbhai :

> 56 ITR 42 , in absence of right to receive such income on account of SAD does not accrue in the relevant previous year.

24. The assessing officer, however, rejected the plea of the Assessee and held that (i) the assessee had right to receive the said income and had accounted the SAD refund as income in the books of accounts, and has not treated this as income in the income tax return; and (ii) between Central Excise department and the assessee there was debtor creditor relationship, and thus income on account of SAD refund had accrued to the appellant during the relevant assessment year. Aggrieved by the aforesaid IT(TP)A No.1537/Bang/2012 observations of the AO in the final order of assessment, the Assessee has raised Gr.No.4 before the Tribunal.

25. We have heard the rival submissions. The Assessee is an importer of certain raw materials/components from outside India which are to be utilized in manufacturing of final products. The aforesaid import of raw material/components, is inter alia subject to, SAD, which is levied in lieu of value added tax on similar goods had the same been manufactured in India, under

section 3(5) of the Customs Tariff Act, 1975. Pursuant thereto, upon export of finished product, the assessee was eligible to claim refund of SAD paid at the time of import of raw materials/components. Accordingly, in the books of accounts, the SAD amount is reduced from the cost of materials used in the export of finished products. Procedurally, upon export of the goods, a refund claim is required to be lodged with the customs authority for refund of SAD. The custom authorities, after verifying the claim on the basis of documents so furnished, pass an order for refund of the said amount. As per Sec.27 & 27A of the Customs Act, claim for refund of SAD is not automatic and is subject to the following conditions viz., (a) an application has to be made for claim of refund of excess customs duty paid under section 27(1) of the Customs Act; (b) such application has to be processed and an assessee will be entitled to refund only if an order is passed under section 27(2). Though the Assessee had lodged claim for refund with the custom authorities, the SAD refund was not sanctioned by the authorities. Therefore the Assessee had no right to receive refund. Since the grant of refund is subject to verification and satisfaction of the custom authorities, the right to receive the same in future is contingent and does not crystallize at the time of filing the application for refund. Therefore under the mercantile system of accounting, income cannot be said to have accrued to the assessee. It was submitted that the decision of the Hon'ble Supreme Court in the case of CIT vs. Excel IT(TP)A No.1537/Bang/2012 Industries Ltd.: (2013) 358 ITR 295 (SC) supports the plea of the Assessee. In the aforesaid decision, the assessee was maintaining its accounts on mercantile basis and accordingly accounted for the benefit of entitlement to make duty free imports in the year of export. However, the aforesaid amounts were excluded by the assessee from computation of total income since the same could not be said to have accrued until imports were made and the raw material consumed. The assessing officer did not accept the assessee's claim on the ground that the assessee had acquired vested right of importing raw material duty free along with an obligation of export commitment. According to the AO, when exports were made, the obligation of assessee was fulfilled and right to receive benefit had vested and become absolute at the end of the year. The issue for consideration before the apex Court was whether benefit of an entitlement to make duty free imports of raw materials obtained by the assessee through advance licences and duty entitlement pass book issued against export obligations, was to be recognised as income in the year in which the exports were made or in the year in which the duty free imports were made. The Supreme Court held that such benefit could not be said to accrue to the assessee until the goods were actually imported and made available for clearance as only then corresponding liability would arise on the customs authorities to pass on the benefit of duty free imports to the assessee. It was, thus, held that until the goods were actually imported, the benefits would only be in the nature of hypothetical income which may or may not materialise and its money value, therefore, would not be income of the assessee.

26. It was submitted that the law is well settled that entries in the books of account are not determinative of the ambit of taxation. If an item of income / expenditure is taxable / deductible, the same has to be taken into account as per the provisions of the Act and not as per the book entries.

IT(TP)A No.1537/Bang/2012 Reference in this regard was made to the decision of the Supreme Court in the case of Kedarnath Jute Manufacturing Company v. CIT 82 ITR 363(SC) laying down the aforesaid proposition. The learned DR reiterated the stand of the AO that when the Assessee has

recognized accrual of income in the books of accounts, that by itself would be sufficient to bring to tax the same.

27. We have considered the rival submissions. We are of the view that in the light of the statutory provisions cited for getting an order of refund of SAD, the mere fact that it was recognized as income in the books of accounts by the Assessee would not be sufficient to bring the same to tax. The decisions cited by the learned counsel for the Assessee in this regard supports the plea that there would be no accrual of income unless the authorities concerned, pass an order sanction of refund and that the entries in the books of accounts by the Assessee are not conclusive in the matter of deciding the point of time at which income can be said to have accrued to an Assessee. Apart from that, we find that out of the total SAD refund aggregating to Rs.5,74,87,167, the amount sanctioned by the custom authorities amounted to Rs.5,71,37,509 only. Out of total sanctioned amount, Rs.4,27,71,514 was offered to tax by the Assessee in assessment year 2009-10 and Rs.1,43,65,995 was offered to tax in assessment year 2010-11, as and when the order in this regard was passed by the Custom authorities. The relevant orders of the customs authorities are at pages 640 and 670 of PB-Vol 1 / pages 2823 and 2829 of PB-Vol 4 respectively). The issue is therefore revenue neutral and do not affect the tax liability of the assessee likely to be collected by the Department as a whole: In the light of the above discussion, we are of the view that the addition made is unsustainable and the same is directed to be deleted. Ground No.4 raised by the Assessee is accordingly allowed.

IT(TP)A No.1537/Bang/2012

28. Ground Nos.5, 7 to 8 raised by the Assessee reads as follows:-

> "5. The Assessing Officer grossly erred in disallowing the depreciation on the cost of assets incurred while taking over the Road development Business (for short RDB) of M/s. Ingersoll Rand (India) Limited (IR for short) acquired through slump sale and the panel grossly erred in sustaining the disallowance without assigning any specific reason of its own.
>
> 7. The Assessing Officer further erred in disallowing warranty claim of Rs.1,01,00,000/- as made by the appellant which was relatable to the Road Transport Division which was incurred in the year out of the business taken over from IR, without providing reasonable/adequate opportunities to the Appellant.
>
> 8. The Assessing Officer further erred in disallowing non- compete fee paid as revenue expenditure, without considering the plea of the appellant, duly supported by various judicial pronouncements."

29. We have already seen that the Assessee has filed an application seeking to raise additional grounds vide its letter dated 14.1.2016. Additional grounds No.15 & 16 and 19 to 23 raised therein are linked to the grounds of appeal (Gr.No.5, 7 to 8) already raised in the original grounds of appeal filed along with Form No.36B along with the appeal. The additional grounds raised therein are therefore admitted for adjudication. The additional grounds viz., ground Nos.15 & 16 and 19, 21 to

23, reads as follows:

> "Raised as Additional Ground of appeal No.15 & 16
>
> 15. Without prejudice to the Ground No.5, the AO/DRP ought to have treated the difference between, the value of tangible and intangible assets assigned as per the valuation report and the written down value of the assets in the books of IR as being Goodwill and allowed depreciation as per the provisions of the Act.
>
> IT(TP)A No.1537/Bang/2012
>
> 16. Without prejudice to Ground No.8, the AO/DRP ought to have held non-compete fee of Rs.5,40,00,000 as being a depreciable asset and allowed depreciation as per the provisions of the Act.
>
> Raised as Additional Ground of Appeal No. 19, 21 to 23 :-
>
> 19. AO/DRP ought to have allowed the value assigned to license, permits, certification, accreditation etc., acquired from IR amounting to Rs.70,00,000 (Rupees Seventy Lakhs) as revenue expenses and should the same be disallowed, the AO ought to provide depreciation on the same.
>
> 21. AO/DRP ought to have held goodwill of Rs.43,40,89,871 as being a depreciable asset and allowed depreciation as per the provisions of the Act.
>
> 22. The Appellant also craves for leave to claim an amount of Rs.13,87,00,000 as revenue expenditure paid towards the right to supply spare parts to customers of IR. Notwithstanding this argument, in case this amount is considered as a payment towards acquiring a capital asset, then the AO ought to allow depreciation on the same.
>
> 23. Without prejudice to the principal grounds and the aforesaid additional grounds, the Appellant pleads that the total consideration paid to IR towards acquisition of business, with the exception of value of land, should either be allowed as revenue expenditure or be entitled to depreciation on the capitalised value."

30. Ground Nos.5, 7 to 8 and Additional grounds No.15 & 16 and 19, 21 to 23 arise out of a Business Transfer Agreement ("BTA") dated 04.05.2007, whereby the Assessee acquired the Road Machinery Division ("RMD") (also known as Road Development Business or "RDB") of Ingersoll Rand India Limited ('IRIL'), by way of slump sale for lump sum consideration of Rs.231,82,00,000 (refer page 118 of PB - Vol 1 / page 2690 of PB - Vol 4). Road Development business has been defined in clause 1.1 of the Agreement defines "Road Development Business" as the IT(TP)A No.1537/Bang/2012 business of the seller i.e., IRIL relating to the road development products including soil and asphalt compactors, small and large pavers, rollers, screeds and road wideners as conducted on the date of

this agreement and comprising of Acquired Assets, Assumed liabilities, transferred employees (page 2686 of paper book Vol.4). Schedule-1 to the BTA lists the items of Acquired Assets (Page 2702 & 2703 of paper book No.4). Schedule-2 to the BTA lists the items of assumed liabilities (Page 2704 & 2705 of paper book No.4). Transferred employee is defined in clause 1.1 of the BTA as the Business employees who consent to the transfer of his or her employment to the buyer i.e., the Assessee. In terms of clause 2.4 of the BTA (refer page 117 of Paper book - Vol 1 / page 2689 of PB - Vol 4), the lump sum consideration represents the undivided sales consideration, with no independent values being assigned to various components of the RDB. However after the conclusion of transfer of the RDB, the Assessee has in its books of accounts recorded the break-up/bifurcation of various assets and liabilities acquired and the same is explained in Note No.18 of Schedule 18 to the note to the Accounts (at Page 2662 of Paper Book Vol.-4).

31. As per section 2(42C) of the Act, Slump Sale means, the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales. There is no dispute that the transfer of RDB by IRIL to the Assessee under the BTA is a slump sale. The Assessee is the transferee and taxation of Slum Sale in the hands of the Transferor (IRIL) is governed by Sec.50B of the Act. As far as Assessee is concerned, after the transfer, he has to record the individual items of assets that were transferred under the Slum Sale in his books of Accounts. Since at the time of purchase of business, no values were assigned for individual assets and liabilities forming part of the undertaking acquired by way of slump IT(TP)A No.1537/Bang/2012 sale, post-acquisition of business, various assets and liabilities taken over were recognized and accounted for individually in the books of accounts of the purchaser i.e., the assessee for accounting and tax purposes on the basis of valuation report dated 28.03.2008 obtained from H.V Krishna Swamy (refer pages 286-296 of PB - Vol 1 / pages 2730 - 2740 of PB - Vol 4) and valuation report dated 5.08.2008 obtained from Bizworth for valuation of tangible and intangible assets respectively, as under (refer pages 324-371 of PB).

| Particulars | Amount (Rs. in lacs) | Remarks |
|---|---|---|
| TANGIBLE ASSETS (A) | | Valuation report from H.V. Krishna Swamy, Chartered Engineer (refer pages 286-296 of PB - Vol 1 / pages 2730 - 2740 of PB - Vol 4) |
| Plant and machinery | 1059.80 | |
| Patterns | 27.05 | |
| Furnitures and Fixtures | 203.74 | |
| Vehicles | 11.36 | |
| Computers | 155.90 | |
| Total (A) | 1,504.24 | Claimed depreciation in ITR |
| Land & Building | 7,240.00 | Claimed depreciation on Building in ITR considering actual cost as the value determined as per the report of E&Y dated 15.3.2007. |
| Capital Work in progress | 28.86 | |
| Total (B) | 7,268.86 | |
| INTANGIBLE ASSETS (C) | | Valuation report from M/s Bizworth India Private Limited (refer pages 324-371 @ 369 of PB - Vol 1 / pages |

| | | |
|---|---|---|
| | | 2741-2788 of PB - Vol 4) |
| Design & Drawing | 3,278.00 | Claimed depreciation in ITR |
| Marketing intangibles | 2,223.00 | Claimed depreciation in ITR |
| Order backlog | 400.00 | Claimed depreciation in ITR |



| | | |
|---|---|---|
| Spare parts supply rights & benefits | 1,387.00 | Neither capitalised nor claimed as revenue. Depreciation claim made before AO vide letter dated 15.10.2012 (refer Addl. ground 22) |
| Supplier database | 600.00 | Claimed depreciation in ITR |
| Software acquired | 194.00 | Claimed depreciation in ITR |
| Sales promotion material | 15.00 | Neither capitalised nor claimed as revenue expenditure. Depreciation claim made before AO vide letter dated 15.10.2012 |
| Non-competition agreement | 540.00 | Claimed as revenue expenditure. Alternate claim of depreciation (refer Addl. ground 16) |
| Licenses | 70.00 | Claimed as revenue expenditure. Alternate claim of depreciation (refer Addl. ground 19) |
| Warranties | 101.00 | Claimed as revenue expenditure. Alternate claim of depreciation |
| Total (C) | 8,808.00 | |
| Total (A +B + C) | 17,581.10 | |
| Add : Other current assets (Net) | 1,260.00 | |
| Total | 18,841.10 | |
| Add: Goodwill | 4,340.90 | Depreciation claim made before AO vide letter dated 15.10.2012 (also refer Addl. ground 21 of the present appeal) |
| Total Consideration | 23,182.00 | |

32. Accordingly, the cost of acquisition of individual assets, forming part of RDB undertaking acquired by way of slump sale from Ingersoll Rand India Limited ('IRIL'), for claim of depreciation in the hands of the Assessee was recorded at the aforesaid values and was determined by independent valuers. Note 18 to the Notes on Accounts as appearing in the financial statements of the Assessee was as follows:

> IT(TP)A No.1537/Bang/2012 "Pursuant to a business agreement dated May 4, 2007 between Ingersoll-Rand (India)Ltd., (Ingersoll-Rand), the Company has during the year acquired the following Assets and Liabilities of the Road Machinery Division of Ingersoll-Rand.
>
> Fixed Assets (Note (a) below) 175,77,55,740

| | | |
|---|---|---|
| Current Assets | | |
| Inventories | 20,17,44,753 | |
| Sundry Debtors | 19,83,27,779 | |
| Cash and Bank | 1,66,03,937 | 217,44,32,209 |
| Other current Assets | | |
| Less: Current Liabilities & Provisions | | |
| Liabilities | 26,84,64,784 | |
| Provisions | 2,18,57,296 | 9,03,22,080 |
| Net Assets taken over from Ingersoll-Rand | | 188,41,10,129 |

The difference between the Purchase consideration of Rs.231,82,00,000 and the value of the net assets of Rs.188,41,10,129 taken over amounting to Rs.43,40,89,871 has been accounted for as Goodwill.

Note (a): These are based on an independent valuation and includes intangibles (comprising of Technical know how and Marketing rights) aggregating to Rs.88,08,00,000."

33. Out of the aforesaid addition to fixed assets aggregating to Rs.175,77,55,740, the Assessee claimed depreciation on the following value of tangible and intangible assets acquired as under:

| INTANGIBLE ASSETS | Amount (Rs. in lacs) |
|---|---|
| Design & Drawing | 3,278.00 |
| Marketing intangibles | 2,223.00 |
| Order backlog | 400.00 |
| Supplier database | 600.00 |
| Software acquired | 194.00 |
| Total Intangible assets on which depreciation claimed in ITR | 6695.00 |



| TANGIBLE ASSETS | Amount (Rs. in lacs) |
|---|---|
| Plant and machinery | 1,504.24 |
| Building | 876.60 |
| Total Tangible assets on which depreciation claimed in ITR | 2380.84 |

34. The claim for depreciation was disallowed by the AO and such disallowance of claim for depreciation as per the aforesaid chart in this paragraph is subject matter of Gr.No.5 raised by the Assessee before the Tribunal.

35. As per the BTA dated 4.5.2007 between the Assessee and IRIL, the Assessee acquired, inter-alia, as part of slump purchase, warranties as contractually agreed by the suppliers, amounting to Rs.1,01,00,000 (refer page 369 of PB - Vol 1 / page 2786 of PB - Vol 4) which was claimed as revenue deduction by the appellant in the return of income for the relevant assessment year (refer page 94 of PB - Vol 1 / page 2666 of PB - Vol 4). The assessing officer disallowed the aforesaid amount of Rs.1,01,00,000, allegedly holding that the same was part of cost for acquiring the Road development business. It is the plea of the Assessee that consistent with the finding of the assessing officer, depreciation may be directed to be allowed on the said amount in terms of section 32(1)(ii) of the Act. The claim for deduction as revenue expenditure is made in Gr.No.7 and for depreciation is made in (Additional) Gr.No.23 which is a general ground for allowance of depreciation on the entire consideration paid for business transfer of RDB.

36. The following were claimed as revenue expenditure in the revised return of income:-

> IT(TP)A No.1537/Bang/2012 Non-competition agreement 540.00 Licenses 70.00 Warranties 101.00 TOTAL 711.00

37. In Gr.No.8 the Assessee has sought deduction of Non-compete fee as revenue expenditure. With prejudice to the aforesaid claim, in (additional) ground No.16 & 19 the payment for non-competition agreement and Licenses is claimed as commercial rights/intangibles on which the Assessee is entitled to claim depreciation as intangible assets viz., commercial rights on which the Assessee is entitled to claim depreciation.

38. The Total consideration payable to IRIL for slump sale of RDB was a sum of Rs.231,82 lacs. After allocation of values for various Assets and intangibles there was a difference of Rs.43,40,89,870/- which was treated as Goodwill. However, no depreciation was initially claimed in the return of income on goodwill aggregating to Rs.43,40,89,870. The relief in respect of depreciation on Goodwill is sought by the Assessee in (Additional) Ground No.15 & 21 specifically.

39. Also, certain business and commercial rights related to spare parts supply rights and benefits amounting to Rs.13,87,00,000 and sales promotion material aggregating to Rs.15,00,000 were neither capitalised nor claimed as revenue expenditure. However, claim of depreciation was made before the assessing officer vide letter dated 15.10.2012 on the aforesaid amounts (refer pages 603-606 of PB-Vol 1 / pages 2817-2820 of PB - Vol 4). The non allowance of depreciation on commercial rights related to spare parts supply rights and benefits of Rs.13,87,00,000/- is agitated in (Additional) Ground No.22.

40. In Ground No.23, the Assessee has sought to raise a plea that total consideration paid to IRIL towards acquisition of business should be IT(TP)A No.1537/Bang/2012 allowed as revenue expenditure or if treated as capital expenditure, depreciation on the capitalized value should be allowed. It can thus be seen that all the aforesaid grounds arise out of the BTA by which the Assessee acquired RMD business of Ingersoll Rand India Ltd. With this background we shall now examine the claim of the Assessee in each of the aforesaid grounds.

41. The dispute in Ground No.5 is with regard to allowability of the claim for deduction on account of depreciation as set out in paragraph-31 of this order on tangible assets and intangible assets acquired on acquisition of RBD from IRIL.

42. The assessing officer while completing the assessment did not dispute that the transfer of RBD undertaking of Ingersoll Rand India Limited ('IRIL'), was by way of slump sale for lump sum consideration of Rs.231,82,00,000. The assessing officer, however, was of the view that inflated values were assigned to the assets only with the intention of claiming higher depreciation. Sec.43 of the Act defines certain terms relevant to income from profits and gains of business or profession:

> Sec.43(1) defines what is actual cost for the purpose of allowing depreciation and it reads thus:-

"43. In sections 28 to 41 and in this section, unless the context otherwise requires--

(1) "actual cost" means the actual cost96 of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met96 directly or indirectly by any other person or authority:.....

Explanation 3.--Where, before the date of acquisition by the assessee, the assets were at any time used by any other person for the purposes of his business or profession and the 3[Assessing] Officer is satisfied that the main purpose of the transfer of such IT(TP)A No.1537/Bang/2012 assets, directly or indirectly to the assessee, was the reduction of a liability to income-tax (by claiming depreciation with reference to an enhanced cost), the actual cost to the assessee shall be such an amount as the Assessing Officer may, with the previous approval of the Joint Commissioner, determine having regard to all the circumstances of the case."

43. The assessing officer invoked Explanation 3 to section 43(1) of the Act held that depreciation would be admissible only with reference to the WDV of the assets (as appearing in the books of IRIL on basis of Form 3CEA report) forming part of the business purchased by the appellant and not with reference to the values on the basis of valuer's report. Accordingly, the assessing officer disallowed the claim of depreciation to the extent of Rs.18,19,73,312, as under

> Asset Cost as per WDV as per Rate of Depreciatio Depreciation Difference Valuation IR as on depre- n as per as per Depreciation report 4.5.2007 ciation valued cost adopted cost Buildings 8,76,60,000 3,34,24,359 10 87,66,000 33,42,435 54,23565 Furniture 2,03,74,000 1,12,98,402 10 20,37,400 11,29,840 9,07,560 & fittings Machiner 11,58,00,000 5,40,10,049 15 1,73,70,000 81,01,507 92,68493 y & plant Vehicles 11,36,000 10,17,277 15 1,70,400 1,52,592 17,808 Computer 1,55,90,000 92,05,190 60 93,54,000 55,23,114 38,30886 s and Software Intangible 65,01,00,000 0 25 16,25,25,000 0 162525000 assets Total 89,06,60,000 10,89,55,300 20,02,22,800 1,82,49,488 18,19,73,312

44. It can be seen from the aforesaid chart that the AO allowed depreciation as per the written down value as appearing in the books of the transferor for all items of assets except intangible assets

which was not recognised by the transferor in its books of accounts and which the Assessee out of the lump sum consideration paid for acquiring the IT(TP)A No.1537/Bang/2012 business attributes as consideration for intangible assets that the Assessee acquired pursuant to the Business Transfer Agreement. The admitted position is that there is no provision in the Act providing as to how the transferor of business in a slump sale has to record in his books as the value of individual items of assets that he acquired under slum sale. Therefore the correctness of the action of the Assessee in attributing values to individual items of assets would depend on the correctness of the valuation based on which the Assessee recorded actual cost of the individual items of assets that he acquired in a slump sale. On the other hand, if the AO wants to dispute the correctness of the claim made by the Assessee, he has to substantiate the same and further he has also to establish that condition precedent for invoking Explanation-3 to Sec,43(1) of the Act exists in a given case. It is the case of the Assessee that in the absence of any method provided in the Act, the cost of acquisition of individual assets, forming part of undertaking acquired by way of slump sale, in the hands of purchasing company has to be recorded at the values determined by independent valuers, on a scientific / rational basis. Such value of assets acquired as part of slump sale, determined by the independent valuers is required to be considered as actual cost / written down value for claiming depreciation under section 32 of the Act, in the hands of the transferee.

45. The AO rejected the claim of the Assessee for the reasons given in Para 5.7.5 & 5.7.6 of the Draft Assessment order dt.26.12.2011. The reasons in short was that (i) the valuers did not do an independent valuation but relied on the information provided by the Assessee and its employees; (ii) Design & Drawings which were valued at Rs.32,78,00,000/- was on the basis of estimate by the Assessee that the designs would have further useful life of 7 years after acquisition by the Assessee; (iii) The Assessee had claimed before the AO that there was an world wide IT(TP)A No.1537/Bang/2012 acquisition of Ingersoll Rand Road Development Business or Road Machinery Division by the parent company of the Assessee and in terms of understanding between the parties on such acquisition that the brand name of Ingersoll Rand (IR) would be used for a period of one year from the date of acquisition in India on road making machinery. The Copy of the said understanding was not furnished. (iv) the allocation of value for brand value was made only on the basis of statement of Assessee's sales and marketing team which was to the effect that the Assessee without the brand name of IR would not be able to penetrate the market for next three years. (v) The valuation of supplier database which was estimated at Rs.3 lacs per vendor was not based on visit of the potential supplier, obtaining prototypes and samples and due diligence evaluation. Customer database cannot be regarded as a depreciable asset.

46. The DRP upheld the conclusions of the AO by observing at para 10.2 of its directions that the business transfer agreement did not give any break up of values of each item of asset and that the Assessee has failed to substantiate its case.

47. We have heard the rival submissions. Copy of the valuation report dated 28.3.2008 by H.V. Krishnaswamy for valuation of Plant & Machinery etc., is at pages 2730 to 2740 of paper book-4. Copy of the valuation report dated 5.8.2008 by Bizworth for valuation of intangibles is at pages-2741 to 2788 of paper book-4. The valuation of tangible assets has been done on the basis of replacement cost for some items. In respect of some items the cost of acquisition has been adjusted

to inflation factor. Valuation of intangibles has been made taking into consideration the terms of the BTA whereby intangible rights that vest in the Assessee have been identified and valued on accepted methodology of valuation. For example a sum of Rs.4 crores has been estimated as the value of intangible order IT(TP)A No.1537/Bang/2012 backlog. The Assessee had a right over the orders that were booked by IRIL and those rights were of the value of 4.85 crores. The expected period of execution of the orders and realization of sale proceeds after giving effect to tax implications has been estimated at Rs.4 crores. Each item of intangible assets have been identified and valued. The valuation has been done by expert in the field. Such valuation cannot be brushed aside for no valid reason or basis. Explanation 3 to section 43(1) of the Act, provides that in case the assessing officer is satisfied that the main purpose of transfer of the asset, including slump sale of an undertaking, was reduction of liability to income tax by claiming depreciation on enhanced cost of acquisition, the assessing officer can substitute the cost of such assets in the hands of transferee with fair value of such assets. The mere fact that the sale in question was a slump sale, does not empower the assessing officer to tinker with the split up of the lump-sum consideration over various tangible and intangible assets, on the basis of values determined by an independent valuer on a rational and scientific basis. The mischief of Explanation 3 to section 43(1) of the Act can be invoked only if the assessing officer is, based on the material on record, satisfied, that the main purpose of transfer of assets (previously used for purposes of business) is reduction of tax liability by claiming depreciation with reference to enhanced cost. The satisfaction to be recorded by the assessing officer is not based on his ipse dixit but on an objective evaluation of material placed / to be brought on record. The Hon'ble Gujarat High Court in the case of Ashwin Vanaspati Industries 255 ITR 26 (Gujarat) wherein the Court held that where the assessee makes a claim for depreciation on enhanced cost, which is actual cost in its hands, it was necessary for the authority who wanted to determine the 'actual cost' as required by Explanation 3 to section 43(1) to place some evidence on record. The ITO is required to determine actual cost to the assessee having regard to all the IT(TP)A No.1537/Bang/2012 circumstances of the case and if in his opinion the written down value was the actual cost, he ought to have supported the same by placing sufficient evidence so as to dislodge the valuation report of the registered valuer.

48. Similarly in the case of Unimed Technologies Ltd. vs. DCIT 73 ITD 150 (Ahd.), it was held that Explanation 3 to section 43(1) of the Act could be invoked only if the Assessing Officer was of the view that fair market value of assets had been inflated to claim excess depreciation; where fair market value of asset had been certified by registered valuer and the assessing officer had not appointed his own valuer for valuation of disputed assets and had even not thought it necessary to examine the said valuer, there being no other evidence to show that the report was not reliable, the valuation report filed by the assessee could not be ignored. In South Asia Tyres Ltd. vs. DCIT: 107 TTJ 319 (Pune), similar proposition as laid down by the Ahmedabad ITAT was laid down

49. The Assessee has filed an application seeking to file the following two agreements as additional evidence, viz., (i) Global Business Transfer Agreement relevant to the portion covering the payment of non-compete fee to Ingersoll Rand (ii) Trademark license agreement providing the right to use the Ingersoll Rand brand name for one year. The existence of these agreements were pleaded by the Assessee before the lower authorities and their non-production has led to some adverse conclusions being drawn by the revenue authorities. We are of the view that these agreements, the genuineness

of which are not disputed, are necessary for proper adjudication of the disputes in the appeal and therefore they are admitted as additional evidence.

50. Clause 5.12 of the Global Business Transfer Agreement between the Assessee's parent company and Ingersoll Rand provides that Ingersoll IT(TP)A No.1537/Bang/2012 Rand shall not conduct any business activity which is the subject matter of transfer i.e., the Road Development Business. Therefore, the general understanding for worldwide acquisition of Road Development Business of Ingersoll Rand by the Assessee's group entities worldwide is subject to the aforesaid non-compete agreement. Though this does not find specific mention in the BTA between the Assessee and IRIL, the overall understanding for global acquisition of RDB of Ingersoll Rand cannot be disputed. So also, the license to use the brand name IR by the Assessee stands established by the license agreement between the parent company of the Assessee and Ingersoll Rand. Thus, the acquisition of these rights under the global takeover of RDB by Volvo entities worldwide cannot be disputed.

51. In the light of the global acquisition of RDB by Volvo group entities worldwide, there is no basis for the AO to invoke Explanation-3 to Sec.43(1) that is motive for valuation of depreciable assets at higher value is to get benefit of higher depreciation and avoid tax. The fair market value of the assets on which depreciation has been claimed by the Assessee, as on the date of transfer, has not been disputed by the revenue authorities on germane grounds. The reasons given by the AO for invoking Explanation-3 to Sec.43(1) in our view are very vague. The valuation report is given by experts in the respective fields. Their conclusions cannot be brushed aside on mere surmises and conjectures. It is undisputed that but for invoking Explanation-3 to Sec.43(1) of the Act, there is no other basis for not allowing the claim for depreciation as made by the Assessee. On the facts of the case, we are convinced that the AO has not established the existence of facts to justify invoking Explanation-3 to Sec.43(1) of the Act and therefore, we hold that the depreciation on the cost of acquisition of various assets as claimed by the assessee in the return of income should be allowed. Thus Ground No.5 is allowed.

IT(TP)A No.1537/Bang/2012

52. As far as Ground No.7 is concerned, the complaint of the Assessee is that it did not have opportunity of being heard on this issue. Neither before AO nor before DRP, the Assessee has provided details of the warranties which were claimed as revenue expenditure. In the statement of facts before DRP it is claimed that warranty claims were taken over from IRIL in the slum sale. The issue requires examination afresh by the AO and the order of DRP/AO is set aside, with liberty to Assessee to establish its claim with evidence.

53. As far as Gr.No.8 and (additional) Gr.No.16 are concerned, the facts are that the Assessee claimed deduction of Rs.5,40,00,000 in the return of income on account of non-compete fee paid to IRIL pursuant to BTA agreement dated 4.5.2007 (refer page 93 of PB - Vol 1 / page 2665 of PB - Vol 4). The value of non-compete fees was allocated out of the value placed on intangible assets, on the basis of determination, by the independent valuer, viz., Bizworth (refer pages 324-371 @ 369 of PB - Vol 1 / pages 2741-2788 of PB - Vol 4).

54. The assessing officer disallowed the aforesaid claim as revenue expenditure allegedly holding that (i) non-competition agreement was not entered into / provided by the Assessee (ii) a part of the consideration paid to take over the Ingersoll Rand business was treated as non-competition fee based on the valuation report and (iii) the same being a payment made to take over a business creates a new source of income and is to be regarded as capital expenditure. The DRP concurred with the findings of the assessing officer.

55. We have heard the rival submissions. We have already mentioned in the earlier part of this order that the Assessee has filed application dated 24.07.2015 under Rule 29 of the Income-tax (Appellate Tribunal) Rules 1963, placing on record relevant extract of the 'Global Business Transfer IT(TP)A No.1537/Bang/2012 Agreement' dated 27.02.2007 entered into between Ingersoll Rand Company Limited (on behalf of itself and the other sellers named therein) and AB Volvo (Publ) (on behalf of itself and the other buyers named therein) which was also referred to during the course of the assessment proceedings. The said agreement is equally applicable to the appellant and Ingersoll Rand (India) Ltd. As per section 5.12 of the said agreement pertaining to Non-Competition; Solicitation (refer internal page 59 of the Global Business Transfer Agreement placed on record vide application for additional evidence dated 24.7.2015) it is provided as follows:-

> "Section 5.12 Non-Competition; solicitation Restrictions on competing Activities following closing:
>
> Each of the sellers agrees that from the closing until the fifth anniversary of the closing, they will not, and they will ensure that each of the Sellers Affiliates (other than the sold Companies ) will not directly or indirectly engage or invest in any business in competition with the business as conducted immediately prior to the closing. Notwithstanding the foregoing, this section 5.12(a) shall not prohibit (i) the Sellers, directly or through any Affiliate, from conducting any business activities conducted by them as of the date of this agreement(other than the Business), including the business activities of all IR company stores retained by sellers (provided that any business activities conducted by such retained IR company stores shall always be conducted in accordance with the terms of the IRES Sales & Service Agreements ), and the business activities required of the sellers pursuant to the Closing Agreements and pursuant to this Agreement;(ii)Sellers, directly or through any Affiliate, from investing in or holding not more than 10% of the outstanding capital stock or other ownership interests of any person; (iii) the Sellers, directly or through any Affiliate, from hereafter acquiring and continuing to own and operate any entity which has operations that compete with the business if such operations account for no more than 25% of such IT(TP)A No.1537/Bang/2012 acquired entity's consolidated revenues at the time of such acquisition; and (iv) the sellers, directly or through any Affiliate, from selling inventory or other Assets then owned by any seller."

(emphasis supplied)

56. The aforesaid clause is applicable to the transfer of RDB business by IRIL to the Assessee as it was part of the global agreement to take over RDB business of IR worldwide, In terms of the said clause(s), Ingersoll Rand (India) Limited agreed, inter-alia, not to engage directly/indirectly in the business similar to the RDB for a period of five years. For that reason, the combined consideration was allocated by the valuer in their report towards non-compete fee. In fact, after the acquisition of Road Development Business, in order to maintain such business's profitability, the non-compete fee was payable merely to prevent Ingersoll from engaging in competitive business to the detriment of the appellant. Therefore, the non-compete fees was paid wholly and exclusively for smooth functioning of business operations, which did not result in acquisition of any capital asset or benefit of enduring nature so as to constitute capital expenditure.

57. The basis of valuation of the consideration attributable to non- compete clause from and out of the lump sum consideration paid for slum sale is set out in para-16 of the valuation report of Bizworth (page-2780 of paper book-4). Since the non-compete clause was valid for 5 years, the value of non-compete fee has been fixed at the estimated net present value of future sales (fir 5 years) based on market share of IRIL and consequent profit after tax that the Assessee might earn. To our mind the basis of valuation appears to be reasonable and no reasons for not accepting this method of valuation has been cited by the revenue authorities.

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58. Several decisions were cited before us by the learned counsel for the Assessee for the proposition that fee paid under agreement for not competing with the business. Those are all cases where there was specific agreement not to compete and the consideration was fixed as per the terms of the agreement. In the present case however, there exists no such agreement. Since the transfer of business was on a slump sale basis, the transferee has split the lump sum consideration as attributable to several tangible and intangible assets acquired consequent to slum sale. The consideration paid for acquiring business is sought to be characterized as revenue expenditure, which does not appear to be appropriate. Nevertheless, the intangible benefit to the Assessee as a result of existence of agreement not to compete with business of the Assessee can be said to be an intangible right, which can be characterized as commercial rights and the Assessee should be allowed the benefit of depreciation on the value as estimated by the Assessee in its valuation report under section 32(1)(ii) of the Act, as laid down in several decisions which we will refer to while dealing with claim of depreciation on goodwill. We hold and direct accordingly and allow Gr.No.16 (Additional) and dismiss Gr.No.8 raised by the Assessee.

59. Additional Gr.No.15 & 21 are concerned, the same are in relation to Goodwill claimed by the Assessee as deductible revenue expenditure or in the alternative treat is as commercial right on which the Assessee should be allowed depreciation.

60. As we have already seen, during the relevant assessment year under consideration, the assessee had acquired the road machinery business of Ingersoll Rand on a "slump sale basis" for a consideration of Rs.2,31,82,00,000. Further, post-acquisition, based on an independent valuation, the difference between the total consideration and the value IT(TP)A No.1537/Bang/2012 allocated

to tangible and intangible assets amounted to Rs.43,40,89,871 which was accounted as an asset in the books of accounts for the financial year ended 31.03.2008 (refer page 9 of PB - Vol 1 / page 2646 of PB - Vol

4). The aforesaid facts were duly stated in the Notes to Accounts, appended to the audited accounts (refer page 25 of PB - Vol 1 / page 2662 of PB - Vol 4). However, depreciation was not claimed by the assessee, in the return of income on the value of Goodwill and certain other intangibles.

61. However, during the course of the assessment proceedings, in view of decision of the Supreme Court in the case of CIT vs. Sniffs Securities Ltd.: 348 ITR 302, the assessee vide letter dated 15.10.2012, made claim of depreciation @ 25% amounting to Rs.14,35,72,468 on goodwill and certain other intangibles. The working of depreciation on goodwill was also filed before the assessing officer vide the said reply dated 15.10.2012 (refer pages 604-606 of PB- Vol 1 / pages 2818-2820 of PB-Vol 4). The assessing officer in the impugned order, did not, however, deal with the claim of depreciation on goodwill and other intangible assets. The grounds of objection for the claim of depreciation on goodwill was not raised before the DRP. In the additional grounds, however, the Assessee has raised a claim for allowing depreciation on good will. As we have already observed, such a claim, which is based on material already available on record, can be entertained, as the purpose of the proceedings are for proper determination of tax liability in accordance with law.

62. Pursuant to the valuation of tangibles and intangibles undertaken by the Assessee, the purchase consideration was allocated over tangible and intangible assets on the basis of valuation report dated 28.03.2008 obtained from H.V Krishna Swamy (refer pages 286-296 of PB - Vol 1 / pages 2730 - 2740 of PB - Vol 4) and valuation report dated 5.08.2008 IT(TP)A No.1537/Bang/2012 obtained from Bizworth as under (refer pages 324-371 of PB - Vol 1 / pages 2741-2788 of PB - Vol 4):

| Assets | Value (Rs. in millions) |
|---|---|
| Tangible assets | |
| Total (A) | 1003 |
| Design & Drawing | 327.8 |
| Marketing intangibles | 222.3 |
| Order backlog | 40.0 |
| Spare parts supply rights & benefits | 138.7 |
| Supplier database | 60.0 |
| Software acquired | 19.4 |
| Sales promotion material | 1.5 |
| Non-competition agreement | 54.0 |
| Licenses | 7.0 |
| Warranties | 10.4 |
| Total (B) | 880.80 |

| | |
|---|---|
| Goodwill | 434.09 |
| Total (C) | 434.09 |
| Total (A) + (B) + (C) | 2317.89 |

63. It was the plea of the Assessee that the excess of purchase consideration over the value assigned to tangible assets, was allocated to intangible assets to the extent of Rs.88.08 crores and goodwill to the extent of Rs.43.40 crores. Such portion of the purchase consideration (which is in excess of the value allocated to tangible assets acquired as part of the undertaking), represents consideration paid for acquisition of various intangible assets in the form of leases, licenses, customer/ supplier database, business contracts, patents, trademarks, etc. The same was reflected in the accounts as (a) intangible assets and (b)goodwill. Irrespective of the nomenclature placed thereupon, the amount is for IT(TP)A No.1537/Bang/2012 acquisition of invaluable business and commercial rights, eligible for depreciation in terms of section 32(1)(ii) of the Act.

64. The learned counsel for the Assessee invited our attention to the decision of the Supreme Court in the case of CIT vs. Smiffs Securities Ltd.: 348 ITR 302 wherein the Supreme Court was concerned with claim of depreciation on goodwill made by the amalgamated company. The Supreme Court regarded goodwill/ reputational advantage and ability to retain the clientele, being the difference between the cost of an asset and the amount paid for such asset, as business/ commercial right eligible for depreciation under section 32(1)(ii) of the Act, observing as under:-

> "the words `any other business or commercial rights of similar nature' in clause (b) of Explanation 3 to S. 32 indicates that goodwill would fall under the expression `any other business or commercial right of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b). In the circumstances, we are of the view that `Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act."

65. Our attention was drawn to the decision of Hon'ble Delhi High Court in the case of Areva T and D India Ltd. v. DCIT: 345 ITR 421 (Del). In the aforesaid case, the facts were that the assessee was engaged in the business of transmission and distribution of power, which was acquired from the parent company pursuant to transfer of business through slump sale for a total consideration of Rs.44.7 crores. In lieu of the aforesaid consideration, the assessee acquired tangible assets having value of Rs.28.11 crores and the balance amount of Rs.16.58 crores was claimed as paid for acquisition of various business and commercial rights, viz., business claims, business information, business records, contracts and know how, etc., categorized under the separate head viz., "goodwill" in the books of account of the assessee. In the return of income the assessee IT(TP)A No.1537/Bang/2012 claimed depreciation under section 32(1)(ii) of the Act with respect to the aforesaid various intangible assets aggregating to Rs.16.58 crores acquired through slump sale and categorized under the head "goodwill". The assessing officer, CIT(A) and Tribunal disallowed the aforesaid claim of depreciation on intangible assets/goodwill. On further appeal, the High Court allowed the appeal of the assessee, holding that nature of intangible assets in the residual category of "business or commercial rights" could not be restricted to the preceding six category of assets

which are of distinct kind and nature. The High Court observed that all the intangible assets fall in the same genus of assets forming part of tool of trade, facilitating smooth carrying of business. The High Court further held that the various intangible assets acquired by the assessee, viz., business claims, business information, records, contracts, etc., were invaluable commercial rights, which were necessary to carry on the business acquired through slump sale. Accordingly, the High Court held that the same were in the nature of intangible assets eligible for depreciation under section 32(1)(ii) of the Act in the residual category of "business or commercial rights". The relevant observations of the High Court are as under:-

> "13. In the present case, applying the principle of ejusdem generis, which provides that where there are general words following particular and specific words, the meaning of the latter words shall be confined to things of the same kind, as specified for interpreting the expression "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act, it is seen that such rights need not answer the description of "knowhow, patents, trademarks, licenses or franchises" but must be of similar nature as the specified assets. On a perusal of the meaning of the categories of specific intangible assets referred in Section 32(1)(ii) of the Act preceding the term "business or commercial rights of similar nature", it is seen that the aforesaid intangible assets are not of the same kind and are clearly distinct from one another. The fact that after the specified intangible assets the words "business or commercial rights of similar nature" have IT(TP)A No.1537/Bang/2012 been additionally used, clearly demonstrates that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. In the circumstances, the nature of "business or commercial rights" cannot be restricted to only the aforesaid six categories of assets, viz., knowhow, patents, trademarks, copyrights, licenses or franchises. The nature of "business or commercial rights" can be of the same genus in which all the aforesaid six assets fall. All the above fall in the genus of intangible assets that form part of the tool of trade of an assessee facilitating smooth carrying on of the business. In the circumstances, it is observed that in case of the assessee, intangible assets, viz., business claims; business information; business records; contracts; employees; and knowhow, are all assets, which are invaluable and result in carrying on the transmission and distribution business by the assessee, which was hitherto being carried out by the transferor, without any interruption. The aforesaid intangible assets are, therefore, comparable to a license to carry out the existing transmission and distribution business of the transferor. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. This view is fortified by the ratio of the decision of the Supreme Court in Techno Shares & Stocks Ltd. (supra) wherein it was held that intangible assets owned by the assessee and used for the business purpose which enables the assessee to access the market and has an economic and money value is a "license" or "akin to a license" which is one of the items falling in Section 32(1)(ii) of the Act.

> 14. In view of the above discussion, we are of the view that the specified intangible assets acquired under slump sale agreement were in the nature of "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act and were accordingly eligible for depreciation under that Section..."

(emphasis supplied) IT(TP)A No.1537/Bang/2012

66. Our attention was also drawn to a similar decision of Hon'ble Delhi High Court in the case of Triune Energy Services Private Limited vs. DCIT: 237 Taxman 230, wherein it was held that goodwill is an intangible asset providing a competitive advantage to an entity which includes a strong brand, reputation, a cohesive human resource, dealer network, customer base, etc.; the expression 'goodwill' subsumes within it a variety of intangible benefits that are acquired when a person acquires a business of another as a going concern. The Court further held that from an accounting perspective, it is well established that 'goodwill' is an intangible asset, which is required to be accounted for when a purchaser acquires a business as a going concern by paying more than the fair market value of the net tangible asset (i.e., assets less liabilities); the difference in the purchase consideration and the net value of assets and liabilities is attributable to the commercial benefit that is acquired by the purchaser.

67. In our view, the aforesaid decisions are squarely applicable to the facts of the present case since in the present case also, the appellant had acquired the business undertaking on a going concern basis and the goodwill acquired upon acquiring the business which is nothing but the difference between the consideration paid in excess of the book value of the assets is eligible for depreciation under section 32(1)(ii) of the Act. The Hon'ble Karnataka High Court in the case of CIT v. Manipal Universal Learning (P.) Ltd : 215 Taxman 151 (Kar.)(Mag.), following the decision of the Supreme Court in Smiffs Securities (supra) held that goodwill is an asset under Explanation 3(b) to section 32(1) of the Act and therefore depreciation is allowable on goodwill.

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68. For the reasons given above, we hold that the purchase consideration paid in excess of the value assigned to the tangible assets, has to be regarded as payment towards acquisition of goodwill which is a specie of business and commercial rights and depreciation as claimed by the Assessee should be allowed. We hold accordingly and allow Ground No.15 & 21 raised by the Assessee.

69. As far as (Additional) Gr.No.19 raised by the Assessee is concerned, the facts are the assessing officer made disallowance of the value assigned to license, permits, certification, accreditation etc. acquired from IR amounting to Rs. 70,00,000 (Rupees seventy lakhs) as revenue expenses allegedly on the ground that the same being a payment made to take over a business creates a new source of income and is to be regarded as capital expenditure of enduring benefit. The claim of the Assessee before us is that if the aforesaid payment is held to be capital in nature, then, depreciation may be directed to be allowed in terms of section 32(1)(ii) of the Act. The details of the licenses and permits and certifications are set out in paragraphs 18.1 to 18.10 at pages 2783 to 2785 of paper-4 which is part of the valuation of intangibles report of Bizworth. The basis of valuation is set out in para-18.8

to 18.10 of this report and in our view, it is in fact an intangible acquired by the Assessee and the basis of estimation of its value is reasonable and acceptable. We therefore direct that depreciation be allowed on this intangible treating it as commercial right u/s.32 of the Act. Gr.No.19 is thus allowed.

70. As far as (additional) Gr.No.22 is concerned, the assessee claimed deduction in respect of the amount of Rs.13.87 crores allocated out of slump consideration towards the rights acquired for supply of spare parts to customers of Ingersoll Rand. The assessing officer disallowed the same on the basis that the same is in the nature of capital expenditure creating new IT(TP)A No.1537/Bang/2012 source of income. It is alternatively submitted by the Assessee that in case the said amount is held to form part of the lump sum consideration towards acquisition of RDB undertaking, then, depreciation may be directed to be allowed thereon in terms of section 32(1)(ii) of the Act as elaborated supra. We are of the view that the alternative claim of the Assessee alone needs to be considered as the main claim for deduction has rightly been negative by the revenue authorities. On the alternative claim for depreciation on the value of right of supply of spare parts to customers of IR is concerned, we have considered the submission of the Assessee. The valuation report of Bizworth explains the method of valuation in paragraph 11 of its report. It is explained that on acquisition of IRIL's RDB several equipments already manufactured and sold by IRIL existed in the market and the Assessee gets a right to sell spare parts for such equipments. Expected sale of spare parts and the margin likely to be earned on such sale has been estimated and value assigned to such right and allocated out of the lump sum consideration paid on slump sale. The claim of the Assessee before us is that if the aforesaid payment is held to be capital in nature, then, depreciation may be directed to be allowed in terms of section 32(1)(ii) of the Act. The basis of valuation is set out in para-11 of the valuation report of Bizworth in our view is in fact an intangible acquired by the Assessee and the basis of estimation of its value is reasonable and acceptable. We therefore direct that depreciation be allowed on this intangible treating it as commercial right u/s.32 of the Act. Gr.No.22 is thus allowed.

71. In view of adjudication of connected grounds of appeal specifically, Gr.No.23 (additional ground) is academic and needs no separate adjudication.

72. Ground No.6 and (additional) Gr.No.20 can be adjudicated together. These grounds read as follows:-

> IT(TP)A No.1537/Bang/2012 "Gr.No. 6. The Assessing Officer further erred in disallowing deduction towards obsolescence of inventory without appreciating the plea as also documents filed in support of the appellant's claim.
>
> Raised as Additional Ground No.20:
>
> 20. AO/DRP erred in denying deduction of Rs.36,34,779 being the amount utilized from the provision for warranty taken over from IR as a revenue expenditure.

(As far as Gr.No.20 is concerned, the Assessee has filed a letter dt.30.4.2019 requesting for modification of the figure of utilized sum from the provision of warranty from Rs.36,34,779 to

Rs.96,30,413/- (which is the correct figure). The error is purely typographical error and the request for modification is accepted).

73. The facts with regard to the aforesaid grounds of appeal are that the Assessee acquired RDB from IRIL by way of a slump sale. All assets and liabilities of the RDB was acquired by the Assessee. The following liabilities also became the liability of the Assessee:-

(a) Provision for inventory Rs.3,79,30,783 (refer page 240 of of PB-Vol 4)

(b) Provision for warranty Rs.1,16,44,629 (refer page 271 of PB - Vol 1 / 2715 of PB - Vol

4) Total Rs.4,95,75,412

74. During the relevant previous year, the assessee had paid/discharged liability against the aforesaid provisions, to the extent of Rs.1,32,65,192 (Rs.36,34,779 + Rs.96,30,413) and claimed deduction thereof in the return of income (refer page 93 of PB - Vol 1 / page 2665 of PB - Vol 4). The details of utilization of aforesaid provisions by appellant during the year are as under:-

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(a) Provision for inventory obsolescence - Rs. 36,34,779 (Refer to Schedule 7 - Inventories in financial statements - page 10 of PB-Vol 1 / 2647 of PB-Vol 4) Particulars Taken over Other than IR Total from IR Opening balance - 6,61,58,750 6,61,58,750 (Pg 2647 of PB-Vol 4) Taken over from IR(Pg 3,79,30,783 - 3,79,30,783 2707 of PB-Vol 4) Provision made during 2,22,18,585 the year Utilized/reversed (36,34,779) Provision disallowed in 1,85,83,806 ROI (Pg 2707 of PB- 5,71,57,535 Vol 4) 7,57,41,341 Amount written back (1,68,25,737) (1,68,25,737) (Pg 2707 of PB-Vol 4) Closing balance (Pg 5,65,14,589 10,64,90,548 16,30,05,137 2647 of PB-Vol 4)

(b) Provision for warranty - Rs. 96,30,413 (Refer Note 16 of Notes to accounts to financial statements -

page 25 of PB- Vol 1 / 2662, 2665 & 2715 of PB-Vol 4) IT(TP)A No.1537/Bang/2012 Particulars Taken over Other than IR Total As per tax Difference from IR (A) computation (B)-(A) (Page 2665 of PB-Vol 4) (B) Opening - 5,16,09,901 5,16,09,901 balance Provision taken 1,16,44,629 - 1,16,44,629 over from IR Provision made - 16,39,78,725 16,39,78,725 17,40,99,834 1,01,21,109 during the year (disallowed during the year) Utilized/reverse (96,30,413) (5,79,06,886) (6,75,37,299) (7,76,58,408) (1,01,21,109) d during the year Closing 20,14,216 15,76,81,741 15,96,95,956 NIL balance

75. The assessing officer did not dispute the claim of deduction of similar costs on account of provision for warranty and obsolete inventory incurred for the business other than acquired from IRIL. The assessing officer disallowed the aforesaid deductions claimed by the Assessee on the

ground that (i) since the incidence of tax had earlier been borne by IRIL/transferor, therefore, transferor only would be eligible to claim deduction of the aforesaid expenses, and (ii) that provision for inventory obsolescence had not been taken over by the appellant during the relevant year. It is the plea of the Assessee before us that the aforesaid action of the assessing officer in disallowing the aforesaid expenses is unlawful and calls for being deleted.

76. To adjudicate the aforesaid issues, it is necessary to look at the various terms of the BTA by which the Assessee took over the business of RMD. clauses (vi) and (x) of Schedule 2 of BTA (refer page 133 of PB- Vol 1 / page 2705 of PB - Vol 4 ) provides for take-over by the Assessee all the liabilities arising to customers of RDB, based on express and implied IT(TP)A No.1537/Bang/2012 warranties and all liabilities arising out of the acquired business. In view of the aforesaid, the aforesaid provisions were also acquired as part of slump purchase from IRIL. The Assessee provides for warranty in the books of account. The amounts actually paid against warranty claims are adjusted against the provision created and outstanding in the books. However, for tax purposes, the Assessee has consistently added back the provision for warranty debited to profit and loss account and claimed deduction for actual warranty claim. In the revised return of income, the Assessee has added back provision for warranty debited to profit and loss account amounting to Rs.17,40,99,834 and claimed deduction for the actual warranty claims paid out during the relevant previous year to the extent of Rs.7,76,58,408. The assessing officer accepted the method followed by the assessee of adding back provision for warranty and claiming deduction for actual warranty claims, except to the extent of warranty claim actually paid in respect of RDB business acquired from Ingersoll Rand. The amount of Rs.96,30,413, being actual payment of warranty claims in respect of the outstanding warranty for products sold by Ingersoll Rand prior to the slump sale, the assessee was bound to honour the same. In that view of the matter, the said amount has to be allowed deduction in the hands of the assessee as expenses incurred wholly and exclusively for the purpose of the business.

77. As far as deduction of Rs.36,34,779 against provision for obsolete inventory, it is the plea of the Assessee that the said sum represents write back of provision to the credit of the profit and loss account. Since no deduction was claimed in respect of provision for obsolescence by the assessee or Ingersoll Rand, the write back was regarded as not constituting income of the appellant under section 41(1) of the Act.

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78. We have considered the rival submissions on the aforesaid grounds of appeal. We are of the view that the actual payment of warranty claims needs to be allowed as deduction as it was revenue expenditure incurred wholly and exclusively for the purpose of business of the Assessee. As far as the Assessee is concerned, it is liability of the Assessee and since it is in relation to the business of the Assessee, the same deserves to be allowed.

79. As far as the deduction of provision for obsolete inventory is concerned, the claim of the Assessee that the sum reversed was not claimed as deduction by IRIL needs to be verified and if found correct, the same should not be taxed as the conditions precedent for invoking the provisions of Sec.41(1) of the Act are not satisfied. Ground No.6 and Ground No.(Additional) 20 are decided

accordingly.

80. Ground No.9 & 10 and additional grounds No.17 & 18 relate to determination of Arm's Length Price (ALP) in respect of an international transaction of rendering captive engineering design services to its Associated Enterprise (AE). These grounds read as follows:-

> "9. The Assessing officer grossly erred in making a Transfer Pricing adjustment of Rs.1,82,98,434/- in relation to software development services alleging shortfall of the price received.
>
> 10. The DRP grossly erred in sustaining transfer pricing adjustment made by the Assessing officer without considering any plea of the appellant and not even referring to the orders of the TPO filed by the appellant before relating to the earlier assessment years and therefore the order as passed by the DRP is without application of mind.
>
> Additional Ground of Appeal No.17
>
> 17. The DRP has erred in confirming the addition made by the AO/ TPO to the Arm's Length Price received in respect of the transaction relating to services to its Associated Enterprises by IT(TP)A No.1537/Bang/2012 rejecting the comparables adopted by it alleging the same to be functionally different from its business.
>
> Additional Ground of Appeal No.18
>
> 18. Without prejudice to the additional ground No. 17 above, the learned TPO erred in not selecting comparables that are functionally comparable to the Appellant which is engaged in the provision of engineering and design services."

81. The Assessee provided captive engineering design service to its associated enterprise. It is not in dispute that the said transaction of providing captive engineering design services by the Assessee to its AE was an international transaction and income from such international transaction has to be determined keeping in mind the Arm's Length Price as is required under the provisions of Sec.92 of the Act. It is also not in dispute that the Transaction Net Margin Method (TNMM) was chosen as the Most Appropriate Method (MAM) for the purpose of determination of ALP. The Profit Level Indicator (PLI) chosen for the purpose of comparison was operating profit of the Assessee and the comparables. The Assessee had chosen a set of 6 comparable companies whose average operating profit was 13.83%. The operative profit earned by the Assessee was 14.74% and therefore the Assessee claimed that the price received in the international transaction was at Arm's Length.

82. The Transfer Pricing Officer (TPO) to whom the AO referred the question of determining ALP of the international transaction in terms of Sec.92CA of the Act, treated the services rendered by the Assessee as akin to Information Technology Enabled Services (ITES) and chose a set of 20 comparable companies and the arithmetic mean of the operating profits of these 20 companies were

24.75% without working capital adjustment and 20.71% after working capital adjustment. Based on the above, the IT(TP)A No.1537/Bang/2012 TPO computed the shortfall in price received at Rs.1,82,98,434 and the said sum was added to the total income of the Assessee, as follows:

| | |
|---|---|
| Operating cost | Rs. 30,65,40,000 |
| Arm's length margin | 20.71% of operating cost |
| ALP @120.71% of operating cost | Rs. 37,00,24,434 |
| Price received | Rs. 35,17,26,000 |
| Shortfall being adjustment | Rs. 1,82,98,434 |

83. On objections by the Assessee before the Dispute Resolution Panel (DRP) to the proposal of the TPO as above, which was incorporated in the draft order of assessment of the AO, the DRP confirmed the action of the AO. Hence, the aforesaid grounds of appeal by the Assessee before the Tribunal.

84. The learned counsel for the Assessee submitted that if two of the comparable companies chosen by the TPO, viz., Coral Hubs Limited and Wipro Ltd., are not regarded as comparable companies, then the average operating profit margin of the Assessee would be within the (+) (-) 5% range of the operating profit margin of the Assessee and therefore in terms of Sec.92C(2) proviso to the Act, no adjustment or addition on account of determination of ALP can be made.

85. Exclusion of Coral Hubs Ltd. (earlier known as Vishal Information Technologies Ltd.): This company is listed at Sl.No.6 of the list of comparable companies chosen by the TPO. As far as this company is concerned, it is seen that this company was earlier known as Vishal Information Technologies Ltd. The objection of the Assessee for including this company as a comparable company was that the activities of the company is not only functionally different, but the business model of the company is also different as it sub-contracts majority of its ITES works to third party vendors and has also made significant payments to those IT(TP)A No.1537/Bang/2012 vendors. The payments made to vendors towards the data entry charges also supports the fact that the company outsources its works. In the circumstances, it cannot be taken as a comparable to the ITES functions performed by the assessee. Since this company is acting as agent only by outsourcing its works to the third party vendors.

86. The comparability of this company in the case of an Assessee providing ITES to its AE such as the Assessee was considered, in the light of the very same objection that this company outsources major portion of its activities, in the following decisions and it was held that this company is not comparable with a company providing ITES to its AE such as the Assessee:

> (i) The Hon'ble Delhi High Court in the case of Rampgreen Solutions P. Ltd 377 ITR 533 (Del) held that this company was outsourcing its activity of providing ITES to its AE and this would have a bearing on its profitability and therefore this company cannot be compared with a company providing ITES to its AE on its own.

(ii) In the case of Pr. CIT vs New River Software Services Pvt Ltd (ITA No 924/2016) the Hon'ble Delhi High Court, relying on the decision in the case of Rampgreen Solutions (supra) rejected this company as comparable. (Page 1889 of CL PB 1)

(iii) In the case of Symphony Marketing Solutions India Pvt Ltd (IT (TP) A No1316/Bang/2012) for assessment year 2008-09, the Hon'ble Bangalore Bench of the Tribunal rejected this company as a comparable on the basis that this company was outsourcing most of its work.

(iv) In the case of DCIT vs Novo Nordisk India Pvt Ltd (IT (TP) A No 1222/Bang/2013) for assessment year 2008-09, the Hon'ble IT(TP)A No.1537/Bang/2012 Bangalore Bench of the Tribunal rejected this company as comparable. (Page 1961-1962 of CL PB 1)

(v) The Mumbai Bench of Tribunal in the case of ACIT vs. Maersk Global Service Centre (India) Pvt. Ltd. (ITA No. 3774/Mum/2011), directed exclusion of this company on the very same ground.

Following the aforesaid decisions, we hold that this company should be excluded from the list of comparable companies.

87. Exclusion of Wipro Ltd. from the list of comparable companies:

The main ground on which this company was sought to be excluded from the list of comparable companies is that it owns significant intangibles in the form of brand, trademarks, patents and technical know-how etc. and therefore, the company cannot be regarded as comparable for the purpose of benchmarking analysis. It is further submitted that the company has been granted 40 patents which provides the company with a significant competitive advantage and enables it to generate high returns. The list of intangibles owned by it has been given by the Assessee.

88. This company was excluded from the list of comparable companies in the case of companies providing ITES such as the Assessee on the aforesaid ground by the Hon'ble Delhi High Court in the case of Pr. CIT vs Oracle (OFSS) BPO Services Pvt Ltd (ITA No 124/2018) on the basis that the company has a significant brand presence and brand value of an entity has a significant role in the ability to garner profits and negotiate contracts. In the case of Symphony Marketing Solutions India Pvt Ltd (IT (TP) A No1316/Bang/2012) for assessment year 2008-09, the Hon'ble Bangalore Bench of the Tribunal rejected this company as a comparable on the basis that it owns intangibles. Following IT(TP)A No.1537/Bang/2012 the aforesaid decisions, we hold that this company should be excluded from the list of comparable companies.

89. The TPO is directed to compute the ALP after excluding the aforesaid two companies from the list of comparable companies and also provide permissible variation of (+) (-) 5% margin in accordance with the provisions of Sec.92CA of the Act. Grounds 9 & 10 and Additional Grounds 17 &

18 are decided accordingly by considering only exclusion of the aforesaid two companies and by holding that the other grounds relating to Transfer pricing do not require any adjudication.

90. Ground No.11 is relating to charging of interest u/s.234B & 234 C of the Act. In so far as it relates to charging of interest u/s.234B of the Act is concerned, the same is consequential and the AO is directed to give consequential effect. In so far as charging of interest u/s.234C of the Act is concerned, the same should be on the returned income. Thus Gr.No.11 is decided accordingly.

91. Ground No.12 to 14 were not pressed and therefore they are dismissed as not pressed.

92. In the result, appeal of the Assessee is partly allowed.

Pronounced in the open court on this 8th day of May, 2019.

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|---|---|
| Sd/- | Sd/- |
| ( JASON P. BOAZ ) | ( N.V. VASUDEVAN) |
| Accountant Member | VICE PRESIDENT |

Bangalore,
Dated, the 8th May, 2019.
/ Desai Smurthy /

IT(TP)A No.1537/Bang/2012

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.

By order

Assistant Registrar,
ITAT, Bangalore.