

**In the Income-Tax Appellate Tribunal,
Delhi Bench '1-2', New Delhi**

**Before : Shri Bhavnes Saini, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No.5828/Del/2011
Assessment Year: 2007-08**

Terex Equipment Pvt. Ltd., (Formerly known as Terex Vectra Equipment Pvt. Ltd.), 108-110, 1 st Floor, Narain Manzil, 23, Barakhamba Road, New Delhi. PAN AABCT 8105H (Appellant)	vs.	ACIT, Circle 16(1), New Delhi (Respondent)
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Appellant by	Sh. Ved Jain, Advocate
Respondent by	Sh. H.K. Chaudhary, CIT, DR

Date of Hearing	11.10.2018
Date of Pronouncement	02.11.2018

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the assessee against the assessment order passed by the AO under section 143(3) read with Section 144C of the Income tax Act dated 31.10.2011 for the assessment year 2007-08 on the following grounds :

"The addition amounting to Rs. 42,499,745 undertaken by the Learned Assistant Commissioner of Income-tax, Circle 16 (1), New Delhi ("the Ld. AO") vide final assessment order dated October 31, 2011 (received by the Appellant on October 31, 2011) passed under section 143 (3) read with section 144C (13) of the Income Tax Act, 1961 ("the Act") is not in accordance with the law and therefore not sustainable.

Transfer Pricing ("TP") Adjustment: Rs. 40,556,951.

That the Hon'ble Dispute Resolution Panel, New Delhi ("the DRP") has erred both in law and on facts by summarily rejecting the Appellant's objections to the draft order dated December 29, 2010 passed by the Ld. AO under section 143(3) read with section 144C(1) of the Act. The Hon'ble DRP while issuing directions under section 144C(5) of the Act did not consider the facts and merits of Appellant's objections to the proposed adjustments, and merely relied on the reasoning given by the Additional Commissioner of Income-tax, Transfer Pricing Officer - II (3) vide order under section 92CA(3) of the Act dated October 15, 2010 ("TP Order"). On the facts and in the circumstances of the case, the Ld. TPO and the Ld. AO have erred in proposing and the Hon'ble DRP has further erred in confirming the transfer pricing adjustment of Rs. 40,556,951 without due application of mind and without affording a reasonable opportunity of being heard in the matter to the Appellant on the following grounds:

- 1.1. By alleging that the losses incurred by the Appellant were due to the international transactions and disregarding the fact that the Appellant's capacity utilization was very low vis-a-vis the capacity utilization of the comparable companies.*
- 1.2. By summarily disregarding the economic adjustment claimed by the Appellant for analysis under the Transactional Net Margin Method and giving erroneous reasons for rejecting the adjustment claimed by the Appellant. The Ld. DRP/ Ld. TPO have failed to appreciate the use of 'Asset Turnover Ratio' as a substitute or proxy for capacity utilization adjustment. Further, the Ld. DRP/Ld. TPO have also erred on facts and on circumstances of the case by misconstruing the approach followed by the Appellant and by placing reliance on erroneous presumptions/ hypothesis.*
- 1.3. By erroneously concluding that the requisite information for carrying out adjustment on account of high establishment cost and low utilisation of capacity is not available in public domain with respect to the comparables and further erred in concluding that such information is also not available in respect of the Appellant.*

- 1.4. *By relying upon data of the comparables for financial year 2006-07 only for determination of the arm's length price, disregarding the multiple year data approach followed by the Appellant. Further, by relying upon updated data of the comparables which was not available to the Appellant at the time of maintenance of Transfer Pricing Documentation within the time-frame mentioned in Rule 10D(4) of the Income Tax Rules, 1962 ("the Rules").*
- 1.4. *By not allowing the benefit of (+/-) 5% as provided in the proviso to Section 92C (2) of the Act, while determining the arm's length price of the international transactions of the Appellant.*

Corporate Tax ("CT") Adjustment: Rs. 1,942,794

On the facts and in the circumstances of the case, the Ld. AO has erred in proposing and the Hon'ble DRP has further erred in confirming the corporate tax adjustment of Rs. 1,942,794 without due application of mind and without affording a reasonable opportunity of being heard in the matter to the Appellant on the following grounds :

- 2.1. *In disallowing the amount of additional depreciation claimed by the Appellant as per the provisions of section 32(1) (iia) of the Income Tax Act, 1961 on the pre-text that additional depreciation is not available on routine additions made to plant & machinery.*
- 2.2. *In disallowing the interest expenditure incurred by the Appellant for legitimate business purpose.*

The above 'Grounds of Appeal' are all independent and without prejudice to one and another. The Appellant craves leave to supplement, to cancel, amend, add and/or otherwise alter/modify any or all the grounds of the appeal stated hereinabove."

2. The brief facts of the case are that the assessee is engaged in the business of manufacturing of earth moving and construction equipments.

During the year the assessee has undertaken following international transactions:-

S.No.	Nature of Transaction	Method used by assessee	Amount (in crores)
1	Purchase of raw material and components and spare parts	TNMM	20.38
2	Purchase of spare parts	TNMM	1.30
3	Sale of finished goods	TNMM	0.28
4	Royalty payment	TNMM	4.04
5	Global Sourcing	TNMM	0.45
6	Design Centre	TNMM	0.57
7	Reimbursement of expense	TNMM	0.09
8	Sale of fixed assets	TNMM	0.34
	Total		27.49

The assessee benchmarked above transactions using TNMM taking operating profit upon sales (OP/Sales) as the Profit Level Indicator (PLI). The assessee on account of the underutilization adjusted the TNMM by using assets turnover ratio (ATR) on the reasoning that a higher fixed-asset turnover ratio shows that the company has been moved effective in using the investment in fixed assets to generate revenues. After adjustment on account of ATR, adjusted Net Profit Margin of comparable was worked out -20.29% as against that of assessee -3.93%. He, therefore, proposed no adjustment.

3. The AO referred the matter of arm's length price to the TPO. The TPO after examination passed the order dated 15.10.2010. The TPO did not allow the claim for adjustment on account of capacity utilization on the ground that Asset Turnover Ratio (ATR) is an inaccurate and not reliable claim of adjustment on account of capacity utilization using ATR in the case of tested

party. Further, the TPO worked out the net profit margin of comparables selected by the assessee at 12.38% (OP/ Sales) and accordingly proposed an adjustment of Rs. 27.08 Crore on account of arm's length price. Thereafter, the AO passed draft assessment order in which he made following additions beside the additions proposed by TPO:

- i) Disallowance of Royalty Payment- Rs. 53,18,872/-
- ii) Disallowance of Depreciation- Rs. 19,35,365/-
- iii) Disallowance of interest expense- Rs. 15,973/-
- iv) Disallowance of Sales and Service Commission- Rs.34,95,878/

The assessee filed objections before the Dispute Resolution Panel objecting to the adjustment proposed by TPO and further addition proposed by AO. The assessee also challenged the action of TPO in not restricting the adjustment to the operating cost of international transaction only. Ld. DRP agreed with the above contention of the assessee and directed the TPO to restrict the adjustment on account of arm's length to the operating cost of international transactions only. Ld. DRP also gave relief to assessee in respect of disallowance of Royalty Payment of Rs. 53,18,872/-, disallowance of Sales and Service Commission- Rs.34,95,878/- and part relief in case of disallowance of interest expense - Rs. 15,973/-.

4. Ld. DRP however confirmed the action of the TPO rejecting assessee's contention of adjustment on account of capacity utilization. The DRP also upheld the action of the AO in disallowing additional depreciation of Rs. 19,42,794/-. The Assessing Officer thereafter passed the final assessment order accordingly, aggrieved by which, the assessee is in appeal before the Tribunal, inter alia, on the grounds reproduced herein above.

5. Ground no. 1.1 to 1.3 pertain to adjustment on account of international transactions. The assessee incurred a loss of 3.93% at net level and the reason for the same was stated to be low capacity utilization and high establishment cost of the assessee company vis-à-vis the comparable company. The assessee for capacity utilization made adjustment to the comparables and after making adjustment to capacity utilization by using assets turnover ratio worked out the arithmetic mean of a comparable (20.29%). The TPO however rejected the computation done by the assessee of the capacity utilization by using assets turnover ratio. The TPO also referred to the Rule 10B(3) and the balance sheet of the assessee company to demonstrate that it has utilized 98.2 % of its installed capacity during the year and hence not eligible for any further adjustment on account of capacity utilization. The TPO was of the view that though the Indian Transfer Pricing Rules allows capacity adjustment but there is no guidance on comparability adjustment in the Rules. What constitute a reasonably accurate adjustment as well as how to perform these adjustment are not provided in the Rules. The TPO was of the view that the assessee has not furnished reasonably accurate data and has also not furnished appropriate documentation. He was also of the view that the necessary data for adjustment of capacity utilization is not available on record. The TPO held that the claim of adjustment on account of capacity utilization using ATR ratio in the case of tested party and the comparable with respect to international transaction can't be allowed.

6. The DRP has confirmed the above action of the AO except the fact that it restricted the adjustment to international transaction only as against the adjustment made by the TPO at enterprise level.

7. The Id. AR of the assessee contended that the TPO/DRP have failed to appreciate the facts in the right perspective. The assessee is engaged in the business of manufacturing of earth moving and construction equipments. This is the third year of the assessee company and it has not been able to utilize its assets fully. The comparable used for the purpose of benchmarking the transactions are all very old and well established. The assessee company has incurred an operating loss of Rs. 6.50 crore from its operation during the year under consideration. The main reason for such losses incurred by the assessee company was that it has spent a significant amount in building the state of art manufacturing facility and it has one of the biggest plants in India for manufacturing earth moving and construction equipment. The products being manufactured are specialized in nature and it takes time to get a respectable market share in an already fiercely competitive environment. The Ld. AR invited our attention to its submission dated June 15 2010 to the TPO whereby it has submitted the detailed analysis explaining the adjustment worked out by the assessee for equating variation in the capacity utilization. It was submitted that the genesis for making adjustments to the arm's length price, under the TNMM, on account of differences between the comparables and the tested party is embodied in Rule 10B.

8. On the issue of installed capacity and actual production, the Ld. AR invited attention to the submission before the DRP placed at paper book page 134, to rebut the contention of the TPO regarding actual production being 982 as against installed capacity of 1000 as per its annual accounts, whereby it was clarified that installed capacity and actual production for different products are denominated in different units. The assessee has also given the figures of the Elecon Engineering Ltd. to demonstrate that capacity utilization as a whole for the entity cannot be accurately calculated as under:

Company Name	Product / Raw Material name	Capacity (All Units)	Production (All Units)	Capacity - Unit (Unitcap)
Elecon Engineering Co. Ltd.	Axels	1500	38	Numbers
	Conveying Equipments	15000	1004	Tonnes
	Crushers, Screens & Feeders	1000	352	Tonnes
	Reduction Gears	55	35.14	000 nos
	Specialized Convey. Equip., Blender Reclaimers Etc.	3000	1055	Tonnes
	Wagon Marshalling Equipments	300	93	Tonnes
	Wagon Tippler Equipment	16	16	Sets

On this basis, the Ld. AR contended that the rejection of the assets turnover ratio for making adjustment has been wrongly rejected by the TPO. It was also submitted that similar adjustment was allowed by TPO using assets turnover ratio in the preceding year. For this, the Ld. AR invited attention to the order passed by the TPO for the preceding year placed at paper book page 249-252.

9. The Ld. AR also placed reliance on the judgment of ITAT Delhi in the case of Lumax Industries Ltd. 2013(8) TMI 669 in support of adjustment by using assets turnover ratio.

10. The Ld. AR also pointed out that the computation done of the adjustment and the reasoning given by the TPO in its order on computation of margin of the comparable after making adjustment on account of assets turnover ratio is illogical. It was also contended that the Ld. TPO himself has agreed that adjustment need to be made while computing margin of the comparables. However, he has disallowed the same on the ground that there is no sufficient reliable data available. The Ld. AR submitted that the absence of reliable data cannot be used adversely against the assessee. The TPO has full power under the Act to call for the information by issuing notices under Section 133(6) and he could have used such power to get additional information. In support thereof, the Ld. AR placed reliance on the judgment of the Bangalore Bench in the case of IKA India Pvt. Ltd. v. DCIT [IT (TP) A No.2192/Bang/2017] dated 17.09.2018 wherein the Tribunal has directed the TPO to exercise powers u/s 133(6) of the Act to call for information on capacity utilization of the comparable companies and thereafter, provide the capacity utilization adjustment to the assessee company.

11. The ld. DR, on the other hand, has filed a written synopsis, which is placed on record and relied on the orders of the Assessing Officer/TPO and DRP. The Ld. DR invited attention to the findings recorded by the TPO that the

assessee has produced 982 nos. as against installed capacity of 1000. He further submitted that the TPO has examined the adjustment made to the comparables by applying assets turnover ratio and has demonstrated that such adjustment will lead to absurdity. The Ld. DR further pointed out that the judgment relied upon by the Ld. AR in the case of Lumax Industries Ltd. (Supra) has nowhere held that assets turnover ratio is the accepted method of making adjustment on account of capacity utilization. As regards the reliance placed by the assessee on the judgment of IKA India Pvt. Ltd. (Supra) the Ld. DR submitted that it is primarily the duty of the assessee to maintain documentation and satisfy the TPO. The Ld. DR submitted that assessee has not tried to provide capacity utilization of comparables rather it has come up with a new concept of applying ATR for capacity utilization. The TPO has examined the contention of the assessee and was of the view that in all the cases the adjustment of net profit margin of comparable will be downward and in fact in some cases it has gone in the negative from the positive. And therefore, he has rightly rejected this method. He further submitted that the contention of the assessee that it has incurred huge expenditure on setting up of new production facility is to be seen with reference to the claim of depreciation which is only 1.74 crore. He further submitted that the assessee having failed to produce the reliable data and documentation, the TPO was right in refusing to allow any adjustment. The onus is upon the assessee to produce sufficient documentation. Thus, the Ld. DR submitted that the order passed by the TPO be confirmed.

12. We have considered the rival submissions and gone through the facts. The issue here is that of adjustment on account of capacity utilization. According to the assessee, there is a difference in the working of the assessee i.e. tested party and the comparables. During the course of the proceedings before the TPO the assessee has submitted the necessary details as is evident from the Paper Book pages 91 to 126. The assessee has picked up each one of the comparables and demonstrated that why adjustment need to be made vis-à-vis the assessee company. It is not the case of either side that the comparables are functionally different. The dispute is revolving around the level of operation and consequent adjustment. According to the assessee, though it had built the state of art and one of the biggest plants in India for manufacturing earth moving machinery, but it has not been able to use it fully. As against this, the TPO's assertion is that as per annual account, it has actually produced 982 nos. as against installed capacity of 1000 nos. Now the issue is whether on this basis itself, the contention of the assessee can be rejected. We are of the view that the same cannot be rejected at the threshold without examination. We have also gone through the argument on this issue submitted by the assessee before the DRP whereby giving an example it has demonstrated that capacity utilization as a whole for the entity cannot be accurately calculated when different items are measured in different 'unit'. In such cases, facts of the tested party and that of the comparables ought to be examined. The TPO has refused to examine the same on the ground that the assessee has not produced sufficient documentation. The DRP has confirmed the action of the TPO on the reasoning in Para 2.2 by holding that requisite information for carrying out adjustment on account of high establishment cost

and low utilization capacity is not available in public domain. We are of the view that assessee having produced the preliminary data as placed in the Paper Book at pages 89 to 126, it was for the TPO to examine the same and in case need be to call for further information by using its power under Section 133(6) from the comparables. As regards the contention of the Ld. DR that the TPO has rightly rejected the adjustment to the net profit margin of a comparable on the ground that adjustment was downward, we are of the view that it doesn't matter whether the adjustment is upward or downward. In case, facts are so that downward adjustment is to be made and as a result of which the net profit margin of comparable get converted from positive to negative the same has to be considered. Merely because consequent to such adjustment downward adjustment is required and such adjustment cannot be rejected. The adjustment can be rejected only on its merit after consideration of facts and not on the ground that it will lead to downward adjustment. In fact, it is the case of the assessee that downward adjustment is required in the facts of the case. As regards the documentation required for considering such adjustment, we are not in agreement with the contention of the Ld. DR that assessee is required to produce even that data which is not in public domain. The assessee cannot be asked to do what is not possible for him. On the contrary, the TPO being an adjudicating officer has to carry out the exercise and wherever required to use its power collect information which will help in correct determination of arm's length price. In such situation, the TPO can always call for the information to collect the information from the comparables. Our this view gets support from the judgment of the Bangalore

Bench of ITAT in the case of IKA India Pvt. Ltd. (Supra) where the ITAT has held as under:

33. The assessee has under-utilized capacity during the subject AY and is accordingly factually and legally eligible to an adjustment for the same. Therefore, such a benefit cannot be denied to the assessee only for the reason that the data about comparable companies is not available. Requiring the assessee to produce such a data which is not available in public domain would tantamount to requiring the Appellant to perform an impossible task. The only way to get the data in the current case, would be where the TPO collates the same from the comparable companies by exercising his powers under section 133(6) of the Act. The relevant extracts of the section are as under:-

“(6) require any person, including a banking company or any officer thereof, to furnish information in relation to such points or matters, or to furnish statements of accounts and affairs verified in the manner specified by the Assessing Officer, the Deputy Commissioner (Appeals), the Joint Commissioner or the Commissioner (Appeals), giving information in relation to such points or matters as, in the opinion of the Assessing Officer, the Deputy Commissioner (Appeals), the Joint Commissioner or the Commissioner (Appeals), will be useful for, or relevant to, any enquiry or proceeding under this Act :”

34. In this regard, we find that the Mumbai ITAT in case of M/s Kiara Jewellery P. Ltd. (I.T.A.No.8109/Mum/2011), has directed the AO/TPO to obtain the exact details of capacity utilization of comparable companies, if not available in public domain. The relevant extract of the aforesaid decision is as under:-

“11. Keeping in view the decision of the Tribunal in the case of Petro Araldite (P) Ltd (supra) laying down the guidelines on the issue of capacity utilization, we consider it appropriate to restore this issue relating to adjustment on account of capacity utilization in the case of assessee company to the file of AO/TPO for deciding the same afresh keeping in view the said guidelines. If

the exact details of capacity utilization of the comparable companies are not available in the public domain, the AO/TPO is directed to obtain the same directly from the concerned parties and to decide this issue afresh after giving assessee an opportunity of being heard.” (Emphasis Supplied)

35. Accordingly, we direct the TPO to exercise powers under section 133(6) of the Act to call for information on capacity utilization of the comparable companies such as -

- Installed Capacity,*
- Actual Production in Units,*
- Break-up of Fixed Cost and Variable Cost;*
- Segmental/ product wise information, if any.*

36. Post obtaining the information, he is requested to provide the assessee an opportunity by sharing the details so obtained, and accordingly, grant the adjustment for capacity under-utilized. Ground No.7 is decided accordingly.”

13. In view of the above, we set aside this issue to the TPO and direct the TPO to examine the data placed by the assessee before it. The TPO shall also call for the information from the comparables by issue of notice under Section 133(6). While carrying out this exercise the TPO shall also examine the ‘unit’ in which such capacity utilization is to be measured. The TPO shall also examine the capacity utilization of the assessee company and will ensure that the capacity utilization of the assessee company i.e. the tested party and that of the comparables is on the same parameters which will include assets turnover ratio. After carrying out such exercise the TPO shall compute appropriate adjustment, if any, on account of capacity utilization. The TPO shall share the details so obtained with the assessee and decide the issue afresh after giving adequate opportunity to the assessee. Accordingly, grounds Nos. 1.1 to 1.3 are allowed for statistical purposes.

14. Ground no. 1.4 is not pressed and is dismissed as such.

15. Ground no. 1.5 is regarding allowing the benefit of (+/-) 5% in terms of proviso to Section 92C(2) of the Act. This ground is consequential to ground no. 1.1 to 1.3. Since we have restored the issue of adjustment on account of arm's length price to the TPO, this issue of allowing benefit of +/- 5% will be considered appropriately by the TPO as per the proviso to Section 92C(2) of the Act while computing the adjustment if any required to be made on account of arm's length price.

16. Ground no. 2.1 is regarding claim of additional depreciation under Section 32(1)(iia) in respect of the new plant and machinery added by the assessee during the year. The AO has denied this claim on the ground that this claim of additional depreciation is to acquire and install the new plant and machinery. The assessee has made small addition which comprises of equipment, welding fixtures and material handling equipments and as such these equipments are not directly engaged in manufacturing of article or things. The DRP has confirmed the action of the TPO by holding that additional depreciation is applicable for installation of main plant and machinery and it is not applicable to the routine addition made to the plant and machinery.

17. The contention of the ld. AR has been that both AO and DRP have fallen in error in denying benefit of additional depreciation available under Section 32(1)(iia) of the Act. It was submitted that the language of Section 32(1)(iia) is very clear and it does not make any distinction between main plant and machinery. All that is required is that the plant and machinery should be acquired and installed by an assessee engaged in the business of manufacturing or production of any article or thing during the year. The assessee is engaged in manufacturing of earth moving and construction equipments. It has submitted the complete details of the machineries purchased during the year. So there is no dispute about acquisition and installation of such machineries as normal depreciation on the same has been allowed by the AO. The only dispute is whether such machinery and equipment will fall within the meaning of plant and machineries on the reasoning given by the AO and the DRP. The Ld. AR placed reliance on the judgment of the Calcutta High Court in the case of CIT vs. Technico Enterprises Pvt. Ltd. 206 ITR 36 and Gujarat High Court in the case of CIT vs. Elecon Engineering Co. Ltd. 96 ITR 672 in support of its contention.

18. The Ld. DR, on the other hand, submitted that assessee is not eligible for claim of additional depreciation. It was submitted that the AO has not disallowed the additional depreciation only on the ground of small plant but also that these assets are not used for manufacturing of article or thing. The Ld. DR invited attention to the finding of the TPO at Para 2 Page 2 whereby it has been stated that assessee is engaged in the business of assembly, marketing and servicing of products and components manufactured in India.

In support of its contention that the assessee is in the business of assembly of products and services of components produced in India. The assessee cannot be said to be in the business of manufacturing and hence not eligible for additional depreciation.

19. We have perused the orders passed by the lower authorities and also the Paper Book filed by the assessee and we note that the issue here is regarding interpretation of Section 32(1)(iia) of the Act which reads as under:

"32(1)(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing [33](#)[or in the business of generation, transmission or distribution] of power, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii) :

Provided that where an assessee, sets up an undertaking or enterprise for manufacture or production of any article or thing, on or after the 1st day of April, 2015 in any backward area notified by the Central Government in this behalf, in the State of Andhra Pradesh or in the State of Bihar or in the State of Telangana or in the State of West Bengal, and acquires and installs any new machinery or plant (other than ships and aircraft) for the purposes of the said undertaking or enterprise during the period beginning on the 1st day of April, 2015 and ending before the 1st day of April, 2020 in the said backward area, then, the provisions of clause (iia) shall have effect, as if for the words "twenty per cent", the words "thirty-five per cent" had been substituted :

Provided further that no deduction shall be allowed in respect of—

(A) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or

(B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or

(C) any office appliances or road transport vehicles; or

(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year;"

20. As per the above Section, an assessee is entitled to additional depreciation on new plant and machinery which has been acquired and installed by an assessee engaged in the business of manufacture or production of any article or thing. Thus, to be eligible for additional depreciation, the assessee has to demonstrate that it is engaged in the business of manufacture or production of any article or thing. Further, it has to demonstrate that it has acquired and installed new machinery and plant during the year. The first issue which has been raised by the Ld. DR is that assessee is not engaged in the business of manufacture or production of any article or thing. For this, he has relied upon the observation of the TPO in its order that the assessee is engaged in the business of assembly, marketing and servicing of products and components manufactured in India. However, ongoing through the annual report of the assessee, we note that assessee is engaged in manufacturing of construction equipments. In fact, the arguments advanced on the issue of adjustment on account of arm's length price are all with reference to actual production where the TPO himself has referred to actual production number being 982 as against installed capacity of 1000 nos. As per the annual report, the assessee has got plant and machinery at gross value of Rs. 10,34,89,552/-. It has incurred manufacturing expenses of Rs. 2,14,26,332/- which include direct labor expenses and power and fuel expenses as well. It is liable to pay

excise duty as per the annual accounts. The comparables used for determination of arm's length price stated on page 12 and 13 of the TPO's order are all companies which are engaged in manufacturing and production. Thus, the contention of the Ld. DR on the basis of the brief description given by the TPO in its order cannot be a basis to hold that Assessee Company is not engaged in the business of manufacture or production of an article or thing. Thus, we hold that assessee is engaged in the business of manufacture or production of an article or thing and as such, the first condition as stipulated in the relevant section stands satisfied.

21. The second condition that assessee has acquired and installed the plant and machinery during the year can't be disputed as AO himself has allowed normal depreciation. It is only the additional depreciation which has been disallowed by the AO on the reasoning that addition made by the assessee during the year do not fall within the meaning of the plant and machinery. The DRP has also held that this clause is not applicable to the routine addition made to the plant and machinery. It may be relevant to first examine what items have been acquired and installed by the assessee during the year. The AO has stated that the items acquired are as under:

- a. Equipment and appliances.
- b. Material handling equipments.
- c. Vendor tooling.
- d. Welding fixtures and equipments.

The above items include caliper, decibel meter, bush pressing table, trolley, glass stand, pigeon hold rack, material rack, welding curtains and fixtures, measuring scales, oil tray, etc.

22. Now the issue is whether the above items can be said to fall within the meaning of the plant and machinery. Section 43(3) defines plant in an inclusive manner to include Ships, Vehicles, Books, Scientific apparatus and surgical equipments used for the purposes of the business or profession. There are several decisions which have interpreted this clause. Way back in the year 1974 the Gujarat High Court in the case of CIT vs. Elecon Engineering Co. Ltd. 96 ITR 672 had occasion to consider meaning of plant and held that the word plant is a word of wide import and in the context of Section 32 must be broadly construed and it included any article or object fixed or movable, live or dead, used by a businessman for carrying on his business. Similarly Calcutta High Court in the case of CIT vs. Technico Enterprises Ltd. 206 ITR 36 has explained the meaning of the plant. In the light of the interpretation of the meaning of the plant in above judgment and the case of the assessee from the items stated hereinabove, it cannot be said that these items will not fall within the meaning of plant. Once the items fall within the meaning of the plant, there cannot be a further category to exclude certain items on the ground that these are routine addition or these are small items. The language of the Section 32(1)(iia) does not make any distinction about routine additions of plant or small additions so as to exclude these items for the purpose of additional depreciation. It may be relevant to point out that the legislature by putting a proviso to this section itself has excluded following items from the benefit of additional depreciation:

“Provided further that no deduction shall be allowed in respect of—

- (A) *any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or*
- (B) *any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or*
- (C) *any office appliances or road transport vehicles; or*
- (D) *any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year;"*

It is not the case of the Revenue that any of the items added during the year is hit by this proviso. If that be so, we see no reason to deny the benefit of additional depreciation in respect of these items. Accordingly, we direct the AO to allow the additional depreciation in respect of these items. Accordingly, Ground no. 2.1 is allowed.

23. Ground no. 2.2 is dismissed as not pressed because of the small amount involved therein.

24. In the result, appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 2nd November, 2018

Sd/-
(Bhavnes Saini)
Judicial member

Sd/-
(L.P. Sahu)
Accountant Member

Dated: 2nd November, 2018

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