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

[Before Hon'ble Shri S.S. Godara, JM & Shri M.Balaganesh, AM]

I.T.A No. 928/Del/2012

Assessment Year : 2004-05

ACIT, Circle-3(1), N.D.	-vs-	M/s Ceratizit India Pvt. Ltd. [PAN: AACCC 2210 P]
(Appellant)		(Respondent)

I.T.A No. 995/Del/2012

Assessment Year : 2004-05

M/s Ceratizit India Pvt. Ltd. [PAN: AACCC 2210 P]	-vs-	ACIT, Circle-3(1), N.D.
(Appellant)		(Respondent)

For the Department : Shri Sanjoy Paul, Addl. CIT Sr. DR

For the Respondent : Shri Manoneet Dalal, AR
Shri Gyan Prakash Srivastava, AR

Date of Hearing : 24.05.2018

Date of Pronouncement : 01.08.2018

ORDER

Per M.Balaganesh, AM

1. These cross appeals by the Revenue as well as Assessee arise out of the common order of the Learned Commissioner of Income Tax(Appeals)-XX, New Delhi [in short the ld CIT(A)] in Appeal No. 149/2007-08/CIT(A)-XX dated 23.12.2011 against the separate order passed by the I.T.O. Ward-3(2), New Delhi [in short the ld AO] under section 143(3) of the Income Tax Act, 1961 (in short "the Act") dated 15.12.2006 for the Assessment Year 2004-05. As the issues are identical in nature, the same are taken up together and disposed off this common order for the sake of convenience.

Let us take up Revenue Appeal in ITA No. 928/Del/2012

2. The first issue to be decided in this appeal is as to whether the ld CITA was justified in deleting disallowance of depreciation for Rs 45,181/- on the designs, in the facts and circumstances of the case.

2.1. We have heard the rival submissions. We find that this issue is already covered in favour of the assessee in its own case for the Asst Year 2003-04 in ITA No. 1627/Del/2011 dated 13.4.2018 wherein it was held as under:-

> *"16.Ground No. 2, raised by the Revenue relates to disallowance of extra depreciation of drawing and designs to the tune of Rs.49,935/-.*
>
> *17. At the outset itself, the ld. Counsel for the assessee has pointed out that this issue is squarely covered by the judgment of the Hon'ble Delhi Tribunal in the assessee`s own case for the Assessment Year 2006-07, in ITA No.5902/Del/2010 and Assessment Year 2008-09 in ITA No.1341/Del/2013, wherein it was held as follows:-*
>
> > *"4.1 The 1st issue relates to depreciation on drawing and designs amounting to Rs.20,650/-, which is incorporated in para 4 page 4 of Ld. CIT(A)'s order and the same is found to be covered in favour of the assessee by ITAT decision in assessee's own case for the assessment year 2006-07.*
> >
> > *So, the order of Ld. CIT(A) in this regard is upheld and the 1st ground of the Revenue's appeal is dismissed."*
>
> *18.As the issue is squarely covered in favour of the assessee by the Co-ordinate Bench of the Tribunal in assessee`s own case (supra) and there is no change in facts and law and the revenue is not able to controvert the findings of the ld. CIT(A), we find no reason to interfere in the said order of the ld. CIT(A). Accordingly, the decision of the ld. CIT(A) on this issue is upheld.*
>
> *19.In the result, Ground No.2 of the Revenue is dismissed."*

Respectfully following the same, we dismiss the Ground No. 1 raised by the revenue.

3. The next issue to be decided in this appeal is as to whether the ld CITA was justified in deleting disallowance of Rs 51,035/- on account of extra depreciation on computer peripherals, in the facts and circumstances of the case.

3.1. We have heard the rival submissions. We find that this issue is already covered in favour of the assessee in its own case for the Asst Year 2003-04 in ITA No. 1627/Del/2011 dated 13.4.2018 wherein it was held as under:-

> *"20.Ground No. 3 raised by the Revenue relates to disallowance of extra depreciation on computer peripherals/accessories.*
>
> *21. At the outset itself the ld. Counsel for the assessee has submitted that this issue is squarely covered in favour of the assessee by the Hon'ble ITAT Delhi Bench in the assessee's own case, in ITA No. 1341/Kol/2013, Assessment Year 2008-09, wherein the Hon'ble ITAT held as follows:-*
>
> > *"4.4 As regards the last ground, in regard to the depreciation on the computer accessories and peripherals amounting to Rs.18,544/- is concerned, this issue is found to be discussed in para 10 pages 11 & 12 of Ld. CIT(A)'s order and the same is found to be covered by Ld. CIT(A)'s order for the assessment year 2006-07 (pages 18 & 19 of the paper book), the same was accepted by the Department and no appeal was filed before the ITAT and hence, this issue is also covered by the decision of Hon'ble Delhi High Court in the case of CIT Vs. BSES Rajdhani Powers Ltd. dated 31.08.2010 in I.T.A. No. 1266/2010 and CIT Vs Orient Ceramics and Industries Ltd. (2011) TMI 201763. Therefore, this issue is decided in favour of the assessee and the appeal of the revenue on this score is also dismissed."*
>
> *22.As the issue is squarely covered in favour of the assessee by the Co-ordinate Bench of the Tribunal in assessee`s own case (supra) and there is no change in facts and law and the revenue is not able to controvert the findings of the ld. CIT(A), we find no reason to interfere in the said order of the ld. CIT(A). Accordingly, the decision of the ld. CIT(A) on this issue is upheld.*

Respectfully following the same, we dismiss the Ground No. 2 raised by the revenue.

4. The next issue to be decided in this appeal is as to whether the ld CITA was justified in deleting disallowance of Rs 80,847/- on account of provision for commission , in the facts and circumstances of the case.

4.1. The brief facts of this issue is that the assessee company claimed expenses of Rs 8,06,277/- on account of commission on sales. The ld AO called for the details of commission which were duly filed by the assessee. The ld AO observed that the assessee had made provision for commission payable for Feb and Mar 2004 to the tune of Rs 80,847/- and accordingly disallowed the same on the ground that provisions are not allowable as deduction. Before the ld CITA , it was pleaded that the assesee company follows mercantile system of accounting and that the provision entry for commission was debited in the profit and loss account on the basis of accrual of expenditure and it is an ascertained liability in as much as the corresponding sales have already been recognized as income in the accounts. The ld CITA deleted the disallowance. Aggrieved, the revenue is in appeal before us.

4.2. We have heard the rival submissions. We find that the assessee had duly submitted the entire details of commission before the ld AO wherein it was found that the commission was payable to the dealers on the sales made through them. Hence there cannot be any doubt that they are ascertained liabilities as on 31.3.2004 in consonance with the mercantile system of accounting followed by the assessee company. The assessee had also filed evidences of subsequent actual payment of these commission to the respective dealers in April 2004 along with copies of vouchers and bills in the form of paper book. These facts were duly appreciated by the ld CITA and hence we do not find any infirmity in the order of the ld CITA. Accordingly, the Ground No. 3 raised by the revenue is dismissed.

5. The last issue to be decided in the appeal of the revenue is as to whether the ld CITA was justified in deleting the disallowance of Rs 1,47,00,813/- on accout of adjustment in Arm's Length Price (ALP) in the facts and circumstances of the case.

5.1. The brief facts of this issue are that the assessee is engaged in the manufacture and trading of inserts i.e tungsten carbide cutting tools which are used for cutting, drilling, milling, threading metal and other materials in several industries like steel and automobiles. It has its manufacturing unit in Kolkata . 95% of the equity of the assessee company is held by Ceratizit Austria A.G. During the year udner consideration, the company generated the revenue from the following business segments:-

a) Manufacturing of cutting tools (comprising of 61% of total sales)

b) Trading of Inserts (comprising of 39% of total sales)

The assessee company was declared as a sick company in October 1987 by Board of Industrial and Financial Reconstruction (BIFR in short) due to continued losses which continued until it was taken over by the CERATIZIT Group with effect from 31.1.2003. Thereafter, due to improved technology and administration, the company started making profits and completely recovered its losses during the financial year 2010-11.

5.2. The international transactions entered into by the assessee during the year are as under:-

Table-1:

S. No.	Description of transaction	Method	Value (In Rs.)
1.	Purchase of raw material	CUP	17,304,876/-
2.	Purchase of stores (misc items)	CUP	14,409/-
3.	Purchase of traded goods	CUP	37,595,629/-
4.	Sale of finished goods	CUP	44,025,766/-
5.	Purchase of computer	CUP	1,08,395/-
6.	Purchase of plant and machinery	CUP	53,06,783/-
7.	Services availe3d	CUP	18,56,250/-
8.	Commission received	CUP	9,05,969/-
9.	Interest paid on ECB	CUP	9,180,000/-

The assessee had adopted transaction by transaction benchmarking and had selected Comparable Uncontrolled Price (CUP) method in its Transfer Pricing (TP) analysis as its Most Appropriate Method (MAM). During the TP proceedings, the ld TPO rejected the assessee's application of CUP method. The ld TPO aggregated both manufacturing and trading activities of the assessee and applied Transactional Net Margin Method (TNMM) as the MAM at entity level, which is evident from page 5 of the order of the ld TPO. The ld TPO selected 3 comparable companies taking Profit Level Indicator (PLI) as Profit Before Tax (PBT) / Net Sales and computed the mean margin of the comparable companies at 7.04% on an overall basis which was compared to the assessee PLI of 2.42%. The ld TPO accordingly made an adjustment of Rs 1,47,00,813/- on an overall basis, including the Non-AE transactions of the assessee company.

5.3. Before the ld CITA, it was submitted that as the company was engaged in two distinct activities, namely trading and manufacturing, in case a margin based analysis needs to be undertaken, then both the activities should be benchmarked separately since the functions performed, assets employed and risks assumed by the assessee with respect to hose activities are totally different. Accordingly, it was pleaded that application of TNMM at entity level as done by the ld TPO was inappropriate and ought to be rejected.

5.4. **For Trading Segment**, the assessee vide its submission dated 3.6.2011 before the ld CITA submitted that based on the FAR analysis for the relevant segment, the Resale Price Method (RPM) was the MAM. As the comparables of ld TPO were engaged in manufacturing activity and not into trading activity, the assessee submitted a fresh benchmarking study for its trading segment, arriving at a set of 3 comparables with 23.90% gross profit margin vis a vis the assessee's gross profit margin of 28.76%. The assessee's list of comparables, which were also accepted by the ld CITA are as under:-

Name of the Company	GP / Net Sales (%)
ADC India Communication Ltd	29.12%
Bajaj Ventures Ltd	25.66%
HMT International Ltd	16.90%
Mean GP / Net Sales	**23.90%**

5.5. **Manufacturing Segment**

5.5.1. The assessee before the ld CITA vide its submission dated 3.6.2011 submitted that TNMM as selected by the ld TPO was indeed the MAM. However, as the assessee had incurred significant non-cash expenditure in the form of depreciation on plant and machinery, operating profit / net sales should not be considered for margin computation. Therefore, cash profit / net sales may be taken as the PLI for margin computation. It was also empirically demonstrated by the assessee that the depreciation cost to total costs of the companies selected by the ld TPO (i.e 3.22%) vis a vis the assesses (i.e. 10.21%) was very high and accordingly cash profit / net sales should be used. The ld CITA accepted the cash profit on sales as the correct PLI for benchmarking the international transactions pertaining to the manufacturing segment.

5.5.2. The assessee submitted that out of the 3 comparables chosen by the ld TPO, 2 of the comparables were pressed for rejection on ground of high value of Related Party Transactions (RPT) by applying the 15% RPT filter. Post rejection of the 2 comparables on account of higher RPT, Rapicut Carbides Ltd would be left with net profit margin of 1.83% as against 2.42% of the assessee. The ld CITA accepted the contention of the assessee.

5.5.3. It was also submitted on without prejudice basis, that the assessee's cash profit margin as computed by the ld CITA of 10.81% also exceeded the cash profit margin of the TPO's comparables which was 9.96%.

5.5.4. The assessee also submitted a fresh benchmarking study arriving at 7 comparables as under:-

Name of the Company	Cash Profit / Net Sales (%)
Dies & Tools Ltd	8.70%
Elan Diamond Tools Ltd	12.02%
Kulkarni Power Tools Ltd	9.26%
Miven Machine Tools Ltd	1.69%
Rajasthan Udyog & Tools Ltd	4.40%
Rapicut Carbides Ltd	3.75%
Tyrolit Sak Ltd	7.61%
Mean Cash Profit / Net Sales	**6.78%**

The assessee submitted that its cash profit margin was 15.17% which was higher than 6.78% and the same was accepted by the ld CITA.

5.6. The assessee submitted segmental financials before the ld CITA vide submission dated 3.6.2011. Since the assessee has two distinguishable segments, benchmarking should be done on a segmental level. The overall TNMM approach adopted by the ld TPO was stated to be erroneous by the ld AR before us. The ld AR in this regard placed reliance on the co-ordinate bench decision of this tribunal in assessee's own case for the Asst Year 2003-04 in ITA No. 1627/Del/2011 dated 13.4.2018 wherein it was held that since the assessee earns its revenues from two separate segments, namely manufacturing and trading segments, separate Arm's Length margin should be considered for the respective segments. This submission was made by the ld AR apart from reiterating the pleadings made before the ld CITA. In response thereto, the ld DR argued that the segment reporting was given by the assessee only before the ld CITA and the assessee

had changed the MAM to be TNMM for its manufacturing segment and RPM as MAM for its trading segment, as against CUP method used in its TP study report. He argued that this change in MAM ought not to have been accepted by the ld CITA.

5.7. We have heard the rival submissions. It is not in dispute that the assessee had earned revenues separately from its trading and manufacturing segments. We find that the assessee had submitted segmental financials separately for manufacturing and trading segment before the ld CITA. As far as trading segment is concerned, the assessee had benchmarked its trading margins at 28.76% whereas the comparables' trading margins were 23.90%. Accordingly, the assessee had proved before the ld CITA that its margins are higher than the comparables margin as far as trading segment is concerned. We also find that this issue had been dealt with by this tribunal in assessee's own case for the Asst Year 2003-04 in ITA No. 1627/Del/2011 dated 13.4.2018 under the similar facts and circumstances, wherein it was held as under:-

> *11. ……*
>
> *We note that based on the holding period, demonstrated by the assessee during the appellate proceedings (page 27 of CIT(A) order), we note that the assesssee's business has a distinct trading segment and therefore, the assessee was justified in applying the RPM as the MAM to benchmark the trading segment of the assessee's business.*
>
> ……..
>
> *Therefore, we note that based on the above analysis, there should not be any adjustment in the trading segment of the assessee.*

Accordingly, the Resale Price Method adopted by the assessee as the MAM for the trading segment is accepted and the assessee's margins thereon is considered to be at arm's length and consequentially no adjustment to ALP is warranted thereon .

5.7.1. The ld TPO had adopted TNMM at entity level without bifurcating between manufacturing and trading segments, whereas the assessee adopted the same only for manufacturing segment. The assessee before the ld CITA had accepted the TNMM to be the MAM as adopted by the ld TPO for the manufacturing segment. We find that the assessee had requested the ld CITA to adopt the cash profit / net sales as PLI in support of which the necessary workings and the comparable workings were duly submitted before the ld CITA. These workings on verification about its veracity were accepted by the ld CITA and hence no further interference is called for in this regard. It is now well settled that the comparables having heavy related party transactions i.e RPT filter of 15% and above, should be excluded while computing the comparables margin. It is not in dispute that 2 out of 3 of the comparables chosen by the ld TPO had huge Related Party Transactions and hence there is no harm in excluding those two comparables for the purpose of benchmarking. Accordingly, we would be left only with one comparable as per ld TPO whose net profit margin was 1.83% as against 2.42% declared by the assessee. Hence no adjustment to ALP is required to be made on this count also. We also find that this issue had been dealt with by this tribunal in assessee's own case for the Asst Year 2003-04 in ITA No. 1627/Del/2011 dated 13.4.2018 under the similar facts and circumstances, wherein it was held as under:-

> *12. Now we deal with the issue whether the ld. Assessing Officer/ TPO, erred in considering TNMM to be the MAM for benchmarking the manufacturing segment of the assessee's business and not considering the cash profit earned by the assessee to compute profit level indicator (PLI). We note that the ld. TPO has rejected the choice of method adopted by the assessee on the manufacturing segment and suggested the use of TNMM as the MAM. The ld. TPO conducted a search to identify the external comparable companies and chose operating profit/total sales as the PLI. However, the assessee submitted during the appellate proceedings that as per the guidance note issued by the ICAI, the ratio of cash profit/sales, as PLI, should be adopted instead of OP/Sales PLI. The assessee submitted during the appellate proceedings that during the Assessment Year 2003-04, there was a substantial addition to plant and machineries. The assessee purchased plant and machineries to the tune of Rs.26,195,160/- in Assessment Year 2003-04 and Rs.8,929,280/- in Assessment Year 2002-03, therefore in this scenario to use the PLI, as OP/Sales, will give a misleading picture to determine the ALP. Therefore, the assessee has adopted cash profit/sales PLI. We note that the assessee submitted the segmental report before the ld. CIT(A) and the ld. CIT(A), in*

turn sent the said segmental report to the TPO for his comment. After considering the TPO's submission and rejoinder of the assessee on the TPO's comment, the ld. CIT(A) came to the conclusion that for trading segment the MAM would be the RPM and for manufacturing segment the MAM would be the TNMM, with PLI,as cash profit/ sales, instead of PLI adopted by the Assessing Officer, as OP/Sales . Reasons for adopting the PLI of cash profit to sales has been explained by the assessee stating that the same is recommended by the guidance note issue by the ICAI on Transfer Pricing. Therefore, the ld. CIT(A) did not change the method to find out ALP in case of manufacturing segment, it was only TNMM with a modification of PLI, as cash profit/ sales, instead of OP/Sales PLI. We note that PLI chosen by the assessee is as per guidance note issued by the ICAI, who is authority on the subject and guidance for Indian companies, that being so we do not interfere in the PLI selected by the ld CIT(A).

13.Coming to the next issue which relates to the segmental report submitted by the assessee before the ld CIT(A), during the appellate proceedings. The ld. TPO disputed the segmental report that there was no basis to prepare the segmental report. However, the ld. TPO did not dispute the figures in the segmental report and he did not bring out any cogent evidence to show that the data given in the segmental report of trading activity and manufacturing activity are untrue. We note that the main allegation of the TPO was that the assessee in his TP Study report selected CUP as the MAM, but later on, during the appellate proceedings, the assessee submitted that TNMM with cash/sales,PLI would be the MAM for manufacturing activities and RPM would be the MAM for trading activities. During the remand proceedings, the TPO disputed that assessee does not have any base to prepare segmental report. However, we note that there is base to prepare the segmental report from the audited accounts. In fact, the TPO himself stated in his order that assessee has manufacturing activity and trading activity vide page 4 of TPO order, it is mentioned by him that for purchase of raw material, the assessee selected Comparable uncontrolled price (cup) method and for trading goods, the assessee computed the gross margin from the trading activity. Meaning thereby that the information was there before the TPO that assessee has manufacturing activity and trading activity. Later on, at appellate stage, the assessee submitted the details of the manufacturing activity and trading activity by way of a segmental report, therefore, we note that information was with the TPO that the assessee has manufacturing and trading activity and it is not an afterthought. Therefore, the TPO ought to apply correct method for trading activity and manufacturing activity to determine the ALP, but we note that TPO computed the ALP on both these segments on entity level basis by applying TNMM method,and for that we do not agree. The appropriate powers have been given to the TPO under the Act to compute the ALP by adopting the MAM,if the method adopted by the assessee is not suitable to compute the ALP and at this juncture it is appropriate to quote the provisions of section 92CA(3) of the Act, which reads as follows:-

> *"On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after*

taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transaction [or specified domestic transaction] in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee ”

Therefore, it is abundantly clear from the above provisions that if the assessee has selected, by mistake a wrong method to compute the ALP, then the ld. TPO has power to examine the method adopted by the assessee to compute the ALP and determine the correct method to compute the ALP as per the facts of the assessee. We note that the TPO has failed to apply MAM in respect of trading activities in spite of having information on record. Before the TPO the assessee submitted Form no. 3CEB, wherein at Serial No. 8(B)(C)(i), it is mentioned that “purchase of traded goods Rs.3,44,97,726/-(PB-338)”, therefore, the information of trading activity of the assessee was on record of the TPO which is known as trading segment but during the proceedings the TPO failed to ask the relevant details, therefore the allegation of the TPO that the assessee does not have a base for the segmental report is not acceptable. We note that the assessee submitted the profit and loss account and the balance sheet before the TPO and as per Schedule 14 of the profit and loss account,(PB Page 324) consists the following information:-

Schedule 14		
MATERIALS		
Raw materials consumed	26,496,534	30,984,124
Purchases-Traded finished goods	52,786,907	34,438,512
Opening stocks		
Work-in-process	8,497,624	11,206,170
Finished goods		
Own manufactured	10,170,037	17,122,545
Traded goods	12,016,546	15,610,599
	30,684,207	43,939,314
Less :		
Closing stocks		
Work-in-process	8,950,223	8,497,623
Finished goods		
Own manufactured	18,798,550	10,170,037
Traded goods	17,459,413	12,016,546
	45,208,186	30,684,206

From the above schedule 14 it is quite clear that ‘Raw material consumed’ which is part of manufacturing segment, and ‘Purchases-traded finished goods’ which is part of trading segment ,and the opening stock and closing stock contained separate details for “manufactured goods” which is manufacturing segment” and “traded goods”, which is trading segment, therefore with help of this information, the ld TPO ought to have asked the assessee to furnish segmental report, which he has failed to do so. Therefore, the allegation of the ld TPO that the assessee does not have base to prepare segmental report is not tenable. Therefore, we note that information was on record of the TPO in respect of the manufacturing and trading segment and hence the TPO cannot say by

any stretch of logic that there is no basis for manufacturing segment and trading segment. The ld. CIT(A) sentthe remand report to the TPO to examine the trading segment and manufacturing segment, wherein the TPO did not dispute the figures reported by the assessee, only his grievance was that the assessee did not have basis to furnish the segmental information. We note that the assessee has already bifurcated in his profit and loss account the raw material consumed for manufacturing activities and the amount of trading activities separately, therefore, there is a basis to compute the segmental report and the said segmental report has been certified by the statutory auditor of the company. Therefore, the stand of the revenue that the assessee has selected CUP method to compute the ALP which has been chosen by the assessee as the MAM and the assessee cannot resort to change his method at the appellate stage, is not acceptable for the reasons given above. We are of the view that such a contention cannot be upheld because it is found on the facts of the case that a particular method will not result into proper determination of ALP, the TPO or the Appellate Authorities can very well hold that why a particular method can be applied for getting proper determination of ALP, or the assessee can demonstrate the particular method to justify its ALP. Thus, even after the assessee has adopted CUP as the MAM in the TP study report, then also he is not precluded from raising the contention before the TPO or appellate court that such a method was not a proper method and does not result into proper determination of the ALP and some other method should be resorted. The ultimate aim of the TPO to examine whether the price or the margin arising from an international transaction with a related party is at ALP or not. The determination of the ALP is the key factor for which the MAM is to be followed. Therefore, if at any stage of the proceedings, it is found that by adopting one of the prescribed method other than the one chosen earlier, the ALP can be determined, the TPO as well as the CIT(A) should take into consideration such a plea before them, provided, it is demonstrated as to why the change in the method will produce better or more appropriate ALP on facts of the case. Therefore, we reject the contention of the ld. DR and also the observation of the TPO that the assessee cannot resort to adopt the Resale Price Method instead of TNMM for its trading activities.

14.Now we deal with the grievance of the ld. DR that the numbers/figures submitted by the assessee in respect of trading segment have not been verified by the TPO during the remand proceedings. The assessee submitted the amount relating to trading activities (trading segment to the tune of Rs.5,00,78,795/-) and the said amount has been considered by the ld. CIT(A) to compute the ALP. However, later on, the assessee found that there was misclassification of numbers/figures of trading sales, therefore, the assessee rectified the error and submitted before CIT(A), the corrected and rectified figures to the tune of Rs.5,87,75,708/-, duly certified by theChartered Accountant. The ld. DR for the revenue stated before the Bench that these numbers/figures, rectified by the assessee, have not been verified by the TPO/Assessing Officer and no opportunity has been given to the TPO/ Assessing Officer to examine the figures relating to trading segment. Therefore, Ld DR requested the Bench to remit the matter back to the file of the TPO/Assessing Officer, for limited purpose, just to verify the numbers/figures relating to trading segment. However, the ld. Counsel for the assessee submitted before us that revenue has not taken any ground of appeal in respect of numbers/ figures

relating to trading activities, the main ground taken by the revenue is that the assessee does not have any basis in the audited financial statement to prepare the segmental report and therefore there is no reason to remit this issue to the file of TPO/AO to verify the numbers/figures of the trading segment. In fact, the CIT(A) sent the segment report to the TPO for his comment and the TPO did not raise any issue in respect of verification of numbers /figures of trading segment therefore no second inning should be provided to the TPO/AO.

After hearing both the parties on the said issue we note that numbers/figures were available with the TPO when the ld. CIT(A) sent the remand report in respect of the segmental report and in the remand report the TPO did not dispute the number/ figures of the trading segment. We note that the main grievance of the revenue in the grounds of appeal is that the segmentation provided by the assessee of its trading and manufacturing activity during the appellate stage has no basis in its audited accounts and therefore the revenue has not disputed the figures relating to trading segment or manufacturing segment. The solitary grievance of the revenue is that there is no basis of segmentation provided by the assessee and for that we have given proper reasons in para No. 13 of this order, stating that assessee has basis to prepare the segmental report. Moreover, we note that after rectification of numbers/figures of trading segment, the total sales remain same, that is, total sales of the assessee putting together trading sales and manufacturing sales remain same therefore, the plea of the ld DR that assessee has manipulated the sales, is without any base. Besides, the ld CIT(A) has co-terminus power as the assessing officer have, and he has verified the numbers/figures of both the segments.

Considering the factual position, explained above we are of the view that there is no need to remit the issue back to the file of the TPO/AO to verify the numbers/figures relating to trading activities, as the revenue did not dispute in the grounds of appeal raised before us hence second inning should not be provided, otherwise it would be a never ending process and there would not be any finality. In taxing statute the finality of the issue is a must and assessee should not be penalized without any just cause. That being so, we decline to interfere with the order of ld. CIT(A), deleting the aforesaid addition, his order on this issue is therefore upheld and the grounds of appeal of the Revenue is dismissed."

5.8. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the judicial precedent relied upon hereinabove, we find no infirmity in the order of the ld CITA. Accordingly, the Ground No. 4 raised by the revenue is dismissed.

6. The Ground No. 5 raised by the revenue is general in nature and does not require any specific adjudication.

Now let us take up assessee appeal in ITA No. 995/Del/2012

7. The first issue to be decided in this appeal is as to whether the ld CITA was justified in upholding the disallowance of Rs 2,33,381/- towards club expenses in the facts and circumstances of the case.

7.1. The brief facts of this issue is that the assessee during the year under consideration incurred club expenditure amounting to Rs 11,645/- on account of entrance fees and subscription and Rs 2,21,916/- on account of cost for club services and facilities utilized during the year. The ld AO disallowed the amount on the ground that the assessee failed to justify the claim and its relation to the business. The ld CITA upheld the action of the ld AO. Aggrieved, the assessee is in appeal before us.

7.2. We have heard the rival submissions. We find that this issue is covered in favour of the assessee in its own case for the Asst Year 2008-09 by the co-ordinate bench decision of Delhi Tribunal in ITA No. 1341/Del/2013 dated 14.2.2014 wherein it was held as under:-

> *"4.3 As regards ground No.3, the same relates to club expenses of Rs.4,40,856/- which issue is covered by Ld. CIT(A)'s order and the same is found to be discussed in para 8 page 10 of CIT(A)'s order. The said issue is found to be covered by the order of Ld. CIT(A) for the assessment year 2006-07 (as mentioned in page 17 of the paper book). The said decision was accepted by the Department and no appeal was filed before ITAT in this regard. Otherwise, this issue is stated to be covered by the decision of Hon'ble Supreme Court in the case of CIT Vs United Glass Manufacturing Co. Ltd., civil appeal No.6447 of 2012 decided on 12.09.2012, therefore, this issue is also held to be covered and the order of Ld. CIT(A) on this issue is upheld and the ground of the Revenue in this regard is dismissed.*

Respectfully following the same, we direct the ld AO to delete the disallowance made on account of club expenditure. Accordingly, the Ground No. 1 raised by the assessee is allowed.

8. The last issue to be decided in this appeal is as to whether the ld CITA was justified in upholding the disallowance in respect of contributions made towards gratuity and superannuation funds of Rs 7,77,070/- and Rs 6,38,188/- respectively in the facts and circumstances of the case.

8.1. The brief facts of this issue is that the assessee during the year under consideration claimed expenses of Rs 6,38,188/- on account of contribution to super annuation fund and Rs 7,77,070/- as contribution to gratuity fund as deduction in the return of income. The ld AO sought to disallow the same on the ground that the assessee did not provide any proof regarding the approval of super annuation and gratuity fund by the Administrative Commissioner of Income Tax (in short the ld CIT) . He stated that the contributions made only to recognized provident funds or an approved super annuation funds could be allowed as deduction u/s 36(1)(iv) of the Act. Similarly as per section 36(1)(v) of the Act, any sum paid by the assessee as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust alone would be entitled for deduction. In the absence of necessary proof in this regard, the ld AO disallowed the total sum of Rs 14,15,758/- (6,38,188 + 7,77,070) in the assessment. The ld CITA upheld the action of the ld AO. Aggrieved, the assessee is in appeal before us.

8.2. We have heard the rival submissions. From the perusal of the records placed in the paper book before us, we understand that the assessee had made an application before the ld CIT on 28.2.1997 for approval of its Employees Group Gratuity Trust in the erstwhile name M/s Siel Hard Metals Ltd. The ld AR stated that the assessee was under

bonafide belief that approval has been granted by the ld CIT in as much as the gratuity fund was formed vide trust dated 31.1.1997 and an application for approval was filed on 28.2.1997 in the office of the CIT . In pursuance to aforesaid application filed for approval of gratuity fund , a letter dated 20.3.1997 had also been received from the ACIT, Company Circle 3(5), New Delhi . It was therefore understood that approval to the trust has been granted by the ld CIT –III, New Delhi under whose jurisdiction the assessment of the company was being made. The ld AR however stated that the copy of the approval letter was not traceable in the records of the company due to change in executives and change in the registered office of the company. Subsequently the assessee vide application dated 12.7.2004 had applied to the ld CIT for approval of amendments in the Trust Deed incorporating the change in trustees (enclosed in page 44 of the paper book) and also pursuant to take over of the erstwhile company by the assessee completely narrating the facts from the inception (enclosed in pages 46 & 47 of paper book). There was a letter issued by the ld CIT, Delhi-I, New Delhi vide letter dated 1.2.2006 to the managing trustee of M/s Ceratizit India Pvt Ltd Employees Group Gratuity Fund (i.e assessee gratuity fund) seeking for certain details (enclosed in page 48 of the paper book). These details were duly furnished by the assessee before the ld CIT vide letter dated 21.2.2006 (enclosed in pages 49 to 87 of the paper book) together with its detailed annexures. Later the assessee wrote a letter to the ld CIT on 16.1.2007 reminding the ld CIT for grant of approval of the gratuity fund of the assessee along with filing of details of copy of master policy taken from LIC for payment of gratuity and extract of board meeting held on 6.12.1996 vide which the subject mentioned trust was formed. The ld AR stated that no approval letter from the ld CIT could be traced either from the records of the assessee company or from the departmental records. Accordingly he pleaded that the assessee was under the bonafide belief that its gratuity trust was already approved by the ld CIT from the date of original application itself i.e in 1997. These facts were narrated by the assessee vide its letter dated 16.1.2007 enclosed in pages 88 to 90 of paper book. Subsequently another application was

preferred by the assessee on 6.6.2008. It was pleaded that the assessee's gratuity trust had complied with all the necessary conditions . It had taken policy from LIC and contributions have regularly been made thereon. Later the ld CIT passed an order approving the gratuity fund of the assessee with effect from 12.7.2004 vide his order dated 26.3.2012 / 27.3.2012. (enclosed in page 105 of the paper book). Hence it could be seen that during the period from 1997 to 12.7.2004, though the assessee had preferred applications before the ld CIT seeking approval of its gratuity trust , no orders passed, if any, thereon, could be traced either from the records of the assessee or from the department.

8.3. Similarly the assessee also preferred an application for approval before the ld ACIT, Company Circle 3(5), New Delhi for approval of Officer's Superannuation Pension Fund Trust. Subsequently the assessee company vide application dated 12.7.2004 had applied to ld CIT-I, New Delhi for approval of amendments in the Trust Deed. The ld CIT-I, New Delhi vide letter dated 2.3.2012 granted approval to the said trust together with its amendments with effect from 12.7.2004 (enclosed in page 183 of paper book). Similar situation as was prevalent for Gratuity Trust prevail for the Superannuation fund also.

8.4. In this scenario, whether the contributions made by the assessee towards gratuity fund and superannuation fund could be claimed as deduction is the issue to be decided by us. We find that the Hon'ble Rajasthan High Court (Jaipur Bench) in D.B.Income Tax Appeal No. 136/2016 in the case of PCIT , Jaipur vs M/s Rajasthan State Seed Corporation Ltd dated 8.9.2016 had passed the following order which is reproduced for the sake of convenience :-

> *"(1) By way of this appeal, the Department has challenged the judgment & order of the Income Tax Appellate Tribunal dismissing the appeal preferred by the Department, confirming the order of the CIT (Appeals).*
> *(2) This court while admitting the appeal framed following substantial questions of law:-*

"1. Whether in the facts and circumstances of the case, the Tribunal was justified in deleting disallowance of prior period expenses of Rs.252468/- made by the Assessing Officer even when it was not in accordance with the accounting policies followed by the assessee.

2. Whether in the facts and circumstances of the case, the Tribunal was justified in allowing deduction for the contribution of Rs.4731494/- made to an unapproved Gratuity Fund.

3. Whether in the facts and circumstances of the case, the Tribunal was justified in holding contribution of Rs.1516912/- to State Renewal Fund as an allowable expenditure though it is not an actual expenditure."

(3) Identical controversy came up for consideration before this court in D.B. Income Tax Appeal No.4/2016 (Principal Commissioner of Income Tax Vs. M/s Rajasthan State Seed Corporation Ltd.) decided on 29.4.2016, wherein it was held in para nos.7,8 & 9 as under:-

"7. Insofar as the prior period expenses is concerned a finding of fact has been recorded by the Appellate Authorities that approval for payment of the said expenditure was given during the year under appeal therefore the liability crystallized during the year and similar method was being regularly followed by the assessee consistently and when there is a finding recorded by the Appellate Authorities that the expenditure crystallized during the year, was written in the books this year and on year to year basis was claimed in the same manner and fashion was rightly claimed and allowed during the year, is a finding of fact.

8. Insofar as disallowance of claim of Rs. 19282605/- is concerned, admittedly, the assessee-respondent has claimed to have applied for according approval of Group Gratuity Scheme to the concerned Commissioner on 31st March, 1981. Once the assessee files an application for approval of the scheme, it was for the Commissioner to have taken recourse of disposing of the said application either to approve or to reject the same. The same having not been done for the last more than almost 25 years, the assessee could not have been blamed for the same. There is no denial by the AO that application for approval has not been filed by the assessee on 31.3.1981. Even the Assessing Officer admits that the application for approval was submitted on 31st March, 1981 and both the Appellate Authorities have come to a definite finding of fact that once an application has been moved for approval and 3 having not been rejected then the claim could not have been disallowed or the claim could not have been rejected merely because the Commissioner did not accord approval of the same. The assessee cannot be made to suffer for inaction of the revenue, admittedly the respondent-assessee is a Government of Rajasthan Undertaking or even otherwise the Commissioner ought not have slept over the application for approval for more than 25 years. The Appellate Authorities are well justified in coming to the said conclusion. Needless to mention that a finding has been given by the Tribunal that the amounts are being disallowed by the learned AO from

year to year at least from the assessment year 1996-97 i.e. almost 20 years but is being allowed regularly in appeal therefore, for this reason also we reject the claim of the revenue. The Assessing Officer ought not have made a repeated addition merely for this purpose and a litigation of this nature ought not to have come before this court as appeals all throughout is being allowed year after year. On the one hand the revenue does not decide the application for approval and the amount is being disallowed by the Assessing Officer from year to year which is not at all justified. The Revenue is well advised not to make repetitive additions/disallowance for this purpose and expose its weakness before the Courts as on the one hand application for according approval has not been granted and for inaction of Commissioner amounts are disallowed and to incur wasteful public money either way as at least the respondent has also to incur public money to defend its case being a Government of Rajasthan Undertaking in filing repetitive appeals though succeeding year after year. Merely because the tax effect is more than what is prescribed in the Circulars be it old or the latest being in December 2015 is no ground to file such appeals, we though were inclined to levy cost on the Revenue but stop ourselves in doing the same to make it clear to the Revenue to be more careful in future that such kind of 4 litigation deserves to be avoided as the Courts are choked with such frivolous litigation and is not able to concentrate on other important issues. 9. Insofar as the expenditure incurred on State Renewal Fund is concerned, said expenditure also goes to show that the renewal fund was set up by the State Government and was created with the object of providing a safety net for the workers likely to be effected by restricting in the State Public Enterprise and that a finding of fact has been recorded that the contribution made to the State Renewal fund is solely for the purposes of the welfare and benefit of the employees. In our view, it is for the assessee to decide whether any expenditure should be incurred in the course of business and expenditure of this nature being for business expediency is certainly allowable deduction under Section 37(1) of the Act. In our view any normal expenditure for the welfare and benefit of employees is allowable expenditure under Section 37(1), the Tribunal has come to a finding of fact that it was a legal obligation of the respondent-assessee towards contribution of the said amount to the State Renewal Fund and there being a legal obligation as well in our view the Tribunal has come to a correct conclusion."

(4) In view of the order, the appeal is liable to be dismissed. The view taken by CIT (Appeals) & Tribunal is required to be affirmed. Therefore, we answer the question raised in the present appeal in favour of the assessee and against the Department."

8.5. We also find that the Hon'ble Rajasthan High Court in yet another case had also held the same in the case of CIT vs Jaipur Thar Gramin Bank reported in (2017) 81

taxmann.com 126 (Rajasthan) dated 12.7.2016. The relevant operative portion of the said order is reproduced hereunder:-

> *9. On perusal of the above, it appears that hearing on the subject 5was going on in the aforesaid case and with reference to certain queries raised by the competent authority, two of the officers of the assessee company namely K.C. Gupta and Mrs. Ruchi Bhargava were deputed to discuss on the subject and this letter also contained some information sought by the competent authority. The claim of the learned counsel for the Revenue that the said letter was not received on 4.9.2000 but then admittedly we notice that there is a seal of Joint Commissioner of Income Tax, Special Range-1st, Jaipur, with date of receipt being 4.9.2000, but learned counsel contends that this letter on information was not found on records. We fail to understand the submission of the learned counsel for the Revenue. It was for the Revenue to have taken remedial measures in case the said letter was not available on record, which bears certainly seal of the receipt clerk with date bearing 4.9.2000. Merely denying that this letter is not on records, in our view, is not proper particularly when hearing was going on and two officers of assessee appeared in person for discussion and placed additional material before the Joint Commissioner of Income Tax, in furtherance of the earlier proceedings going on, on the same subject. It was for the Revenue to put its affairs in order rather than denying/disallowing a just and reasonable claim. The doubt raised by the learned counsel for Revenue is contrary to the material on record. Be that as it may, the assessee is sponsored by UCO Bank, a Govt. of India Undertaking and duly complied with the conditions laid down for approval under* ***Section 36(1)(v)****. At-least the AO when this factum was brought to his notice that the assessee has filed copy of the trust-deed, application to the competent authority on 4.9.2000 then even the said letter could have been forwarded to the concerned Commissioner who ought to have taken recourse of either rejecting or approving the Gratuity Scheme created by the assessee. The assessee cannot suffer for the inaction of the Revenue authorities and the AO ought not to have disallowed the claim merely because the Commissioner has not granted approval of the Gratuity Scheme. Once the assessee fulfills the condition laid down for approval having created a trust with the Life Insurance Corporation of India, and it is not the case of Revenue that assessee has not deposited money in terms of creation of the trust, therefore, in our view the Tribunal on such facts is well justified in holding that the claim is just, proper and allowable. A just and reasonable claim deserves to be allowed. We find that both the appellate authorities have found it allowable on the facts found and is essentially a finding of fact based on material and evidence on record. No substantial question of law can be said to emerge out of the order of the Tribunal, so as to call for interference of this Court. We also do not find any perversity in the order impugned. The appeals are dismissed."*

8.6. In view of the aforesaid observations in the facts and circumstances of the case and respectfully following the aforesaid judicial precedents, we direct the ld AO to grant deduction towards contribution made to gratuity fund and superannuation fund in the

sums of Rs 7,77,070/- and Rs 6,38,188/- respectively. Accordingly, the Ground No. 2 raised by the assessee is allowed.

9. In the result, the appeal of the revenue in ITA No. 928/Del/2012 is dismissed and appeal of the assessee in ITA No. 995/Del/2012 is allowed.

Order pronounced in the Court on 01.08.2018

Sd/-	Sd/-
[S.S. Godara]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 01.08.2018
SB, Sr. PS

Copy of the order forwarded to:
1. ACIT, Circle-3(1), N.D.
2. M/s Ceratizit India Pvt. Ltd., 5th Floor, Kirti Mahal, 19, Rajendra Place, New Delhi-08.
3..C.I.T.(A)- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches