IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, BENGALURU

BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER
and
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.1135/Bang/2014
(Assessment year: 2003-04)

M/s. H.P. India Sales Pvt. Ltd.
(Formerly known as Hewelett-Packard India Sales Pvt. Ltd.),
24, Salarpuria Arenam Hosur Main road,
Bengaluru-560 030. … Appellant
PAN:AAACC9862F

Vs.

Joint Commissioner of Income-tax, LTU,
Bengaluru. … Respondent

AND

ITA No.1137/Bang/2014
(Assessment year: 2003-04)
(by Revenue)

Assessee by : Shri Sharath Rao, CA.
Revenue by : Shri C.H.Sundar Rao, CIT(DR)

Date of hearing : 07/02/2019
Date of pronouncement: 15/02/2019

O R D E R

Per BENCH :

These are cross appeals filed by the revenue and the assessee against the order of the CIT(A), LTU, Bengaluru, dated 30/06/2014 for the assessment years 2002-03 and 2003-04. Since the issues are common in both the appeals, they were heard together and disposed of by this common order.

2. For the sake of convenience, we shall take up the revenue's appeal in ITA No.1137/Bang/2014 and facts narrated. The revenue has raised the following grounds of appeal:

1. **"Depreciation on assets given on finance lease -** in holding that the tax treatment in respect of the asset given on finance lease, the lessor continues to be the owner of the assets given on lease and is entitled to claim depreciation on the same.
2. **Disallowance of provisions for warranty -** The Hon'ble CIT(A) erred in directing the AO to allow the provision for warranty. The jurisdictional ITAT has upheld the disallowance in the case of Microland Ltd Vs. CIT.
3. **Disallowance of payment to non-residents without TDS -** The Hon'ble CIT(A) erred in holding that both deduction and payment/deposit of tax deducted at source is applicable from 1/4/2004 and would not be applicable for A.Y.2002-03 and A.Y.2003-04. As per Sec.40a(i) no deduction shall be allowable in a case where the assessee has not deducted tax or after deduction of tax not paid sum before expiry of the time prescribed in Sec. 200(1) of the I T Act."

3. Brief facts of the case are that the assessee is erstwhile Hewlett-Packard India Sales Pvt. Ltd., and engaged in the Business of manufacturing and trading of computer equipment and accessories and rendering related services and filed the Return of income disclosing total income of Rs.2,21,59,35,340/- on 02/12/2003. Subsequently the case was selected for scrutiny and notice u/s 143(2) of the Income-tax Act,1961 ['the Act' for short] was served on the assessee. A questionnaire was issued along with notice u/s 142(1) of the Act. In response, the learned AR of the assessee appeared from time to time and furnished the details. Whereas the assessee, vide letter dated 23/09/2005 raised the issue for jurisdiction of assessment and submitted that Hewlett-Packard India Sales Pvt. Ltd., amalgamated with M/s.Hewelett Packard India Sales Pvt. Ltd.

w.e.f. 01/04/2003 and the copies of amalgamation orders u/s 394 of the Companies Act passed by the Hon'ble High Courts of Delhi and Karnataka were filed. Whereas the AO, after considering the amalgamation order, came to unilateral conclusion that Hewlett-Packard India Sales Pvt. Ltd., stood dissolved without winding up and the amalgamated entity of Hewlett-Packard India Sales Pvt. Ltd ended on 31/03/2003 on the point of assumption of jurisdiction. Learned AO found similar objections were raised in proceedings of assessment year 2002-03 and whereas CIT(A) passed the order overlooking the objections and AO observed at page 4 para.2.7 of the order which reads as under:

> "2.7 It is pertinent to mention that for the appellate proceedings related to A.Y. 0203 similar objections were made before the CIT (A), that the assessee company has wound up thereby no legal juristic identity existed. While disposing the arguments, the Ld. CIT (A) relied on various case laws and emphasized on 292B of the I.T.Act, 1961. Accordingly, it was held that the proceedings against the amalgamated company were valid. It was also held that the company's income was taxable and that being the substantive issue it cannot escape taxation of income by holding out the plea of technical error."

4. Accordingly, the AO proceeded with the present assessment and rejected the objections raised by the assessee and passed the final assessment. In the course of assessment proceedings, the AO also dealt on the submissions of the assessee on the provision for warranty and disallowed Rs.11.02 crores. Similarly, the AO made addition on loss on account of foreign exchange fluctuation Rs.2,53,23,411/- and under the provisions of section 40(a)(i) disallowed Rs.4,86,192/-. Further The AO also made disallowance of Rs.19.82 crores on depreciation of finance lease. With these additions, determined

the total income at Rs.2,55,01,44,940/- and passed order u/s 143(3) of the Act dated 29/03/2006.

5. Aggrieved by the order, the assessee filed an appeal before the CIT(A), whereas the CIT(A) having considered the facts and submissions in the appellate proceedings on validity of jurisdiction has confirmed the action of the AO and dismissed the ground of appeal of the assessee. Whereas in respect of the additions made by the AO on depreciation on assets given on finance lease, the CIT(A) relied on the judicial decisions and allowed the ground of appeal at page 13 para 8 which read as under:

> "8. In the course of the leasing business of erstwhile HP India, certain assets were given on finance lease. In the books of account, the accounting treatment adopted for these assets was that prescribed under Accounting Standard-19 issued by the Institute of Chartered Accountants of India. The tax treatment in respect of the assets given on finance lease, however was as per Circular number 2, 2001 dated February 9, 2001 issued by the Central Board of Direct Taxes wherein it has been clarified that the lessor continues to be the owner of the assets given on lease and is entitled to claim depreciation on the same. A number of judicial decisions were cited on this matter by the appellant.
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> - CIT Vs. Avon Capital Service P Ltd. [CC no.6306 of 1997 (SC)]
> - CIT Vs. Essan Investments Ltd. (2002) 254 ITR 83 (Mad)
> - Multican Builders Ltd Vs. CIT (147 Taxman 103) (Cal)
> - Hero Honda Motors Ltd Vs. JCIT (95 TTJ 782)
> - Soni Capital Markets Ltd. (ITA No.4091/Mum/2000)
>
> The matter was finally stated to be covered in terms of the Hon'ble Supreme Court decision in case of M/s.ICDS

Ltd.,Vs CIT, Mysore and another in Civil Appeal No.3282 of 2008.

8.1 I have perused the above judicial decisions, especially the order of the Hon'ble Apex Court and I find that it covers the facts of the appellant's matter. The grounds are, accordingly, allowed."

6. Similarly, the CIT(A) granted relief to the assessee in respect of provision for warranty, which was disallowed and relied on the Hon'ble Apex Court decision in the case of Rotork Controls India Pvt. Ltd. (341 ITR 62)(SC) referred at page 14 para 9 which read as under:

"9. During the course of appeal proceedings, it was pointed out that this matter was decided in the appellant's favour in its own case (Civil Appeal Nos. 3513, 3321, 3522 & 3523 of 2009) by the Hon'ble Supreme Court. The decision was rendered in the case of Rotork Controls India Pvt ltd 341 ITR 62 in which both erstwhile HP as well as HPISPL, which was formerly known as Compaq Computers India Pvt. Ltd., were parties tagged to the Rotork case. For AY 2008-09 I have decided this matter in favour of the appellant by respectfully following this judgement. Considering the identity of facts involved in the present appeal also on this matter, the AO is directed to allow the provision for warranty. This ground, accordingly, succeeds."

7. In respect of disallowance of payments made to non-resident without deduction of tax at source, the CIT(A) dealt on the provisions of law u/s 40(a)(i) of the Act as amended from 1/4/2004 and also relied on the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Oracle Software India Ltd.* (293 ITR 353)(Del.) and directed the AO at page 16 of the order at para. 11.2 which read as under:

"11.2 For AY 2003-04 it was pointed out that the gross amount of expenses in respect of which there had been delay in remittance of taxes was Rs.1,65,808 as against Rs.4,86,192 disallowed by the AO. Prima facie the claim

appears to be correct. The AO is directed to verify the facts and allow the correct claim thereafter."

8. Aggrieved by the order of the CIT(A), the revenue has filed the appeal before the Tribunal. The learned DR argued the first ground of appeal that the CIT(A) has erred in granting relief to the assessee in respect of assets given on financial lease and also the assessee, being owner, entitled for depreciation.

Contra, learned AR relied on the order of the CIT(A) and the decision of the co-ordinate bench of Tribunal in the assessee's own case for assessment year 2002-03.

9. We heard rival submissions and perused the material on record. The CIT(A) has granted relief to the assessee in respect of finance lease where depreciation was disallowed by the AO relying on the decision in the case of *Oracle Software India Ltd.* (supra). We found the similar the disputed issue was considered by the co-ordinate bench of the Tribunal in the assessee's own case for the assessment year 2002-03 in ITA No.1136/Bang/2014 & 1134/Bang/2014 dated 30/10/2015 at pate 10 para 14 of the order which is as under:

"14. We have perused the orders and heard the rival submissions. AO himself has stated in the assessment order that though assessee termed the lease as financial lease, the terms of the lease did not provide for transfer of ownership to the lessee automatically at the end of the lease. Only reason why the lease was considered to be financial in nature was that the lease period was more or less on par with the life of the assets which were leased out and the renewal of the lease was at the option of the lessee for a nominal rent. However, in our opinion none of these can substitute the clause in the lease agreement which specified that the ownership of the assets continued to be with the assessee. Insurance for the leased products were borne by the assessee. Assessee was the owner and held the title of the assets. Giving an equipment on lease by itself can be considered as a business. We are of the opinion that by virtue of the decision of Hon'ble Apex Court in I. C. D. S (supra), assessee having capitalised the assets in its books was eligible for claiming depreciation thereon. We do not find any reason to interfere. Ground.2 of the Revenue stands dismissed."

In the course of hearing, no new material was filed by Revenue to take a different view. Accordingly, we rely on the decision of the co-ordinate bench of the Tribunal and are not inclined to interfere with the order of CIT(A) on the ground of appeal and dismiss the revenue's grounds of appeal.

10. On second ground of appeal on disallowance of provision for warranty, the learned DR submitted that the CIT(A) has erred in directing the AO to allow the provision for warranty overlooking the judicial decisions.

Contra, learned AR relied on the order of the CIT(A) and the decision of the ITAT in the assessee's own case for assessment year 2002-03 in ITA No.1136/Bang/2014 dated 04/06/2018(which was recalled) and the facts of case at page 1 & 2 which read as under:

> 2. This appeal along with ITA No. 1134/Bang/2014 being appeal filed by the assessee against the very same order of CIT(A) was heard and decided by this Tribunal by its order dated 30.10.2015. In the said order ground no. 3 raised by the revenue was allowed by setting aside the order of the CIT(A) and remanding the issue raised in Gr.No.3 by the Revenue with regard to deduction on account of provision for warranty to the AO for fresh consideration. The Tribunal had observed that since the lower authorities did not verify whether the change in the methodology of providing liability on account of provision for warranty was scientific, the issue being remanded to the AO and the AO was directed to look into that aspect afresh.
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> 3. The assessee filed M.P. No. 112/Bang/2016 pointing out that the issue with regard to provisions for warranty was already considered by the Hon'ble Supreme Court in the case of Rotork Controls India Pvt. Ltd. (314 ITR 62) and the assessee was also a part of the group of cases which were decided by the Hon'ble Supreme Court. The assessee also pointed out that in assessee's own case, the Hon'ble Karnataka High Court in Assessment Year 2003-04, had decided the issue in favour of the assessee.

4. The Tribunal vide its order dated 28.03.2017 accepted that there was a mistake apparent on the placed on the record and recalled the entire order dated 30.10.2015.

5. The assessee filed M.P. No. 7/Bang/2018 pointing out that the entire order dated 30.10.2015 need not be recalled and only the order of the Tribunal in ITA No. 1136/Bang/2014 to the extent of the claim for deduction on account of provision for warranty viz., Gr.No.3 in Revenue's appeal ought to have been recalled for a fresh decision. The Tribunal accepted this claim in its order dated 09.02.2018 and directed the Registry to fix the appeal for hearing and decision afresh only with regard to ground no. 3 raised by the revenue in ITA No. 1136/Bang/2014.

11. The ld. AR of the assessee made submissions referred at pages 6 to 8 para 12 to 14 of the Tribunal order dated 04/06/2018 which read as under:

6. "Accordingly, the appeal was heard on ground no. 3 with regard to claim for deduction made by the assessee on account of provision for warranty. The assessee is a company engaged in the business of manufacturing and trading of computer equipment and accessories and rendering services. The AO noticed that the assessee had claimed a sum of Rs. 23,72,84,914/- on account of provision for warranty. The AO was of the view that deduction on account of provision for warranty is a contingent and unascertained liability. The assessee explained before the AO the nature of its liability on account of warranty. The assessee explained that its products were sold along with warranty ranging from 1 to 3 years along with the products such as personal computers. This was the normal feature of the market in which the Assessee operated. Under the warranty terms, the assessee was under a contractual obligation to provide such after sales service and also replace defective parts during the warranty period. The sale price covered the price of delivery of spares as per the terms of warranty. There were a large number of products sold during the year for which the warranty had not expired on close financial year ended 31.3.02. Thus arose the necessity to make a provision in the books to meet the liability on this account as and when it occurs. This liability was in presenti. The provisions were made on a scientific basis based on the actual

warranty expenses and the period for which warranty was to be provided in the future. It was the contention of the assessee that the provision of warranty was an actual lability that arose at the time of sale of products. It was required to provide for all costs directly associated with revenues as expenditure as per the accounting standards. This included provision for warranties. The accrual system of accounting prescribed under the Companies Act was similar to the mercantile system of accounting prescribed under sec. 145 of the IT Act. It was submitted that the provision was not a contingent liability but a liability in presenti.

7. The AO however noticed that in Assessment Year 2001-02, the liability on account of provision for warranty was only a sum of Rs. 0.85 Crores whereas the liability in Assessment Year 2002-03 had gone up to Rs. 23.73 Crores. The AO noticed that the sales in Assessment Years 2001-02 and 2002-03 had not increased substantially. The AO called upon the Assessee to explain the provision on account of warranty liability in the present Assessment year compared to the provision made in the earlier Assessment year despite the sales not having increased proportionately.

8. The assessee explained that in Assessment Year 2002-03 a new methodology for computing liability on account of warranty cost was adopted by assessee. The assessee explained that earlier the warranty cost were computed by considering standard cost of spare parts consumed but in Assessment Year 2002-03 other related costs like customs duty was also being included in the calculation. The assessee reiterated its stand that the provision for warranty was made on a scientific basis. The AO however did not agree with the submissions of the assessee and he disallowed the claim of the assessee for deduction for the following reasons.

"*6.5 As to the assesses's claim that the provision is created on a scientific basis, suffice would be to compare the provision created in. FY 2000-01 to that created in FY 2001-02. On almost identical sales in the two years the amount of provision created- both being claimed to have been created on a scientific basis- differ widely, which would not be the case on art objective and consistent scientific method.* ***However, the expenditure is disallowable not because the method of computing the provision is unreliable and unrealistic, though this could form a reasonable ground for disallowing the claim, but because the liability is held to be contingent.***" (emphasis supplied)"

Finally, the co-ordinate bench of Tribunal considering the facts and the submissions of the learned AR, has relied on the Hon'ble Supreme Court and dismissed the revenue's appeal at page 8 para 15 of the order:

> 15. "We have given a careful consideration to the rival submissions. It is not disputed before us that the assessee's case for Assessment Year 2001-02 was also part of group of cases decided by Hon'ble Supreme Court in the case of Rotork Controls India Pvt. Ltd. (supra). The Hon'ble Supreme Court held that the method of accounting for warranty liability has to be a fair estimate and the liability of the assessee should represent present obligation of the assessee as a result of past event that the estimate made by the assessee should be reliable and the liability should be certain. The main thrust of the argument of ld. DR was that the new methodology of providing for liability on account of warranty claims should be examined by the AO afresh. The new methodology in our opinion was only enhancing the cost of the spare parts consumed by including in the cost of spare parts considered for estimating liability on account of warranty by adding to the cost of spare parts labour cost, customs duty, other logistics charges etc. In our view this was the reason why the liability on account of provision for warranty increased in the present year that does not mean that the provision made by the assessee on account of warranty liability was not scientific or that it was not a certain liability and reliable estimate. Moreover as we have already seen the AO did not disallow the claim of the assessee on the ground that the estimate of liability made by the assessee was not proper. He proceeded on the basis that the liability was contingent. Moreover the Hon'ble Karnataka High Court in assessee's own case for Assessment Year 2003-04 has decided the issue in favour of the assessee. We have also seen that in the subsequent assessments completed, changed methodology has been accepted by the appellate forums or by the Assessing Officer himself as could be seen from the chart extracted in the earlier part of this year. Keeping in mind all these facts and circumstances we are of the view that the CIT(A) was justified in deleting the addition made by the AO on account of provision for warranty liability. We find no grounds to interfere with the order of CIT(A). Accordingly ground no. 3 raised by the revenue is dismissed."

12. In the present case, the revenue has not brought on record any cogent evidence controverting the findings of the CIT(A) on disputed issue and accordingly, we are inclined to affirm the action of the CIT(A) in allowing relief relying on the decision of the Hon'ble Apex Court. This ground of appeal of Revenue is dismissed.

13. The third ground of appeal raised by the revenue that CIT(A) erred in granting relief in respect of disallowance of payments made to non-residents without deduction of tax at source on applying the amended provisions of section 40(a)(i) of the Act. Whereas the learned AR supported the order of the CIT(A) which is conclusive and relied on the decision of the co-ordinate bench of Tribunal in the assessee's own case in ITA Nos.1136 & 1134/Bang/2014 dated 30/10/2015. We found this issue was dealt, by the Tribunal at pages 16 & 17 paras.28 & 29 of the order and relied on the decision of the Hon'ble Delhi High Court in the case of *Oracle Software India Ltd.* (supra), which read as under:

> *"28. We have perused the orders and heard the rival contentions. The impugned assessment year being 2002-03, the law as it stood prior to the substitution of the said sub-section through Finance (No.2) Act, 2004 applied. The said provision as it applied at the relevant point of time read as under :*
>
> *a) in the case of any assessee--*
>
> *(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act which is payable outside India, on which tax has not been paid or deducted under Chapter XVIIB:*
>
> *Provided that where in respect of any such sum, tax has been paid or deducted under Chapter XVII-B in any subsequent year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid or deducted.*
>
> *29. Hon'ble Delhi High Court in the case of Oracle Software India Ltd (supra) had held that once tax was deducted at source within the relevant previous year, disallowance u/s.40(a)(i) of the Act could not be made on the ground that the remittance thereof was made in the next*

financial year. We are of the opinion that CIT (A) was justified in relying on the judgment of Hon'ble Delhi High Court in the case of Oracle Software India Ltd (supra) and giving relief to the assessee. Ground 4 of the Revenue stands dismissed.

14. On applying the ratio of the decision to the present case we found the CIT(A) was justified in granting relief to the assessee. Accordingly, we are not inclined to interfere with the order of the CIT(A) on this disputed issue and uphold the same and dismiss the ground of appeal of the revenue.

15. In the result, the revenue's appeal is dismissed.

ITA No.1135/Bang/2014 (Assessee's appeal):

16. Now, we take up the assessee's appeal in ITA No.1135/Bang/2014. Before we proceed with the appeal certain facts brought on record based on the submissions made by the learned AR and the DR.

17. Learned AR submitted that the AO has made the assessment on the non-existing company on the date of assessment. Further learned AR mentioned that the assessee-company was amalgamated with M/s. H.P. India Sales Pvt. Ltd. w.e.f. 1/4/2003 and therefore, M/s. Hewelett-Packed India Sales Pvt. Ltd., corporate entity ended on 31/3/2003. But on the date of passing of the assessment order and issue of notice u/s 143(2) and 142(1) of the Act. M/s. Hewelett-Packed India Sales Pvt. Ltd., is *non-est*. Whereas for the assessment year 2002-03, in the assessee's own case in the Tribunal in ITA No.4016/Del/2005 dated 28/4/2006 has held that the assessment in the name of M/s. Hewelett-Packed India Sales Pvt. Ltd., is null and void and is invalid and allowed the assessee's appeal. Aggrieved by the order, the revenue had filed an appeal with the Hon'ble Delhi High Court and the Hon'ble

Delhi High Court in ITA No.55/2007 order dated 30/05/2011 has made observations pages 1 to 4 which are as under:

30.05.2011

Present: Ms.Prem Lata Bansal, Sr. Advocate with Mr.Ruchir Bhatia,Advocate for the appellant.

Mr.Arvind Datar, Sr. Advocate with Mr.Kanan Kapur, Advocate for the respondent.

ITA No.55/2007

This appeal was admitted on the following substantial question of law:

> "whether the Income Tax Appellate Tribunal was correct in aw in quashing the assessment framed by the Assessing Officer in the name of M/s.Hewlett Packard India Pvt. Ltd. for the period before the appointed date of amalgamation that is 15" April, 2003?'

It so happened that M/s.Hewlett Packard India Pvt. Ltd. (assessee herein) got amalgamated with M/s.Hewlett Packard India Sales Pvt. Ltd. by the scheme of amalgamation framed under Section 291 of the Companies Act, 1956, which were approved by Delhi High court as well as Karnataka High Court. The petitions were filed in both the High Courts because of the reason that the assessee had its registered office at New Delhi and M/s.Hewiett Packard India Sales Pvt. Ltd. is having its registered office in Bangalore.The appointed date fixed was 01.04.2003.

Assessee had filed return of income tax for the assessment year 2002-2003 that is the period before the date of amalgamation and the notice under Section 143(2) of the Income Tax Act was also issued. However, by the time the assessment proceedings could be culminated, the assessee company got amalgamated, as aforesaid. The representative of M/s.Hewlett Packard India Sales Pvt. Ltd. before the Assessing Officer appeared and informed about the said amalgamation, which has resulted in dissolving of the assessee company without winding up as per the sanction scheme. The Assessing Officer, however, passed the assessment order in the name of the assessee company describing the assessee as under:

> "M/s. M/s.Hewlett Packard India Pvt. Ltd. Merged w.e.f. 1.4.2003 and new entity is M/s.Hewlett Packard India Sales Pvt. Ltd."

The assessment was challenged inter alia on the ground that there could not have been an assessment order in case of company which had been dissolved and was no longer in existence on the date when the assessment order was passed. This contention of the assessee,

though was not accepted by the CIT(Appeal), has prevailed over the Income Tax Appellate Tribunal, which has set aside the assessment on this ground. It is against this order, the present appeal is filed raising the aforesaid substantial question of law.

Learned counsel for the respondent has, however, informed us that after the orders of the Tribunal in the case of transferee company (M/s.Hewlett Packard India Sales Pvt. Ltd.) had been reopened by issuing notice under Section 147 of the Income Tax Act and the entire income of the assessee (transferor company) for the assessment year in the question has been included in the reassessment carried out in the case of the transferee company. The reassessment order dated 30.12.2007 has been passed in this behalf by the Assessing Officer raising the tax liability of '47.00 crores approximately. Copy of the assessment order is produced before us. It is further stated at the Bar by the counsel for the respondent that the transferor company (M/s.Hewlett Packard India Sales Pvt. Ltd.) had paid the aforesaid tax liability as well.

In view of this statement of the learned counsel, we are of the opinion that the issue becomes academic and need not be decided in this appeal. Copy of the aforesaid documents is handed over to the counsel for the Revenue also.

We are, however, informed that against the aforesaid reassessment order dated 30.12.2007, the transferee company (M/s.Hewlett Packard India Sales Pvt. Ltd.) has preferred an appeal, which is pending before the CIT(A), Bangalore. In the said appeal, validity of the reassessment proceedings is also challenged. We make it clear that in case the transferee company (M/sliewlett Packard India Sales Pvt.Ltd.,) ultimately succeeds in getting the reassessment proceedings quashed, it would be open to the Revenue to move an application for revival of this appeal."

Therefore, the observations of the Hon'ble High Court of Delhi and the decision of the Tribunal for the earlier assessment year are applicable to the present case of assessment year 2003-04 wherein issues are similar and the learned AR supported the submissions relying on plethora of judgments and prayed for allowing the assessee's appeal.

18. The assessee has raised the following grounds and the additional grounds.

1. The order passed by the learned Commissioner of Income Tax (Appeals) — LTU, Bangalore ["CIT(A)"] is bad in law and on facts;

2. The learned CIT (A) has erred in law and on facts in upholding the order of the Assessing Officer ("AO") under section 143(3) of the Act which is void-ab-initio as the AO does not have jurisdiction under section 124 of the Act over erstwhile Hewlett-Packard India Private Limited for the Assessment Year ("AY") 2003-04;

3. The learned CIT (A) has erred in law and on facts in upholding an assessment against a Company which is dissolved with effect from April 2003;

4. The learned CIT (A) has erred in law and on facts in upholding an order of assessment against a non-existent company on the date of assessment;

5. The learned CIT(A) has erred in law and on facts in upholding the reliance place by the AO on section 292B in upholding the validity of the assessment order; and

6. The learned CIT (A) has erred in law and on facts in interpreting the order of Delhi High Court in the case of Hewlett-Packard India Private limited for the Assessment Year ("AY") 2002-03 wherein the appeal of the revenue was disposed of without altering the decision of Honourable Income-tax Appellate Tribunal for the AY 2002-03 wherein it was held that an assessment cannot be carried out on an entity which ceases to exist.

Each of the above ground is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Tribunal to decide this appeal according to law.

Additional ground:

7. Without prejudice to the claim of the Appellant that provision for warranty is allowable in year in which the provision is created, the Ld. AO has erred on facts and in law in not providing the consequential relief of the deduction of the amount of Rs 127,144,468 which represents reversal of the warranty provision, while computing the assessed income for AY 2003-04, despite disallowing the provision amount in AY 2002-03."

19. At the time of hearing, the learned AR has not pressed additional grounds and made endorsement. Therefore, the additional grounds raised by the assessee are dismissed for non-prosecution. Whereas grounds No.1 to 6 are in respect of validity and jurisdiction of the AO. The learned AR explained the facts and made submissions on the Company law provisions in respect of Amalgamation of the company.

Contra, the learned DR objected to the submissions of learned AR and vehemently argued that technical defect of issuing re-assessment notice in the name of the erstwhile entity, would be cured u/s 292B of the Act and supported his arguments relying on judicial decisions. Whereas learned AR referred to Hon'ble Delhi High Court decision in the case of *Spice Infotainment Ltd. vs. CIT* (247 CTR 500), the headnote of the decision is as under:

> "Assessment-Validity—Assessment in the name of non-existing amalgamating company—Though S Ltd. was in existence minis filed the returns for the relevant assessment years, it got amalgamated with MC Ltd. before the case was selected for scrutiny and assessment proceedings could be initiated—With this amalgamation made effective from 1st July, 2003, S ceased to exist —S stood dissolved simultaneous with the sanctioning of the scheme—A company dies on its dissolution as writ provisions of the Companies Act—It cannot be said that the assessment made by the AO in the name of S was in jars the name of the amalgamated company and that this was only a procedural defect—Even though S had filed the returns, it was incumbent upon the IT authorities to substitute the successor in place of the said 'dead person' once the fact amalgamation was brought to the knowledge of the AO—Assessment order made in the name of S is clearly void—Mere participation by the appellant (amalgamated company) in such proceedings is of no effect as there is no estoppel against lbs-4inessment framed in the name of a non-existing entity is not merely a procedural irregularity of the nature which can be cured by invoking the provisions of s. 292B—Thus, provisions of s. 292B are not applicable in such a case-However since the returns were filed by S on the day when it was in existence, it is permissible to make assessments. On the basis of those returns after substituting the name of the appellant in place of S and taking the proceedings afresh from the stage of

issuance of notice under s.143(2), if it is still permissible as per law."

20. Further the revenue has filed an appeal with the Hon'ble Supreme Court in Civil Appeal No.285 of 2014 on the Hon'ble Delhi High Court decision and the Hon'ble Supreme Court passed the order as under:

"Delay condoned.

Head the learned Senior Counsel appearing for the parties.

We do not find any reason to interfere with the impugned judgment(s) passed by the High Court.

In view of this, we find no merit in the appeals and special leave petitions.

Accordingly, the appeals and special leave petitions are dismissed."

Further the learned AR supported his arguments with judicial decisions and submitted that the order of the Hon'ble Supreme Court is clear in respect of curability of the provisions of section 292B of the Act.

21. We heard rival submissions and perused the material on record. Prima facie, we are of the substantive opinion that the Tribunal in the assessee's own case for the assessment year 2002-03 has dealt on similar issues and held the assessment as null and void at page 1 to 10 which read as under:

"2. The first two grounds of appeal of the assessee are general in nature and call for no specific adjudication. Ground nos. 3 to 5 reads as follows.:

"3. The authorities below erred in framing an assessment against the appellant company which was already dissolved effective from 01.04.2003. Thus, the authorities erred in

making an order of assessment against a non-existent entity on the date of assessment.

4.The Commissioner of Income Tax (Appeals) erred in refusing to hold the assessment as null and void and further erred in relying on S292B in upholding the validity of the order.

5. The Commissioner of Income Tax (Appeals) ought to have appreciated that the successor company is assessed to tax in Bangalore before aCIT, Circle 11(3) with PAN no.AAACC 9862 F. Framing of assessment by the Assessing Officer in New Delhi amounts to passing of two assessments for the same year which is clearly unwarranted under the Act."

3. There was a company by name M/s Hewlett Packard India Pvt.Ltd. (H.P.India). This company was in the business of dealing with computer and computer peripherals besides deriving income from executing service contracts. There was a scheme of amalgamation proposed between H.P.India and M/s IIewlett Packard India Sales P.l.td. (H.P.Sales). As per the scheme of amalgamation the appointed date was 1.4.03. The effective date of the scheme was the date on which the last approvals/events specified in clause 13 of the scheme arc obtained/have occurred. Clause 13 of the scheme reads as follows.

"Scheme conditional upon:" :- This scheme is conditional upon the following approvals/events and the Scheme shall be deemed to be effective on obtaining last of the following approvals and the occurrence of the last of the following events:-

a. the approval of the Scheme by the requisite majority of the members and creditors of H.P.India and H.P.Sales, as the case may be, as required u/s 391 of the Act;

b. the sanction of the Scheme by the High Courts of Delhi and Karnataka u/s 391 and 394 of the Act and other applicable provisions of the Act, rules and regulations, as the case may be, and

c. certified copies of the High Court orders being filed with the Registrar of Companies, Delhi and Karnataka, as applicable."

4. As per the clause 11 of the scheme of amalgamation H.P.India was to amalgamate with H.P.Sales with effect from the appointed date and on the scheme becoming effective H.P.India shall stand dissolved without being wound up. As per Clause 8 of

the scheme during the period between the appointed date and effective date H.P.India shall hold and stand possessed the undertaking on account of and interest for H.P.Sales and all the profits or income accruing or arising to H.P.India for all purposes be treated and be deemed to be profits or income of H.P.Sales.

5. Since the registered office of H.P. Sales was at Bangalore a petition u/s 391 to 394 of the Companies Act, 1956 was presented by the transferee company for sanction of the scheme before the Hon'ble Karnataka High Court. The Hon'ble High Court by its order dt. 28.5.04 sanctioned the above scheme. The Court directed the transferee company within 30 days of the Court's order should file a certified copy of the Court's Order with the Registrar of Companies, Karnataka. Since the regd. office of H.P.India was at Delhi a petition u/s 391 to 394 of the Companies Act was also filed before the Hon'ble Delhi High Court for sanction of the scheme. The Hon'ble Delhi High Court by its order dt. 12.2.2004 sanctioned the scheme of amalgamation. Thus consequent to the orders of the Hon'ble High Court and the scheme of amalgamation H.P.India stood dissolved with effect from the appointed date without the process of winding up. Thus w.e.f. 1.4.03 H.P.India ceased to exist as an entity.

6. H.P.India for A.Y. 2002-03 filed its return of income on 30.10.2001. In the course of assessment proceedings vide letter dt. 26.7.04 it informed the Assessing Officer that pursuant to the amalgamation of H.P.India with H.P.Sales, H.P.India stood dissolved even the notice u/s 143(2) had been issued on 23.10.03, H.P.India pointed out that no assessment can be made on a company which is not in existence. The Assessing Officer however rejected this claim of the assessee and proceeded to frame the order of assessment.

7. Before the CIT(A) the assessee agitated the issue. The assessee brought to the notice of the Assessing Officer the decision of the Delhi Bench of the ITAT in the case of Imp Sat Pvt.Ltd. 91 ITD 354 (Del) wherein it has been held that an order of assessment on a company which no longer exists, is not valid in law. It was pleaded that the order of assessment was a nullity. On this submission of the assessee the CIT(A) referred to the decision in the case of K.H.Chambers 55 ITR 674 (S.C.) regarding succession and when succession to a business takes place. Reference was also made to the decision in the case of United Provinces Electric Supply Co.Ltd., 204 ITR 795 (Cal) regarding the right of an official liquidator to tile the return of income on behalf of the company which is in liquidation. Further reference was made to the decision of the Karnataka High Court in the case of Mysore Spun Silk Mills Ltd. 79 ITR 399 wherein it was held that where a company has been ordered to be wound up it is still a person within the meaning of S.4 of the I.T.Act. Finally the CIT(A) referred to the provisions of S.292 B of the Act and held that it was a non substantive lapse. The final

conclusions of the CIT(A) are given in para 6.5 of the order which reads as follows.

> "I see above that the appellant's pleadings on technical ground are based on the arguments that the notices and consequentially the assessment proceedings in the context of a non-existent entity, are void. Keeping in mind the case law referred by me above and the provisions of law relating to succession of business, I am of the view that the new amalgamated company was the successor of the erstwhile company, as well as the erstwhile business, and therefore the proceedings in which the officers of the successor company participated, were valid in law. Furthermore, the Courts have held that proceedings can be taken in the context of a company in liquidation. Applying the same analogy, I hold that proceedings against the amalgamated company were valid. This begs the question of the validity of the notices served on the erstwhile company. To my mind, the identities as well as the business of the erstwhile company and the new company stood merged with each other and I see no infirmity in the proceedings hied by the A.O. Moreover, even if some technicality arose, it would stand covered by the provisions of S.292 B which covers non-substantive lapses. Moreover, the officers of the company had accepted the notices and responded to them and had participated in the assessment proceedings and had signed letters and note sheets on behalf of the assessee company. Consequently, to my mind the principle of Estoppel would apply and the appellant can not now taker the plea of non-jurisdiction on the ground that the entire proceedings were flawed due to the non-existence of the company. Lastly, but importantly I hold that the erstwhile company's income was taxable and that is the substantive issue. The appellant can not escape taxation of income by holding out the plea of technical error. Therefore, in my view the proceedings were valid."

8. In the appeal before this Tribunal the assessee has challenged the aforesaid decision of the CIT(A). Besides reiterating the submissions as were made before the revenue authorities the Id. counsel for the assessee. also brought to our notice the decision of the Hon'ble Supreme Court in the case of Marshall Sons & Co.Ltd. Vs. ITO 223 ITR 809 (S.C.). The 1dDR however submitted that the facts in the case of Marshal Sons (supra) were different in as much as the transferor company in the present case filed the return of income and subjected itself to the jurisdiction of the A.O. On the decision of the Delhi Bench of the Tribunal in the case of ImpSat (supra) it was submitted that applicability of the provisions of S 170 was not considered by the Hon'ble Tribunal. Further reference was made to the decision of

the Rajasthan High Court in the case of CIT vs Gyan Prakash Gupta 165 ITR 501 . We may mention here that that was a case where the question was whether non issue of notice in the name of legal heir vitiates the proceedings. The Court held that the invalidity is not of such nature which goes to the root of the procedure. Reliance was placed on the decision of the Supreme Court in the case of CIT vs Jai Prakash Sons 219 ITR 737 (S.C.) wherein it has been held that the liability to tax is by virtue of S.3 and 4 of the Act and that omission to serve or defect in the service of a notice is only a procedural lapse which does not efface or erase the liability to pay tax. We may mention here that this decision is not of any relevance to the issue in the present case. This was a case where the legal representative against whom proceedings were initiated claimed that he was not a legal heir. He also challenged the assessment on the ground that notice to other legal representatives were not sent. It was in that context that the Supreme Court held as above. Reliance was placed on the decision in the cast of CIT vs Premier Capital Market 275 ITR 205 (M.P.). This was a case where objection regarding invalidity was not raised before the Assessing Officer and on that ground it was held that the assessee has waived its rights. As already noticed in the present case the assessee has raised an objection before the Assessing Officer. Reference was made to the decision of the Tribunal in the case of Ashok Kumar Vs ITO 80 ITD 33 (ASR) (TM). That was a case dealing with the effect of assessment proceedings where an assessee dies after filing of the return. This was a case relating to an individual and not a limited company and therefore not relevant to the present issue before the Tribunal. The same principle will apply to the decision in the case of CIT vs Kokar Plant 233 ITR 620 relied upon by the 1dDR.

9. The question whether after dissolution of a company and after the intimation of such dissolution with the ROC an assessment can be made on dissolved company or not had come up for consideration in several decisions. In the case of CIT, Madras Vs. Express Newspapers Ltd. (supra) the question was as to when a company whose name has already been struck off the Rolls of the Registrar of Companies pursuant to voluntary liquidation on 12.4.48 and which company filed a Return of Income on 3.1.48 and assessed to tax by order of Assessing Officer on 28.2.50, such an order of assessment was valid. The Court held as follows:

> To answer that question it is first necessary to consider whether the assessment on the basis of the return was valid. The Id. counsel for the assessee urged that the assessment could not be held to be invalid for the mere reason that the Free Press Company was not in existence on the date of assessment, and that the rules of abatement of suits under the Civil Procedure Code would not apply to assessment proceedings under the Income Tax Act, as the 1TO was not a Court; and

> that, even if it were to be held that the rules as to abatement would apply to such proceedings, the enquiry in this case having been concluded on April 3, 1948, the company then being in existence, the assessment would be valid on the principle recognized in Order 22, rule 6, of the Civil Procedure Code. We agree that the rules as to abatement laid down by the Civil Procedure Code will not apply to the proceedings before the ITO. But the principle of representation applicable to regular suits and proceedings under the Civil Procedure Code would well apply to such proceedings. Vide Alfred Vs. ITO. That apart, the existence of an assessee is essential for an assessment. There can not be an assessment of a non-existent person. The definition of the word "assessee" in section 2(2) would obviously apply only to a living person. The rule contained in Order 22, rule 6, can not, therefore, apply to the assessment proceedings. The assessment in the instant case was made long after the Free Press Company was struck off from the register of the companies, and it could not be valid.

10. In the case of Birla Cotton Spinning & Weaving Mills Ltd. Vs. CIT 123 ITR 354 (Mad.), the Hon'ble Delhi HC was dealing with a case where proceedings were initiated and orders of assessments made on Amalgamating Companies, which cease to exist. An order of assessment was made on companies which ceased to exist after the date of dissolution of Amalgamating Company without the process of winding up. One of the Hon'ble Judges held as follows:

> "Therefore, the position would be that the orders passed under section 23A(1) by the ITO purportedly against these companies were invalid orders of assessment. However, the validity of the orders would have no effect on these companies since they did not exist at the time of the orders. In a case, where an assessee exists and the order of assessment is null and void for some reason, the assessee would be aggrieved and would and should file an appeal to get rid of the invalid order. But where the assessee is non-existent and consequently can have no grievance against the assessment order there is no question of its preferring any appeals against the said order. The appeals preferred before the AAC in the first instance and thereafter before the Appellate Tribunal purportedly on behalf of these companies were manifestly incompetent appeals. It does not need much argument to say that an appeal preferred by a non-existing person must be treated as non est. In other words, there were no appeals at all, in the eye of law, before the AAC or before the Appellate Tribunal. Consequently, there could be no competent reference to this court out of the orders passed by the Tribunal on such appeals."

11. The decision of the Delhi Bench of IIAT in the case of lmpsat (P) Ltd. Vs. ITO - 91 ITD 354 (Del) also supports the plea of the Assessee. The facts of the said case were that an assessee, a

limited company was incorporated to implement a project in the country, in collaboration with the foreign company. The assessee received some money from a foreign collaborator in Assessment Year 1995-96 and 1996-97. The assessee due to heavy losses abandoned the project. The collaborators thought it fit to waive refund of the share application money and wrote a letter dated 24.10.2000 waiving their claims. The assessee companies name was struck off the Register by the ROC on 18.9.2001 pursuant to an application by the assessee under section 560 of the Companies Act, 1956. The assessee however, later in point of time, filed a ROI for Assessment Year 2001-02 declaring loss. The revenue treated the waiver of share application money by the foreign collaborator as giving rise to a casual and non-recurring income in the hands of the assessee. In the appeal before the Tribunal one of the question that arose for consideration was as to whether a company whose name was struck off the Register by ROC under section 560 of Companies Act, 1956 and therefore, stood dissolved, could be assessed to tax after dissolution? The Tribunal held that existence of the person sought to be taxed at the point of making the assessment is a condition for the validity of the assessment. The Tribunal referred to the decision of the Hon'ble Bombay High Court in the case of Patiala State Bank, In Re 9 ITR 95 (Born) wherein it was held that tax is not imposed on income generally. It is imposed on the income of a person, natural or artificial, as defined in section 3. The Tribunal thereafter, referred to the various provisions in the Income-tax Act, 1961, for initiating proceedings for assessment of income in the case of death of different assesses. In the case of a company which is in liquidation the provisions of section 178 of the Act providing for assessment in the hands of a liquidator, was referred to. The Tribunal then referred to the distinction in law between liquidation and winding up and ultimately concluded that there was no provision under the Income-tax Act to assess a company which is dissolved and that there was a lacunae in the Act in this regard. The Tribunal ultimately held that the order of assessment passed on the assessee company was a nullity.

12. In view of the legal position as laid down in the aforesaid decisions, it is clear that the assessment made in the present case in the name of HP India after the date of its dissolution is not valid. The fact that this company filed a return of income is not of any consequence. The order of assessment was made on 25.2.2005. As on this date HP India as an entity did not exist. The assessment is therefore held to be invalid and is cancelled.

13. In a case of amalgamation where one entity takes over the business of two other entities, the same would be a case of succession to business otherwise on death and therefore the provisions of Sec. 170 of the Act would apply. The provisions of Section 170 reads as follows:

"170. SUCCESSION TO BUSINESS OTHERWISE THAN ON DEATH.

(1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referred to as the successor) who continues to carry on that business or profession, -

a. the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession;

b. the successor shall be assessed in respect of the income of the previous year after the date of succession.
(2) Notwithstanding anything contained in sub-section (1), when the predecessor cannot be found, the assessment of the income of the previous year in which the succession took place up to the date of succession and of the previous year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor, and all the provisions of this Act shall, so far as may he, apply accordingly.

(3) When any sum payable under this section in respect of the income of such business or profession for the previous year in which the succession took place upto the date of succession or for the previous year preceding that year, assessed on the predecessor, cannot be recovered from him, the [1630a Assessing Officer 1630a] shall record a finding to that effect and the sum payable by the predecessor shall thereafter be payable by and recoverable from the successor, and the successor shall be entitled to recover from the predecessor any sum so paid.

(4) Where any business or profession carried on by a Hindu undivided family is succeeded to, and simultaneously with the succession or after the succession there has been a partition of the joint family property between the members or groups of members, the tax due in respect of the income of the business or profession succeeded to, up to the date of succession, shall be assessed and recovered in the manner provided in section 171, but without prejudice to the provisions of this section.

Explanation : For the purposes of this section, "income" includes any gain accruing from the transfer, in any manner whatsoever, of the business or profession as a result of the succession."

> Applying the provisions i.e. Sec. 170(1)(a) the predecessor (i.e. the Amalgamating Company) has to be assessed in respect of income up to the date of succession. There is no no provision in the Act by which the Assessing Officer can proceed to assess the income of a predecessor in business (i.e. the Amalgamating Company) in the hands of a successor in business (i.e. the Amalgamated Company). 10ne exception is provided by Sec. 170(2) where a predecessor is not found, successor can be assessed for a period comprising of previous year in which succession took place up to the date of succession and the previous year preceding such previous year. It is for the revenue to initiate appropriate proceedings against the right person in accordance with law. For the present case we may observe that the assessment framed against HP India is liable to be held as invalid in law.
>
> 14. We therefore hold that the assessment in the name of H.P.India is null and void and the assessment is therefore held to be invalid and is cancelled. In view of the decision on this preliminary issue the other issues raised by the assessee are not taken up for consideration.

Accordingly, we rely on the Tribunal decision for the assessment year 2002-03. On judicial precedence the facts are similar and are not disputed by the revenue and hold that the assessment is invalid and allow the ground of appeal of the assessee.

22. In the result, the revenue's appeal is dismissed and the assessee's appeal is allowed.

Order pronounced in the open court on 15th February, 2019.

sd/-	*sd/-*
(JASON P BOAZ)	**(PAVAN KUMAR GADALE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Place : Bengaluru
D a t e : 15/02/2019.
srinivasulu, sps

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By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore