

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No.1376/DEL/2017
Assessment Year: 2004-05

JCIT Special Range-03, room No. G-22B, C. R. Building, I. P. Estate, New Delhi	Vs	Daikin Airconditioning India Pvt. Ltd. F-25/2, Okhla Industrial Area, Phase-II, New Delhi -110020 PAN AABCD0971F
(APPELLANT)		(RESPONDENT)

ITA No.1525/DEL/2017
Assessment Year: 2004-05

Daikin Airconditioning India Pvt. Ltd. F-25/2, Okhla Industrial Area, Phase-II, New Delhi -110020 PAN AABCD0971F	Vs	DCIT Circle – 7 (1) Room No.403 4 th Floor, C. R. Building, New Delhi -110002
(APPELLANT)		(RESPONDENT)

Assessee by	Sh. Vishal Kalra, Advocate Sh. Ankit Sahani, Advocate
Revenue by	Sh. Sanjay I. Bara, CIT DR

Date of hearing:	14/03/2019
Date of Pronouncement:	02/04/2019

ORDER

PER N. K. BILLAIYA, AM:

ITA No.1376/Del/2017 and 1525/Del/2017 are cross appeals by the revenue and the assessee preferred against the order of the CIT(A)-44, New Delhi dated 08.09.2016 pertaining to A. Y.2004-05.

2. Both these appeals were heard together and are disposed of by this common order.

3. ITA No.1376/Del/2017 revenue's appeal.

4. The sole grievance of the revenue is that the CIT(A) erred in deleting the disallowance of Rs.1,15,27,735/- made by the Assessing Officer on account of depreciation of exclusive business rights (good will). At the very outset the Ld. Counsel for the assessee stated that the dispute is settled in favour of the assessee and against the revenue by the Tribunal in assessee's case in A. Y. 2003-04 in favour of the assessee and against the revenue. The DR could not bring any distinguishing decision in favour of the revenue.

5. We have carefully considered the orders of the authorities below qua the issue. We find force in the contention of the Counsel a similar dispute was considered by the coordinate bench in ITA No.5293/Del/2011 and 2922/Del/2011 for A. Y. 2003-04. The relevant findings of the coordinate bench read :-

25. *Brief facts apropos ground nos. 2 & 3 are that assessee had claimed depreciation amounting to Rs. 41511312/- which included depreciation of Rs. 2 500/- on goodwill and Rs. 1,53,70,313/- on patent and trade marks @ AO had disallowed the assessee's claim in regard to depreciation on ill observing that the same was not covered under intangible assets r the Income-tax Rules. As regards depreciation on patent and marks, the AO denied the assessee's claim, inter alia, observing that t, trade marks were required to be registered under the Trademarks ion Act and only the company in whose name the same had been , was entitled to use the same.*

26. *Ld. CIT(A) noted that disallowance of depreciation of Rs. 28,12,500/- respect of written down value of the amount paid to Usha al Ltd. for acquiring the business and commercial rights sin AY She noted that the assessee company vide Business Purchase entered on 8.8.2000, purchased the business of manufacture of oner/ cooler from Siel Aircon Ltd. Usha International Ltd. carried lusiness of , inter alia, distribution of air-conditioners and water ~manufactured by Siel Aircon Ltd. The assessee company also 'To an agreement with Usha International Ltd. called "Business Agreement" dated 1.5.2000 for purchase of said business and its assets including exclusive business rights. Ld. CIT(A) further noticed that as per clause 4 of the*

agreement with Usha International Ltd. consideration for business right payable to Usha International Ltd. was Rs.17300000/- and for other business and commercial rights of Rs.27,00,000/- was capitalized as goodwill in the books of a/c. She noted that in A.Y. 2001-02 the Tribunal had allowed the assessee's claim and following the same she allowed the assessee's claim of Rs. 28,12,500/-

27. Having heard both the parties, we find that the issue relating to depreciation on WDV of goodwill paid to Usha International Ltd., is covered in favour of the assessee by earlier decisions of the Tribunal. We find that The ITAT Delhi Bench B' vide its order dated 23.12.2011 rendered in ITA no. 1346/Del/2010 & 1404/Del/2010 has decided the issue in favour of the assessee by observing as under:

4. In the ground no.2 of revenue's appeal, the issue involved is deleting the addition of Rs.37,50,000/- made by the Assessing Officer claimed as 'Goodwill' by the assessee on account of depreciation on WDV paid to Usha International Ltd. for acquiring business and commercial rights.

5. Ld. DR relied on the order of the Assessing Officer. On the other hand, the learned AR submitted that the assessee company has purchased marketing , rights along with employees and premises and also trade names etc. from 'Usha International Ltd under the business agreement dated 1st May, 2000. As per the agreement, the Usha International Ltd. was not to compete with the assessee company for 20 years in the marketing of air-conditioners and water coolers of M/s. SI EL Aircon Ltd. The learned AR submitted that this agreement was for business rights, therefore, eligible for depreciation

under section 32 of the Income-tax Act as intangible assets. He further pleaded that the exclusive business rights as defined in the agreement were represented as carrying on the business as successor to Usha International Ltd. which include all records of business including records of suppliers and customers; the benefit of the current orders; the benefit of all bids and proposals that have been made by Usha International Ltd. and all rights to Usha International Ltd. distribution network for the business excluding Usha International Ltd.'s company shop.

The consideration for exclusive business rights was payable of Rs.1,73,00,000/-. For other business and commercial rights Rs.27,00,000/- was paid. These amounts were capitalized as goodwill in books of accounts. These amounts were paid to Usha International Ltd. during the period relevant to assessment year 2001-02. These amounts were capitalized as Goodwill in the books of account. For computing the taxable income, depreciation was claimed @ 250/0 as prescribed in schedule of depreciation rates in respect of the intangible assets. The depreciation in the year 2001-02 was claimed at Rs.50,00,000/- and in assessment year 2002-03 at Rs.37,50,000/-. For the assessment year 2001-02, the CIT (A) granted the relief. The revenue went in appeal before the ITAT wherein the ITAT had dismissed the revenue's appeal by upholding the order of the CIT (A). The ITAT has held as under

"A perusal of the business purchase agreement also clearly shows that UIL as agreed to sell to the assessee and. the assessee agreed to purchase the business and the goodwill and the other assets thereof. A perusal of the consideration also clearly shows that the agreement is for selling 3 items, first one being the business, second goodwill and third other assets. The purchase consideration also shows the computation of such 3 items being the exclusive business rights for a consideration of Rs.1,73,00,000/-, 27,00,000/- Without any specifications and (c) the transferable deposits which would have to be considered as other assets. This being as the amount of Rs.27,00,000/- as shown in the

purchase price has not been shown to be in relation to either exclusive business rights or for transferable deposits. The same would have to be treated as being towards "goodwill". This being so, we are of the view that the amount of Rs.27,00,000- as paid by the assessee would have to be treated as goodwill. In regard to the balance of 1.73 Crores, it is for the exclusive business rights."

The ITAT vide Para 7 of their order held as under:

"In these circumstances, we are of the view that the Id. CIT(A) was right in holding that the assessee was entitled to the depreciation in regard to the purchase of the exclusive business rights to the extent of Rs.1,73,00,000 and directing the AO to grant depreciation on the same. In regard to the amount of Rs.27,00,000 as paid by the assessee, as it has not been shown that this amount had been paid for any specific rights, the same would have to be treated as goodwill and the depreciation on the same cannot be granted.

In the circumstances, the findings of the Ld. CIT(A) on this issue is modified to the extent that the AO is directed to grant the depreciation on the consideration of Rs.173,00,000/- paid to UIL for the purchase of the exclusive business rights which are to be treated as intangible assets. The action of the AO in disallowing the depreciation on the goodwill to the extent of Rs.27,00,000 is confirmed."

Ld. AR pleaded that the facts are same and there is no change in the circumstances, therefore, the order of the CIT (A) may be upheld:

6. We have heard both sides and perused the material on record. Since the assessee has got the relief from ITAT in the preceding year, on the same facts. The issue remains the same, therefore, respectfully following the decision of ITAT, we dismiss this ground of revenue's appeal."

28. No change in facts, for the assessment year in question, have been brought to our notice. Therefore, respectfully following the earlier orders of the Tribunal in assessee's own case, we uphold the order of CIT(A). Ground is dismissed.

29. As regards depreciation on WDV of patent, trademark and intellectual property rights paid to Cyel Aircon Ltd. is concerned, Id. CIT(A) noted that assessee company vide business purchase agreement entered on 8.8.2000 purchased the manufacturing business of Siel Aircon Ltd. and the consideration for the Intellectual Property Rights, paid by the assessee was Rs. 109,300,000 to SAL. The assessee pointed out that as per provision of Trademark Act, 1999, a person is entitled to assign use of trademark. In this regard reference was made to sections 37 & 38 of the Trademarks Act, 1999. It was further pointed out that there was no statutory requirement under the law to get the trademark registered under the Trademarks Act, 1999 so as to enjoy the legal ownership thereof. It was pointed out that registration of trademarks was desirable but not a statutory compulsion. The assessee had relied on various judicial pronouncements wherein it was held that the registration of an asset in the name of purchaser was not necessary for the purpose of claiming depreciation. Following the Tribunal's decision for AY 2001-02 the Id. CIT(A) allowed the assessee's appeal.

30. Having heard both the parties we find that we find that the issue relating to depreciation on patents, trademarks

and intellectual property rights acquired by the assessee from Siel Aircon Ltd. is covered in favour of the assessee by earlier decisions of the Tribunal. The ITAT Delhi Bench 'B' vide its order dated 23.12.2011 rendered in ITA no. 1346/Del/2010 & 1404/Del/2010 has decided the issue in favour of the assessee by observing as under:

"8. The assessee company has purchased manufacturing business of M/s. SIEL Aircon Ltd. as a going concern vide agreement dated 08.08.2000. As a part of this agreement, the assessee company also acquired intellectual property rights which include patents, trademarks, etc. etc. and paid Rs.10,93,00,000/-. The amount was capitalized in books as pat fit and trademark and the same is treated as' intangible assets.

These intellectual property rights have not been registered in the name of assessee company. The assessee company claimed depreciation as per section 32 of Income-tax Act read with Schedule for depreciation @ 25%. The Assessing Officer disallowed the same by following the order of earlier year. The CIT (A) has granted the relief to the assessee by following the decision of ITAT in assessee's own case for assessment year 2001-02 where the ITAT has held as under:-

"A perusal of the purchase price consideration as per the business purchase agreement entered into between the assessee and SAL shows that the consideration has been 'paid for the intellectual property rights. Intellectual property rights are immovable asset. It is also an intangible asset as per the provisions of section 32 (1) (ii) of the Act.

It is also undisputed that the 'assessee has used the intellectual property rights in its business and there has been no claim against the assessee for the use of the said trademarks. In fact as per the agreement in clause 8.1 (a)(i) it has been specifically agreed that on completion duly executed instruments of transfer, assignment etc. as the assessee may reasonably be required to complete the

transfer, assignment and conveyance of the asset in accordance with the provisions of this agreement shall be delivered to the assessee at a place nominated by the assessee. This clearly shows that once the completion of the agreement is done by payment of the consideration as on the completion date specified in the agreement the assessee would be in possession of the duly executed instruments of transfer, assignment and Conveyances of the assets as specified in the agreement which are basically the intellectual property' rights and the fixed assets. This being so, as also the principles as laid down by the Hon'ble Supreme Court in the case of Mysore Minerals Ltd. referred to supra and reaffirmed the decision of Dalmia cements" it would have to be held that the assessee was the owner of the property and the assessee having used the same in its business was entitled to depreciation on the same. In the circumstances the finding of the Ld. CIT(A) on this issue stands confirmed."

Since the revenue has failed to brought on record any distinction of facts from the earlier year, i.e., 2001-02, therefore, respectfully following the decision of ITAT, we dismiss this ground of revenue's appeal also.

31. *There being no change in facts and circumstances of the case and the order of Id. CIT(A) being in conformity with the earlier order of the Tribunal in assessee's own case, we uphold the order of CIT(A) on the issue in question. Ground is dismissed.*
6. Respectfully following the findings of the coordinate bench we decline to interference with the findings of the CIT(A), appeal filed by the revenue is accordingly dismissed.
7. ITA No.1525/Del/2017 assessee's appeal.

8. The substantive grievance of the assessee read :-

“2. That on the facts and circumstances of the case and in law, the CIT(A) has erred in rejecting the benchmarking analysis conducted by the Appellant wherein Resale Price Method (“RPM”) was adopted as the most appropriate method (“MAM”) to benchmark the international transaction of purchase of finished goods for resale. The CIT(A) further erred in upholding Transactional Net Margin Method (“TNMM”) as the MAM in determining the ALP of the international transaction for purchase of finished goods for resale and an entity level.

2.1 That on the facts and circumstances of the case and in law, the CIT(A) has erred in rejecting RPM as the MAM for benchmarking the international transaction of purchase of finished goods for resale, by arbitrarily holding that the data regarding the comparable companies was not available, disregarding the submissions filed providing the gross trading margins for the said comparable companies.

2.2 That on the facts and circumstances of the case and in law, the CIT(A) has erred arbitrarily holding that the comparable companies chosen by the Appellant were not functionally comparable for the purposes of benchmarking RPM as the MAM, disregarding the trading segmental data specifically provided for such comparison.

2.3 That on the facts and circumstances of the case and in law, the CIT(A) has erred in not appreciating that the comparable companies held to be not functionally comparable for the purposes of RPM, were on the contrary functionally not comparable at an entity level for benchmarking using TNMM, being engaged in the business of manufacturing and trading of electrical goods.

Notwithstanding and without prejudice:

3 That on the facts and circumstances of the case and in law, the CIT(A) has erred in not adjudicating the grounds raised in the appeal memo in relation to reduction of non-operating extra ordinary expenses, namely, expenses incurred on discontinuation of assembling / manufacturing; interest on working capital loan; forex loss; and provision for doubtful debts, doubtful receivables, doubtful advances and advances written off.

3.1 That on the facts and circumstances of the case and in law, the CIT(A) has erred in upholding the action of the AO / TPO and further erred in not directing to reduce the following extra ordinary non-operative expenses while computing the margin using TNMM:

Extraordinary expenses incurred for discontinuation of assembly / manufacturing function amounting to INR 4,70,30,905; Interest on working capital loan amounting to INR 4,54,69,460; Foreign exchange loss (net) of INR 1,18,65,964; and Provision of doubtful debt amounting to INR 95,47,008, provision of doubtful receivables amounting to INR 13,28,212, provision for doubtful advances amounting to INR 26,51,567 and advances written off amounting to INR 60,00,000.

3.2 That on the facts and circumstances of the case and in law, the CIT(A) has erred in not appreciating that the losses incurred by the Appellant were due to extra ordinary commercial, unforeseen circumstances and were not in relation to import of finished goods from AEs.”

9. Representatives of both the sides were heard at length. Case records carefully perused. Facts on record show that during the year the international transaction entered into by the assessee are as under :-

S. No.	Description of transaction	Method	Value (In Rs.)
1	Import of finished goods	RPM	56,32,80,873
2	Commission received	TNMM	1,12,24,717
3	Reimbursement received	-	2,32,73,202
4	Import of spare parts	-	61,86,952
5	Royalty	CUP	40,762

6	Service Warranty	Cost – to- cost	65,22,714/-
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10. As explained by the counsel the assessee is having three segments the first segment relates to the distribution of airconditioners imported from AE. The assessee is also doing marketing and attending warranty claims for its AE. However, while bench marking the international transaction the TPO has erroneously clubbed manufacturing activities while considering the total sales of the assessee. The counsel further pointed out that while bench marking the TPO has adopted TNMM as the most appropriate method and while doing so once again in the aggregation the TPO has included the manufacturing activities of the assessee.

11. This fact is evident from computation of operating profit to sales which is as under :-

INCOME		
Sales	1,244,769,306	
Excise Duty 1	26,579,143	1,218,190,163
Net Sales		
Other Income		
Other Income		
Misc. Income	21,347,801	

Acc. in Inv	51,110,344	72,458,145
Oper. Income		1,290,648,308
EXPENDITURE		
Ccost of Matl	984,923,549	
Man. Exp	47,030,905	
Employee Cost	81,531,513	
Admn & Ors	125,041,751	
Selling & Dist	150,459,432	
Intt on WC	45,469,460/-	
Depreciation	142,762,316	
Misc. Exp	76,116,961	
Total (A)	1,653,335,887	
Less : Extraordinary Expenditure		
Goodwill w/ off	20,000,000	
Patents w/ off	109,300,000	
Misc Exp w/off	53,770,131	
Loss on Fixed Assets	901,084	
Fixed Assets scrapped	3,322,911	

Total (B)	187,294,126	
Operational Expenditure (A-B)		1,466,041,761/-
Operating Loss		-175,393,453/-
OP/ Sales		-13.59%

12. The bifurcation of the sales can be understood from the following chart:-

Information on the primary business segment is as follows:

Reportable Segments	Water Cooler Rs.	Air Conditioner Rs.	Air Cleaners Rs.	Total 31.03.2004 Rs.	Water Cooler Rs.	Air Conditioner Rs.	Air Cleaners Rs.	Total 31.03.2003 Rs.
Revenue								
Sales (net of excise duty)	115,618,560	1,088,419,604	2,296,461	1,206,334,625	111,477,068	720,826,095	394,810	832,697,973
Unallocated sales (spares & service income)				11,855,538				9,316,880
Other Income				22,178,709				4,012,095
Total Revenue	115,618,560	1,088,419,604	2,296,461	1,240,368,872	111,477,068	720,826,095	394,810	846,026,948
Result								
Segment Result	49,909,893	64,690,978	(243,581)	114,357,290	44,180,563	92,687,408	39,097	136,907,068
Unallocated Corporate Expenses				514,183,725				269,163,854
Operating Profit/(Loss)				(399,826,435)				(132,256,786)
Unallocated sales (spares & service income)				11,855,538				9,316,880
Other Income				22,178,709				4,012,095
Prior Period Adjustments				(25,085,318)				(5,961,635)
Profit Before Tax				(390,877,506)				(124,889,446)
Add: Deferred tax credit				(54,669,072)				44,355,199
Profit After Tax				(445,546,578)				(80,534,247)
Other Information								
Segment Assets	48,436,591	379,902,565	6,424,555	434,763,711	63,240,066	399,422,384	7,253,345	469,915,795
Unallocated Assets				846,976,118				599,182,564
Total Assets				1,281,739,829				1,069,098,359
Segment Liabilities	1,342,820	469,953,690	-	471,296,510	6,240,624	266,971,715	-	273,212,339
Unallocated Liabilities				810,443,319				795,886,020
Total Liabilities				1,281,739,829				1,069,098,359
Capital Expenditure (including capital work in progress & capital advances)				10,719,515				34,852,095
Depreciation				142,762,316				11,762,140
Other Non-cash Adjustments								
Provision for Staff Benefits				2,921,065				1,670,954
Provision for Doubtful Advances				3,979,779				-
Provision for Doubtful Debts				9,547,008				7,040,102

13. From the above chart only airconditioners are imported from AE and water cooler plus air cleaners are manufactured and no sales are made to the AE.

14. We are of the considered view that the bench marking done by the TPO is on erroneous facts. Unless a proper bench marking is done the dispute cannot be decided.

15. Moreover, we find that the TPO has adopted TNMM as the most appropriate method by saying that the comparables are not clear and their operating profit margin is not capable of applying RPM as most appropriate method though the same comparables have been used for bench marking by applying TNMM. This contradiction needs to be examined once again.

16. In the interest of justice we restore this issue to the files of the AO/ TPO with a direction that the manufacturing activity should not be considered as part of international transaction. Expenses directly attributable to the manufacturing activity should be ignored and the comparables should be once again examined to decide whether RPM is the most appropriate method. The assessee is free to raise any other issue relating to the bench marking and the TPO is also free to decide the issue after giving a reasonable opportunity of being heard to the assessee.

17. In the result all the grounds under dispute with sub grounds are treated as allowed for statistical purpose.

Order pronounced in the open court on 02.04.2019.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

NEHA

Date:- 02.04.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	18.03.2019
Date on which the typed draft is placed before the dictating Member	19.03.2019
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	02.04.2019
Date on which the final order is uploaded on the website of ITAT	02.04.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	