

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH, "C" AT KOLKATA
(समक्ष) श्री ए. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य
[Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. Nos. 1362 & 1363/Kol/2017
Assessment Years: 2010-11 & 2011-12

DCIT, Circle 10(1), Kolkata	Vs.	M/s. DIC India Ltd. (PAN: AABCC 0703 C)
Appellant		Respondent

Date of Hearing	11.02.2019
Date of Pronouncement	03.05.2019
For the Appellant	Dr. P.K. Srihari, CIT, DR
For the Respondent	Shri D.S. Damle, FCA & Shri Akkal Dudhwewala, FCA

ORDER

Per Shri A.T.Varkey, JM

These appeals filed by the Revenue are against the separate orders of the Ld. CIT(A)-22, Kolkata dated 10th March 2017 for the Assessment Years 2010-11 and 2011-12.

2. We first take up the appeal filed by the Revenue in ITA No. 1362/Kol/2016 for AY 2010-11. Ground No. 1 raised by the Revenue relates to disallowance of sales tax component of the bad debts written off amounting to Rs.11,11,054/-. At the outset the Ld. AR of the assessee submitted that the issue under consideration is covered by the order of this Tribunal in the assessee's own case for AY 2012-13 wherein disallowance of sales tax component of the bad debts written off was disallowed by the AO on the identical reasons. On appeal the disallowance was deleted by Ld. CIT(A) against which the Revenue had come up in appeal in ITA No.552/Kol/2017. The coordinate Bench of this Tribunal in its order dated 14.02.2018 upheld the Ld. CIT(A)'s order by holding as follows:

"We have given a very careful consideration to the rival submissions. It is an admitted position that the trading receipts of the assessee recorded in the books of accounts also includes a sum of Rs.3,34,330/- on account of sales tax. The assessee cannot claim deduction of the aforesaid sum without payment in view of the provision of section 43B of the Act. If the assessee had made

the payment of sales tax then the debtor of the assessee has to pay back the said amount to the assessee and therefore it will assume the character of a debt in the hands of the assessee. If ultimately the customer does not pay this amount to the assessee, it has to be regarded as bad debt written off and allowed as deduction u/s 36(1)(vii) of the Act. In any event the deduction has to be allowed u/s 28 of the Act as a loss incidental to the business. We therefore direct the claim of the assessee to be allowed.”

3. Before us both the parties agreed that this issue is squarely covered by the ITAT's order for the AY 2012-13. Following the appellate order for the AY 2012-13, we hold that the sales tax component of the debts written off, was allowable as business loss under Section 28 of the Act being in the nature of loss incidental to business. Ground No. 1 is accordingly dismissed.

4. In Ground No. 2, Revenue has objected to the relief allowed by the Ld. CIT(A) in respect of interest disallowance of Rs.14,37,394/- under Section 14A of the Act read with Rule 8D(2)(ii) of the Income-tax Rules, 1962. The Ld. AR for the assessee pointed out that the assessee had held only one investment in shares of its wholly owned subsidiary M/s DIC Coatings India Pvt Ltd which was acquired in the AY 1998-99. In that context, in the assessment orders for the AYs 2003-04, 2005-06 & 2008-09, had disallowed interest paid on the presumption that the investment in the shares of the subsidiary company was made out of borrowed funds. On appeal the interest disallowance was deleted by the Ld. CIT(A) on being satisfied that the no borrowed funds were utilized since the sale consideration for transfer of business undertaking, was received by the assessee in the form of shares of the wholly owned subsidiary, M/s DIC Coatings India Pvt Ltd. On further appeal, orders of the CIT(A) were upheld by this Tribunal in all the three years.. Copies of the appellate orders for AYs 2003-04 & 2008-09 were placed before us.

5. We thus find that the issue with regard to disallowance of interest with reference investment in shares of the subsidiary, was extensively considered by the coordinate Benches of this Tribunal. In its latest order dated 19.10.2016 the 'B' Bench of this Tribunal in ITA No.315/Kol/2014 recorded the following findings :

“Heard rival submissions and perused the material available on record. We find that the equity shares of the subsidiary company i.e. DIC Coatings India Ltd. were acquired pursuant to sale of coating business by the assessee in terms of a scheme of arrangement approved by Hon'ble Calcutta High Court. The CIT-A examined the facts of the order passed by the CIT-A

for A.Y. 2005-06 and found satisfied that the facts involved therein in the first appellate order for AY 2005-06 is one and same to the facts of case the year under consideration. Further, the CIT-A found that the assessee invested only in its wholly owned subsidiary DIC Coating India Limited which was acquired in 1997 in terms of the scheme approved by the Hon'ble High Court of Calcutta. Undisputedly, the Revenue did not carry the first appellate order for A.Y. 2005-06 in appeal to the higher forums having jurisdiction. Therefore, we find no infirmity in the order impugned before us and the said order passed by the CIT-A is justified in deleting the disallowance of interest made on account of borrowed funds to an of Rs. 1,14,63,036/- u/s 36(1)(iii) of the Act and confirmed. Accordingly, grounds raised by the revenue are dismissed."

6. Before us both the parties fairly agreed that the issue involved in Ground No. 2 is covered by the orders of the coordinate Bench of this Tribunal in the assessee's own case for the earlier years. Since factual matrix of the case remained unchanged during the relevant year, following the appellate orders for the earlier years, we uphold the Ld. CIT(A)'s order on this issue and dismiss ground No. 2 of the appeal.

7. Ground No. 3 is against the relief allowed by the Ld. CIT(A) in respect of travelling expenses of Rs.16,44,313/- reimbursed to the assessee's parent company, M/s DIC Corporation, Japan. Briefly stated the facts of the case are that the assessee belongs to Dainippon Inks Corporation Group of Japan, which is a leader in speciality and printing ink business worldwide. Being member of the DIC Group, the assessee stands to benefit by the technological advancement achieved by the group companies worldwide. As is the practice followed in MNC groups, senior personnel of Group holding company pay visits to promote business interests of the Group affiliates in their respective territories. The personnel also pay visits to manufacturing locations with the purpose to review their operations, suggest improvisation and to inspect the facilities with a view to ensure that the affiliates are meeting the specified standards of the Group as a whole. Since the visit of the senior executives of DIC Japan were undertaken at the instance of the assessee company to promote its business interests, the assessee company reimbursed the travelling expenses of the personnel of DIC Japan and claimed deduction in respect thereof. The travelling expenses reimbursed were also reported by the assessee in its Form 3CEB furnished under Section 92CE of the Act and in the transfer pricing order u/s 92CA(3), the TPO accepted the payment to be at arm's length being pure reimbursement. The AO however claimed that the travelling expenses of DIC Japan personnel were borne by the assessee over enthusiastically

even though the assessee had no liability to incur such expenditure. The AO therefore disallowed the expenditure on the ground that it was not incurred or laid out wholly, exclusively and necessarily for the purposes of assessee's own business u/s 37(1) of the Act. Being aggrieved the assessee preferred an appeal before the Ld. CIT(A) who deleted the impugned disallowance by observing as under.

"15.2 From the material on record, it is an undisputed fact that the appellant is part of DIC Group of which Dainippon Inks Corporation, Japan (DIC Japan) is the flagship company. The said DIC Group carries on business of manufacturing inks and related chemicals in different countries and the said DIC Group is a leader in this field. As happens in all multinational groups, synergies of the group companies are utilized for advancing the business interests of the affiliates in different part and for this purpose the experts employed at the headquarters undertake visits to the manufacturing locations belonging to the affiliates in different countries. In case of conglomerates such as the DIC Group, it is thus a customary practice for the technical team of the ultimate holding company to visit plant locations to carry out review of operations, inspection of business facilities and suggest improvements. Such visits are undertaken by the personnel of the ultimate holding company for achieving improvement in the operations and thereby achieving improvement in the profitability of the affiliate and consequently the growth of the Group in overall terms. Since the visit of the technical team from DIC, Japan; was undertaken for reviewing the business operations of the assessee, the travelling expenses of the personnel visiting India were incurred by the assessee company and claimed as business expenditure u/s 37(1) of the Act. Merely because the persons visiting Indian operations of the assessee were employees of DIC, Japan did not ipso facto lead to conclusion that expenditure reimbursed on their visit to India were not for the purposes of assessee's own business. In my considered opinion the expression "incurred or laid down wholly & exclusively for the business purposes" as used in section 37(1) is much wider in its connotation and the said expression cannot be given any restrictive meaning. Whether or not the expenditure is incurred or laid out for business purposes must be viewed from the perspective of a businessman and not that of the Tax Authority"

15.3 In the impugned order the Ld. AO has opted to make disallowance on the ground that there was no necessity on the assessee's part to bear the expenses of foreign employees of the holding company. In my considered opinion, however, for deciding the allowability of expenditure, it is not necessary for the assessee to satisfy the 'necessity' test and it is not assessee's obligation to establish that incurring of expenditure was necessary or mandatory. so long as the assessee incurs an expenditure in the hope of deriving some business advantage or benefit or for promoting its business interests the expenditure is allowable even though such expenditure may also benefit some third party. All that section 37(1) requires is that the assessee must prove the nexus between incurring of the expenditure and purpose of such expenditure for advancement of assessee's business. Once the assessee proves such nexus then it is not open to the Ld. AO to sit in the arm chair of the businessman and decide as to whether the assessee should have incurred such expenditure or not. In the present case, the Ld. AO did not dispute the fact that technical team of DIC, Japan visited assessee's Indian offices in connection with business carried out by the appellant in India. Visit of the technical team was in the course of assessee's business to interact with technical personnel of headquarters for review of business operations and take corrective measures for improving efficiency in operations. I also note that since the expenditure was reimbursed to ultimate holding company, the amount reimbursed was also reported in Form 3CEB and in transfer pricing

proceedings u/s 92CA, the l-d. TPO had not drawn any adverse inference. On these cumulative facts therefore, I find that the Ld. AO has without any requirement introduced the 'necessity' test for deciding the allowability of the expenditure which is not prescribed by the Legislature in section 37(1) of the Act, and I am unable to agree with the Ld.AO in such a requirement .”

8. At the time of hearing the Ld. DR strongly relied on the AO's order and argued that the assessee had failed to bring on record any material which would justify the claim for deduction for travelling expenses incurred in respect of employees of the foreign companies. The Ld. DR submitted that the travelling expenditure which was borne by the appellant was not incurred by the assessee's own employees but by the employees of its group companies and therefore assessee had no locus to incur the expenditure and the assessee also failed to establish the business purpose which was served by incurring such expenditure in respect of visits undertaken by employees of the foreign company.

9. Per contra the Ld. AR of the appellant fully relied on the order of the Ld. CIT(A). He submitted that the senior employees of DIC Japan had visited the manufacturing sites of the assessee at assessee's request and as a result of these visits, assessee had received useful advice for improving its business operations. The Ld. AR further submitted that it was wholly at the discretion of the assessee to decide as to the terms on which it could deal with its foreign associates and the AO could not decide the issue of allowability of the expenditure from the view point of the tax gatherer. The Ld. AR submitted that it was never disputed by the AO or TPO that the assessee had merely reimbursed the travelling costs actually incurred and no further payment was made. He therefore urged to uphold the order of the Ld. CIT(A).

10. After giving a thoughtful consideration to the submissions of the rival parties, we find force in the submissions of the Ld. AR. It is an undisputed fact that the expenditure in question represented travelling costs actually incurred on the visit to India by the executives of DIC Japan which is the group holding company. It also an undisputed fact that DIC Japan is worldwide leader in the inks business and therefore visit by the senior executives of the parent company to the manufacturing locations of the assessee was prompted by the business exigencies. The interaction with senior executives of its Japanese parent company

helped the assessee company in carrying on its business in India in consonance with the Group's standards which were followed internationally and therefore the expenditure incurred had direct and proximate nexus with the appellant's business of ink manufacturing in India. Once the assessee established business connection with the visits undertaken by the executives of the foreign parent then the conditions prescribed under Section 37(1) for allowing deduction for expenditure were fulfilled. In such case it was not open for the AO to decide whether or not incurring of such expenditure was necessary for the assessee's business. All that the assessee was required to show was that the expenditure was incurred or laid out wholly and exclusively for its business purposes. On the facts of the present case we find that the assessee had established that the expenditure was incurred for its business purposes and therefore the Ld. CIT(A) was justified in allowing the relief to the assessee. Ground No. 3 is therefore dismissed.

11. Ground No. 4 of the appeal is against the relief allowed by the Ld. CIT(A) in respect of additional depreciation of Rs.39,65,345/- which the AO disallowed on the ground that the depreciation did not pertain to plant & machinery but in respect of furniture & fixtures. Briefly stated the facts of the case are that during the relevant year the assessee had made additions to fixed assets classified as electrical installations totaling Rs.2,07,43,630/-. According to the assessee the electrical installations were situated at the factory premises and installed to enable the operations of the plant & machinery installed at various factory premises and therefore constituted integral part of 'plant & machinery' block. The AO however held that the electrical installations did not form part of 'plant & machinery' block but these were in the nature of 'furniture & fixtures' qualifying for lower depreciation rate of 10%. The AO also disallowed the assessee's claim for additional depreciation in respect of electrical installations added during the relevant year. On appeal the Ld. CIT(A) allowed the relief on appreciation of the facts and evidences brought on record and also having regard to the nature of assets and the places at which these electrical installations were commissioned. The Ld. CIT(A) also adverted to the judgments of the Hon'ble Punjab & Haryana High Court in the cases of CIT vsOswalWollen Mills Ltd (289 ITR 261), CIT

VsMetalman Auto Pvt Ltd (11 taxmann.com 51) and CIT VsSubrataDuttaChoudhury (197 Taxman 71) and recorded the following findings :

“From the details of the additions made, I find that the appellant had made additions on account of air compressor, piping, filter housing, fire protection systems, chilled water lines, fabrication of structures, storage tanks, weighing scales & flame proof fittings for fire safety. It is also appeared from the locational details enumerated in the assessment order by the AO that he never questioned the fact every item was installed at the factory premises situated at Noida, Bangalore & Kolkata. I therefore find force in the Ld. A.R's submissions that these items were not installed at office or residential premises.

From the impugned order, I also find that no positive material or evidence was gathered by the Ld. AO to substantiate his finding that these items of addition were in the nature of "furniture & fixtures" and not "plant & machineries" On the contrary, I find that from the nature of each of these machineries that they are intimately connected with the appellant's manufacturing operations and having regard to the actual use to which these assets were put, it cannot at all be said that these machineries were in the nature of "furniture & fixtures". When one applies the purpose test then it was very much evident that the machineries which the appellant had acquired & installed could have been used only within its factory premises where manufacturing operations were conducted by the appellant. Further merely because the machineries were installed or fixed at one location, they did not automatically become "fixtures & fittings" so as to qualify for depreciation at lesser rate, being part of "furniture & fixtures" block. On verifying the use or purpose for which the machineries were put to use, I am satisfied that these machineries were directly and intimately connected with manufacturing operations of the appellant's factory producing printing inks and therefore these machineries formed integral part of the block of "plant & machinery" which qualified for depreciation @ 15%. The assessee's reliance on the judgments of the Punjab & Haryana High Court in the case of CIT Vs Oswal Wollen Mills Limited (289 ITR 261), CIT Vs Metalman Auto Pvt. Ltd (11taxmann.com 51) & CIT Vs Subrata Dutta Choudhary (197 Taxman 71) therefore appears to be relevant.”

Aggrieved by the order of Ld. CIT(A), the Revenue is in appeal before us.

12. Before us, at the first instance, the Ld. AR of the assessee stated that the same issue came up for consideration before the Tribunal in assessee's own case for the AY 2012-13 in ITA No. 552/Kol/2017. He submitted that in that year also, applying the same analogy the AO similarly re-computed the depreciation allowance in respect of additions of electrical installations and also disallowed the assessee's claim for additional depreciation u/s 32(1)(iia) of the Act. On appeal the DRP had set aside this issue to the file of the AO with the following directions:

“Findings: Ground No. 13 was also carefully considered by us. The arguments were also taken into account by us. It was noted by us that additional depreciation was claimed by the A' on multi gas detector model selection model – PGM-6228 & 12KL GD Storage Tank. The

said object cannot be regarded by us as an office equipment or furniture. The AO shall verify from records whether additional depreciation is pressed against the above plant or against some office equipment. If it is in respect of the former the claim shall be allowed.”

13. Since the directions of the DRP were not acted upon, the matter was taken up in appeal before the Tribunal. The coordinate Bench of this Tribunal in its order dated 14.02.2018 in ITA No.552/Kol/2017 directed the AO to follow the directions of DRP and pass a speaking order. The Ld. AR for the assessee pointed out that in the order u/s 254 the AO accepted the assessee's contention that the electrical installations were installed at factory premises and these were not in the nature of 'furniture & fixtures' but formed part of 'plant & machinery' block qualifying for depreciation @ 15% and also additional depreciation u/s 32(1)(iia) of the Act. Since the factual matrix of the assessee's case during the year is found to be same and the Ld. DR was unable to controvert the findings of the Ld. CIT(A) which were recorded after going through the specifications of the electrical installations; we do not find any reason to interfere with the order of the Ld. CIT(A). This ground is therefore dismissed.

14. Ground No. 5 of the Revenue's appeal is against the deletion of the transfer pricing adjustment by the Ld. CIT(A) which the AO had made on the basis, recommended by the TPO in respect of assessee's international transactions with AEs involving payment of royalty, purchase of material & export of finished goods. We first deal with the issue involving transfer-pricing adjustment made in respect of royalty payments made to the AEs. Briefly stated facts of the case are that the assessee paid royalty to its AEs, M/s DIC Corporation, Japan ('DIC') and DIC Asia Pacific Pte. Ltd, Singapore ('DICAP') as a percentage of sales towards licensing of technical information, trademarks and brand names in respect of specific products, production processes and raw materials. The assessee had benchmarked this international transaction, applying External Comparable Uncontrolled Price Method ('CUP Method'). The TPO however rejected the application of CUP stating that this was not one of the five methods prescribed under the Indian transfer pricing laws and that the specifics of the external comparable agreements relied upon by the assessee were not available. He therefore applied the TNMM Method and benchmarked the royalty payment at the entity level after aggregating other international transactions including

purchase of raw materials and export of finished goods. On appeal; the Ld. CIT(A) set aside the action of the Ld. TPO and upheld the assessee's benchmarking of royalty under CUP Method. Aggrieved, the Revenue is in appeal before us.

15. We have heard the rival parties and carefully perused the material on record. It is noted that the assessee company belongs to the DIC Corporation Group of Japan which is its ultimate holding company. The assessee company is engaged in the business of manufacture of printing inks. The printings inks are mixtures of pigments and chemical additives. In order to manufacture specialized printing inks, the assessee has entered into two technical collaboration agreements with M/s DIC Corporation, Japan ('DIC') and DIC Asia Pacific Pte Ltd, Singapore ('DICAP'). In terms of the agreement with DICAP, the assessee company was licensed intangibles which consisted of technical information concerning manufacturing, formulation and application along with plant designs, production process, quality control etc. in relation to manufacture of offset inks, gravure inks, web offset inks, conventional black and color inks, varnishes of all types including flush varnish, metal decorating inks, adhesives including packaging adhesives. The assessee has also been granted limited right to use the trademarks and brand names vis-à-vis such products. The assessee is permitted to non-exclusively use these licensed IPRs to manufacture and sell the products as aforesaid in any country except where DIC or DICAP has their plants. In terms of the said technical collaboration agreement, the assessee is also entitled to use the improvements in the licensed intangibles from time to time as a consequence of new developments, research, modifications, technological updates etc. In consideration the assessee was required to pay royalty at the rate of 2% on the net sales revenue of such products manufactured and sold using such technical knowhow and trademarks to DICAP. This technical collaboration agreement was entered into on 1st July 2008 having effective period of seven years.

16. The assessee also entered into another technical collaboration agreement with DIC Corp. Japan involving licensing of intangibles consisting of technical information for manufacturing, formulation and application along with plant designs, production process, quality control etc. in relation to manufacture of polyester, poly-urea resin and poly-

urethane. In addition, DIC which is the ultimate holding company of the Group also licensed all the trademarks and brand names associated with its products to the assessee in order to market & sell the goods. In consideration the assessee was required to pay royalty at the specified rate of 3% on the net sales revenue of the products manufactured and sold using such technical knowhow and trademarks. This technical collaboration agreement was originally entered into on 05.12.2000 for a period of seven years and thereafter renewed on 1st January 2007 having effective period of nine years.

17. From audit report in Form 3CEB and the Transfer Pricing Study Report ('TPSR') it is noted that the royalty was benchmarked under the CUP Method. In the TPSR it is stated that under the current foreign policy of the Secretariat of Industrial Assistance and FIPB, residents of India are permitted to enter into technical collaboration agreements with non-residents and pay Royalty upto 5% and 8% of domestic sales and export sales respectively under the automatic route. It was further stated in TPSR that since the royalty payments to the AEs were within the prescribed parameters of SIA & FIPB; the transactions involving royalty payments were at arm's length. This benchmarking was further supplemented with the data obtained from the Royalty Stat database. After carrying out a detailed search on this database, seven comparable agreements were identified involving licensing of technical information, trademarks and brand names and where the consideration in form of royalty was paid as a percentage of sales. The mean rate of royalty paid under the comparable agreements was worked out at 8.55% and hence the royalty payments to the AEs were reported to be at arm's length.

18. The Ld. DR submitted that the benchmarking exercise conducted by the assessee was not appropriate and he relied upon the order of the TPO. He submitted that the royalty rates notified by the SIA / FIPB in respect of technical collaboration agreements under the automatic route was only an indicator and therefore could not be taken as a benchmark to arrive at the ALP of the transaction in question. He further submitted that the assessee never submitted the details of the search process conducted in the Royalty Stat Database before the TPO and therefore the TPO was justified in rejecting the application of CUP Method. He submitted that the Ld. CIT(A) was unjustified in benchmarking the royalty transaction

himself instead of setting it aside to the file of the AO and therefore urged us that the matter should be restored to the file of the AO.

19. Per contra the Ld. AR strongly relied on the appellate order of the Ld. CIT(A). He pointed out that the technical collaboration agreement with DIC was entered into way back in 2000 and the one with DICAP was entered into in 2007. It was submitted that all the preceding years were subjected to transfer pricing scrutiny u/s 92CA(3). In none of the past assessments the TPOs disputed ALP of the royalty payments. Upon query from the Bench; the Ld. AR of the assessee pointed out that the assessee all along had followed the same CUP Method and benchmarking exercise and there was no change in the factual matrix of the case. He submitted that the reasoning given by the TPO to discard the CUP Method was devoid of any merit. The Ld AR submitted that the TPO' contention that CUP is not one of the Method prescribed for determination of ALP under the Indian transfer pricing laws was factually incorrect. Drawing attention to provisions of Rule 10B of the I T Rules, 1962; the Ld. AR submitted that CUP was the foremost method prescribed under the said Rule to benchmark international transactions under the transfer pricing provisions. He further invited our attention to the TPSR placed at Pages 47 to 138 of the paperbook wherein the complete details of the search process and criteria followed by the assessee to identify the comparable technical collaboration agreements. He submitted that in the TPSR the brief synopsis of the contents of the agreements, the licensed intangibles etc. were set out. He pointed out that the royalty rates of the comparable agreements were not only submitted vide submission dated 23.03.2012 furnished before the TPO but it was available in the public domain as also in Royalty Stat Database. The Ld. AR further submitted that the royalty payments were made at the rates which were within the parameters set out by the Government of India in relation to technical collaboration agreements and the rates prescribed were for such collaborations where royalty was payable under the automatic route on the ground of being within the limits prescribed by the Government. Referring to the following decisions, the Ld. AR therefore argued that when the royalty was within the parameters prescribed by the Government, then the TPO could not question such payment on the ground that payment was in excess of ALP.

20. After giving a thoughtful consideration to the rival submissions of the parties; we find merit in the contentions of the Ld. AR of the appellant. We note that the agreements in terms of which royalty was paid to AEs were in force in the past years as well. The technical collaboration agreement with DIC, which was entered into in the year 2000, was originally approved by the Dept. of Industrial Policy & Promotion, Ministry of Commerce & Industry. The same agreement was renewed in 2007 in terms of which royalty was consistently paid at the rate of 3% of the net sales. Similarly the technical collaboration agreement with DICAP under which royalty was paid at 2% of the net sales was entered into in the year 2008. The income-tax assessments of the assessee for the preceding years were completed u/s 143(3) after obtaining orders u/s 92CA(3) from the TPO. We note that in none of the past assessments the TPOs had questioned the ALP of royalty payments nor any material was brought on record in these orders to suggest that the payment of royalty was excessive. We therefore find force in the submissions of the Ld. AR that on the principle of judicial consistency the TPO as well as AO were not permitted to depart from the accepted position permeating through the years when neither of the authorities pointed out any change in the factual matrix or provisions of law governing such payments. In this regard a useful reference can be made to the decision of this Tribunal in the case of Donaldson India Filter Systems (P.) Ltd. Vs ACIT (101 taxmann.com 66) wherein it was observed as under:

“19. Furthermore, when it is not in dispute that the business model of the taxpayer has not undergone any change since 2004 and payment of intra-group services have been formed to be at arm's length by the Revenue by passing detailed order by the TPO for AYs 2008-009, 2009-10, 2011-12 and 2012-13, available at pages 129 to 136 of Case Law Paper book, no reason whatsoever has been given by the ld. TPO to depart from the rule of consistency. No doubt, principle of res judicata is not attracted to the income-tax matter but when the business model has not undergone any change and facts and circumstances are identical "rule of consistency" is required to be maintained as has been held by Hon'ble Apex Court in RadhasoamiSatsang v. CIT[1992] 193 ITR 321/60 Taxman 248.

20. When we examined TP order for AY. 2011-12 and 2012-13, available at pages 133 to 136 of the Case Law Paper book, payment of intra-group charges to the tune of Rs.1,26,97,965 and Rs.1,56,08,715/- respectively have been held to be arm's length as per TP analysis conducted by the taxpayer. So, it cannot be held that since payment of intra-group services is increasing day by day, it leads to profit shifting.”

21. The principle of consistency was again applied by this Tribunal in the case of AT & S India Pvt Ltd Vs ACIT (94 taxmann.com 18). In the decided case the assessee had entered

into cost contribution agreements with its AE for financing global purchase services, global order handling services, global sales services and other services. In all the preceding transfer pricing assessments, the payments made pursuant to the cost contribution agreements were accepted to be at arm's length. In the relevant year under question, the TPO disputed the ALP of the transaction and benchmarked the same at NIL. While deciding the issue in favour of the assessee, this Tribunal held as under:

31. Before us the material factors relating to principle of consistency, which have been pointed out by the assessee is that on the same facts and circumstances of the case, no ALP adjustments were directed by the Ld TPO in respect of international transactions involving payments made by the assessee under the Cost Contribution Agreement (CCA) for receiving purchase services, order handling services and sales services for last three assessment years i.e. AY 2009-10, AY 2010-11 and AY 2011-12. Though there was no change in the facts and circumstances of the case for the previous year relevant to the assessment year 2012-13, the TPO/DRP determined the arm's length price of the said transactions at NIL value thereby violating the rule of consistency enunciated by the Hon'ble Supreme Court in the matter of Dalmia Promoters & Devels. (P.) Ltd. (supra). In the aforesaid decision, the Hon'ble Supreme Court has held that:

"We are not going into this issue in as much as this appeal can be disposed of on the ground that consistency does demand that there being no change in circumstances, the income for the year 1993-94 would also have to be treated business income as for the previous three years. Accordingly, the appeal is dismissed."

We note that the Department has been consistently accepting the assessee's transfer pricing documentation on the same facts and circumstances of the case, and no ALP adjustments were directed by the Ld TPO in respect of international transactions involving payments made by the assessee under the Cost Contribution Agreement (CCA) for receiving purchase services, order handling services and sales services for last three assessment years i.e. AY 2009-10, AY 2010-11 and AY 2011-12, therefore we do not agree with the stand taken by the TPO in the current assessment year under consideration, by following the Rule of consistency. For that we rely on the order of the Hon'ble Supreme Court in RadhasoamiSatsang v. CIT [1992] 60 Taxman 248/193 ITR 321, wherein it was held as follows:

"We are aware of the fact that, strictly speaking, res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. On these reasoning, in the absence of any material change justifying the Revenue to take a different view of the matter - and, if there was no change, it was in support of the assessee - we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-tax in the earlier proceedings, a different and contradictory stand should have been taken."

We are of the view that the above cited precedents on principle of consistency are squarely applicable to the assessee under consideration, as the facts under the Cost Contribution Agreement (CCA) for receiving purchase services, order handling services and sales services for last three assessment years i.e. AY 2009-10, AY 2010-11 and AY 2011-12, remain same and

the Ld. DR for the Revenue is unable to produce any material to controvert the aforesaid facts in CCA agreement. Therefore, the Revenue has to have some consistency in its views and it cannot blow hot and cold at its sweet-will and hence the assessee succeeds on this score.”

22. We also take note of the fact that the rates at which the royalty was paid was pursuant to the agreement approved by the Dept. of Industrial Policy & Promotion, Ministry of Commerce & Industry. Such rates were also within the rates prescribed by SIA & FIPB in respect of the technical collaboration agreements between residents of India and the non-residents under the automatic route i.e. 5% & 8% in respect of domestic sales & export sales respectively. In view of the foregoing facts we hold that the rate of royalty adopted by the assessee for making royalty payments were within the prescribed parameters and therefore at arm's length. In the circumstances therefore we do not find any infirmity in the Ld. CIT(A)'s order in granting relief. In this regard, we find support from the decision of the coordinate Bench of this Tribunal in the case of ACIT Vs Dow Agrosiences India Pvt Ltd (76 taxmann.com 124) wherein on analogous facts the Tribunal had held as follows:

“7.1 In order to appreciate the aforesaid, the following discussion is relevant. The royalty paid by the assessee to its associated enterprise i.e. Dow Netherlands has been approved by the Secretariat of Industrial Approval (SIA), Ministry of Industry (Government of India) vide communication dated 07/09/1996 and also by the Reserve Bank of India dated 11/03/1997. Before us, a reference has also been made to Paper Book, wherein the aforesaid communications have been placed as also a communication SIA dated 22/1/1997, which is in continuation to its earlier approval dated 17/09/1996. In terms of such approvals, assessee is permitted to pay its foreign collaborator i.e. Dow Netherlands, royalty @ 5% on domestic sales and 8% on export sales. In this background, before the TPO assessee asserted that since royalty was paid in terms of the approvals by the Central Government, the payment of royalty was at arm's length rate. In other words, the rate of royalty approved by the Central Government was used as a reliable data for benchmarking the transaction of payment of royalty. In this manner, assessee adopted the Comparable Uncontrolled Price (CUP) method as the most appropriate method to benchmark its international transaction of royalty and the rate approved by the Central Government was used as a reliable CUP data. Similar was the position taken by the assessee in assessment year 2003-04. Apart there-from, assessee had also canvassed that even after application of the Transactional Net Margin Method (TNMM) to test the arm's length nature of its transaction of payment of royalty, no adjustment was necessitated. Be that as it may, the TPO noted that another associate enterprise of the assessee namely, UK King Lynns Plant (in short 'Dow UK') was also paying royalty to Dow Netherlands, which was at lower rates. Based on the above, the TPO determined that the royalty paid by Dow UK was a comparable transaction and accordingly determined the arm's length royalty payment at 3% for domestic as well as 5% for gross export sale, which were the rates at which royalty was paid by DOW UK to DOW Netherlands. In assessment year 2003-04 as also in the instant assessment year, assessee had challenged the

aforesaid action of the Transfer Pricing Officer. Firstly, it was canvassed that the rate of royalty payments having been approved by the Government of India, such rates constitute a valid CUP data and no further adjustment was required to the stated value of the royalties paid. Secondly, Ld. Representative for the assessee also pointed out that the comparable transaction adopted by the Transfer Pricing Officer i.e. payment of royalty by Dow UK to Dow Netherlands was a wrong approach inasmuch as comparison could be made only with an uncontrolled transaction, whereas in the case of Dow UK and Dow Netherlands, both were associate enterprises and, therefore, payment of royalty by DOW UK to DOW Netherlands was a controlled transaction and accordingly, the same could not be considered as a valid CUP data. In so far as the latter plea of adoption of controlled transaction was concerned, the CIT(A) in assessment year 2002-03 has accepted the plea of the assessee. However, with regard to the plea of the assessee based on the rate of royalty approved by the Central Government is concerned, the CIT(A) rejected the same as according to him, such rates could not be considered as valid CUP data. The CIT(A) had however, allowed relief by benchmarking royalty payment under the TNMM whereby, the margins from the manufacturing activities of the assessee were found to be favourable vis-à-vis those of the comparables concerns. The Tribunal in assessment year 2003-04 upheld the ultimate conclusion of the CIT(A) to delete the addition on the ground that the basis on which the royalty was paid by the Dow UK to Dow Netherlands was different than that was paid by assessee to Dow Netherlands in as much as Dow UK was paying royalty as a percentage of gross sales, whereas assessee was paying royalty at net sales, in accordance with Foreign Exchange Control Regulations. The Tribunal found that if the royalty payable was calculated by adopting the same basis, then the royalty being paid by Dow UK was higher than what has been paid by assessee company to Dow Netherlands and, thus, the royalty paid by the assessee was at an arm's length rate, and no adjustment was required. On this basis, the Tribunal affirmed the order of the CIT(A) deleting the addition in assessment year 2003-04.

7.2 Now in the present year, the case of the assessee is that the plea that rate of royalty approved by the Central Government as also by the Reserve Bank of India constitutes a valid CUP data has been affirmed by the Hon'ble Bombay High Court in the case of CIT v. SGS India (P.) Ltd. [IT Appeal No. 1807 of 2013, dated 18-11-2015. In this context, the Ld. Representative for the assessee pointed out that before the Hon'ble High Court, the Revenue had relied upon Press Note No.9 (2000 series) issued by Central Government for adopting the rates of royalty prescribed therein for benchmarking royalty payable. In this context, reference was made to para 8 of the order of the Hon'ble High Court, wherein clause (IV) of the Press Note was specifically noted, which provided for payment of royalty upto 8% on export sales and 5% on domestic sales. The Ld. Representative for the assessee explained that though clause (IV) of Press Note No.9 (2000 series) considered by the Hon'ble High Court related to payment of royalty by a wholly owned subsidiary to its offshore parent company, but similar treatment has been extended even to other entities also vide A.P. (DIR Series) Circular No.5 dated 21/7/2003 issued by Reserve Bank of India, Exchange Control Department, Central Office, Mumbai, a copy of which has been placed on record. The Ld. Representative for the assessee pointed out that before the Hon'ble High Court, Revenue stated the Press Note No.9 (2000 series) dated 8/9/2000 was applicable to examine the reasonableness of the royalty paid while computing the arm's length price.

7.3 On the basis of aforesaid it is canvassed that the royalties paid by the assessee are in terms of the approval granted by SIA as also in terms of Circular No.5 dated 21/7/2003 (supra) of the

Reserve Bank of India and, therefore, the royalties paid @ 8% on export and 5% on domestic sales are to be considered at arm's length rate.

7.4 Although the Ld. Departmental Representative did not dispute the factual matrix, but he has merely relied upon the order of the TPO in support of the case of the Revenue.

7.5 In our considered opinion, following the judgment of the Hon'ble Bombay High Court in the case of SGS India Ltd. (supra), the payment of royalty by the assessee to its associated enterprise, Dow Netherlands @ 5% on domestic sales and 8% on export sales is liable to be considered as at an arm's length rate in view of the Circular No.5 dated 21/7/2003 (supra). Therefore, the addition made by the Assessing Officer on this count is unsustainable. In the ultimate analysis, we uphold the action of the CIT(A) in deleting the addition, albeit, on a different ground.”

23. Similar view has been endorsed by another coordinate Bench of this Tribunal in the case of ACIT Vs. Owens Corning Industries (India) (P.) Ltd (67 SOT 61) wherein it was held as follows:

16. Furthermore, the assessee claimed that the Royalty agreement was originally entered with Saint GobainVetrotex France S.A.) from 1.7.2001 to 30.6.2008 and that agreement called for 5% of net "ex-factory sales price" as royalty payment. Further, by way of a supplementary agreement dt. 8.5.2002 the approval for payment towards foreign technology transfer sanctioned by RBI was incorporated in the original agreement (refer page 6 & 7 of TPO order dt. 13.12.12). Finally it is seen that Saint GobainVetrotex France S.A. is now known as Owens Coming Invest Cooperatief, Netherlands with which subsequent agreement dt. 1.7.2008 was made and under whom the payments were made in the impugned assessment year 2009-10. In short, the assessee has claimed that the royalty payments were based on agreement which was approved by RBI and hence the TPO cannot question the same.

17. We find merit in this claim that once the RBI approval of royalty rate was obtained the payment was considered to be held at arm's-length. It is also noted that various Tribunals such as Air LiquideEngg. India (P.) Ltd. (supra), Dy. CIT v. SonaOkegawa Precision Forgings Ltd. [2012] 17 taxmann.com 98/49 SOT 520 (Delhi), Hero Motocorp Ltd. v. Addl. CIT (IT Appeal No. 5130/Del/2010), ThyssenKrup Industries India Ltd v. Addl. CIT [2013] 33 taxmann.com 107 (Mum. - Trib.), Abhishek Auto Industries Ltd. v. Dy. CIT [2011] 9 taxmann.com 27 (Delhi) have taken a view that RBI approval of the Royalty rates itself implies that the payments are at Arm's Length and hence no further adjustment needs to be made viewed from this angle too.

18. We, therefore, allow the grounds of the assessee with respect to ground no. 2.3 and 2.9 (i.e. the TPO erred in holding that no tangible benefits were derived by the assessee out of royalty payments made by it and restricted the payment to 2% of net sales). We also allow the ground No. 2.9 of the assessee (i.e., transactions made under Royalty agreement approved by RBI are to be considered to be at arm's-length). We do not find the need to adjudicate the other Grounds namely. 2.4 to 2.8 raised by the assessee.”

24. Respectfully following the ratio laid down in these decisions therefore, we uphold the Ld. CIT(A)'s order deleting the downward adjustment made by the TPO in respect of royalty payments. Ground No. 5(i) & (ii) of the Revenue's appeal therefore stand dismissed.

25. Now we proceed to deal with the issue concerning the adjustment made by the TPO in respect of international transactions involving purchase/sale of materials/goods. Briefly stated facts of the case are that the assessee had benchmarked the transactions involving purchase of finished goods applying Resale Price Method ('RPM') and the transactions involving import of raw materials and export of finished goods by applying Transactional Net Margin Method ('TNMM'). For applying the TNMM, the assessee conducted a search and thereafter identified seven comparables whose mean PLI, being OP/OR worked out to 5.74%. The assessee was taken as the tested party and its PLI was worked out at 5.33%. Since the PLI fell within the range of +/-5% prescribed in the proviso to Section 92C; the transaction was reported in the TPSR to be at arm's length. The TPO rejected the application of RPM vis-à-vis the import of finished goods in absence of reliable data and sought to benchmark it under TNMM Method. The TPO also did not fully agree with the benchmarking exercise conducted by the assessee company in respect of import of raw materials and export of finished goods. In his initial show cause notice he proposed to benchmark both the set of transactions separately under TNMM Method. He initially proposed to benchmark the transactions only with those companies, which were involved in manufacturing of inks. The AO also increased the turnover filter to 20% and the RPT filter to 25%. Further, instead of multiple year data, the AO advocated use of single year data of the comparables. In respect of import of finished goods, the AO identified two comparables and taking OP/OR as the PLI, he worked out the arm's length PLI at 15.15%. With regard to import of raw materials and export of finished goods; he proposed that OP/TC should be considered as the PLI instead of OP/OR and based on the afore-discussed search criteria he identified five comparables whose PLI worked out at 15.70%. After examining the objections put forth by the appellant to the initial show cause notice pointing out the serious defects and infirmities therein, the AO issued another show cause notice wherein he proposed to benchmark all the international transactions on aggregate basis at entity level.

The TPO then abandoned the comparables originally selected and identified altogether new set of 13 comparables. As such none of the earlier comparables outlined in the initial SCN featured in the second show cause notice. OP/OC was taken to be the appropriate PLI and the mean PLI of comparables was worked out at 13.54%. He also re-computed the PLI of the tested party i.e. the assessee at 4.94%. Since the PLI of the tested party was not comparable with the arm's length PLI of comparables, transfer pricing adjustment was recommended by the TPO.

26. On appeal, the Ld. CIT(A) upheld the TPO's action of using single year data as opposed to multi year data. With regard to the issue of the appropriate PLI, the Ld. CIT(A) took note of the fact that in the subsequent transfer pricing assessments, the TPOs had held OP/OR to be the appropriate PLI and therefore he upheld the assessee's contention for use of OP/OR as the PLI. Further after examining the nature of the items of income credited under the head 'Other Income', the Ld. CIT(A) held that income arising from recovery of bad debts, sale of containers, discount received, management fees and foreign exchange gain was to be considered as part of the 'operating revenue' to arrive at the correct PLI of the tested party. The Ld. CIT(A) also agreed with the TPO's broader product comparability search of manufacture of specialty chemicals including printing inks as opposed to the appellant's claim for considering companies only engaged in manufacture of printing inks. He however noted that some of the comparables adopted by the TPO as well as the assessee were not functionally similar even under this broader product comparability test. After analyzing the functional profile of each of the comparable; the Ld.CIT(A) identified seven companies, which in his opinion fitted the broader product comparability and rejected companies which according to the Ld. CIT(A) did not fit even in the broader functional comparability. With these findings, the Ld. CIT(A) directed the AO to re-work the transfer pricing adjustment in the facts of the present case. Aggrieved by this order of the Ld. CIT(A), the Revenue is in appeal before us only on two specific issues; (a) whether foreign exchange gain can be considered to be operating income and (b) whether the Ld. CIT(A) was justified in adopting exact product comparability criteria as opposed to broader product

comparability criteria and thereby rejecting functionally comparable companies as identified by the TPO.

27. We have heard the submissions of the rival parties. The Ld. AR of the assessee very fairly conceded at the beginning that foreign exchange gain could not be considered to be forming part of the operating income in the given set of facts. We therefore direct the AO to re-work the PLI of the tested party i.e. the assessee company, being OP/OR after excluding the foreign exchange gain. Ground No. 5(iii)(a) of the Revenue's appeal therefore stand allowed.

28. As regards the issue of adoption of the criteria of broader product comparability; we find the Revenue's ground to be misconceived because the Ld. CIT(A) has followed a broader approach and considered the companies who were functionally comparable and were engaged in the business of manufacture of specialty chemicals including printing inks. Adopting this approach, the Ld. CIT(A) rejected eight comparables from the set presented before him by the TPO as well as the assessee. In arriving at such conclusion the Ld. CIT(A) opined that even under the broader functional comparability test only the companies which were principally engaged in the manufacture of specialty chemicals were required to be considered. Applying this criteria the Ld. CIT(A) shortlisted seven companies and directed the TPO/AO to re-compute the mean PLI of these comparables. Before us, the Ld. DR argued that the Ld. CIT(A) ought to have set aside the entire issue to the file of the TPO instead of undertaking the comparability analysis at his end. Per contra the Ld. AR submitted that ideally the Ld. CIT(A) as well as TPO ought to have selected the comparables which were engaged only in the business of manufacturing of printing inks and should not have selected the comparables from the wider spectrum of specialty chemicals. In support of this contention the Ld. AR drew our attention to the SCN issued initially by the TPO himself in which he had admitted that in selection of comparables, product comparability was of critical importance and therefore he had restricted his search only to companies engaged in 'Printing Inks' Industry. The Ld. AR alternatively submitted that even if the Ld. CIT(A)'s order adopting the broader product comparability criteria and thereby selecting companies engaged in manufacture of specialty chemicals inter alia

including printing inks is accepted at its face value, even then the facts demonstrated that the assessee's transactions with AEs involving import of material and import & export of finished goods were on arm's length requiring no transfer pricing adjustment. In this regard he drew our attention to the order passed by the TPO while giving effect to the Ld. CIT(A)'s order wherein the TPO worked out mean PLI of the comparables at 4.11% whereas the PLI of the assessee was 5.51%. He therefore urged that the order of the Ld. CIT(A) on this issue be upheld.

29. After hearing the submissions of the rival parties; we do not see any merit in the Ld. DR's submission that the entire issue should be restored to the file of TPO for consideration afresh because the Ld. DR could not pin point any glaring factual mistake or legal infirmity in the Ld. CIT(A)'s findings nor any fresh material was brought to our attention on the basis of which we could be persuaded to hold that the entire issue needs to be de novo examined by the TPO. We note that the specific grievance raised in this grounds of the Revenue is that the Ld. CIT(A) had undertaken exact product comparability instead of a broader product comparability which is otherwise permitted under the TNMM. However from the facts as discussed above, it is evident that the Ld. CIT(A) himself adopted broader product comparability criteria and not exact product comparability by adopting the broader segment of specialty chemicals as opposed to only printing inks. The Ld. DR could not controvert this fact. We therefore do not find any in-principle merit in the grievance raised by the Revenue.

30. On the merits of the issue, we are of the opinion that for correct application of TNMM, it was necessary for the lower authorities to select comparables, which were functionally similar and engaged in similar line of business. It is by now well settled that functional similarity is of paramount importance under TNMM and therefore in some cases product comparability can be given a go by in comparison to other prescribed methods. The principle of broader product comparability should however be eschewed if the sufficiently reliable data is available in the public domain in respect of the comparables who satisfy exact product comparability test to determine the ALP in a given case. It is only when the TPO can demonstrate that sufficient and reliable data, concerning the specific

industry/product segment, is not available in the public domain and therefore it is not possible to determine the ALP, only then the TPO can enlarge the scope for search of comparables beyond the specific product/industry. Applying these principles to the facts of the present case we note that the assessee is engaged in the business of manufacture of printing inks, which by itself is a major industry segment in which several companies are engaged. In the circumstances ideally for application of TNMM; the industry specific data pertaining to printing inks industry alone should have been taken into consideration (since sufficient and reliable data was available) as was rightly done by the TPO in his initial SCN. However, as the assessee has not filed appeal or cross objection on this issue; we are not inclined to entertain the A/R's argument for adoption of comparables which are industry/product specific. Further the Ld. AR appearing on behalf of the assessee drew our attention to the order passed by the TPO giving effect to the directions of the Ld. CIT(A), wherein the TPO even after following the broader approach as advocated by the Ld. CIT(A) and by taking into account functionally comparable companies engaged in manufacture of specialty chemicals, found the PLI of the tested party i.e. the assessee to be at arm's length. In this regard, we further note that even the Ld. DRP, Delhi while adjudicating the assessee's objections to transfer pricing adjustments carried out by the TPO in the immediately succeeding year i.e. AY 2012-13, in-principle upheld the inclusion of only those broadly comparable companies which were engaged in manufacture of specialty chemicals, in the list of comparables. Therefore in our considered opinion and having regard to the facts of the case, the approach of the Ld. CIT(A) in considering companies found to be functionally comparable under the broad segment of specialty chemicals cannot be faulted with.

31. Based on the reasons as discussed in the foregoing, we now proceed to examine the reasons as to why in the impugned order the Ld. CIT(A) rejected the comparables selected by the TPO /Assessee under the broader functional comparability criteria.

- M/s Akzo Nobel Chemicals India Ltd : The Ld. CIT(A) noted that this company was engaged in the business of manufacture of Polymerization Initiators and Catalysts. The

finished products of the company were found to be not even broadly comparable to that of the appellant and therefore rejected.

- Casil Industries Limited & Vivimed Labs Limited: The Ld. CIT(A) noted that these two companies belonged to the drug & pharmaceutical industry segment. Since the product profile was completely different with the tested party, these companies were rejected by the Ld. CIT(A).

- Daikafill Chemicals India Limited :The Ld. CIT(A) noted that this company was engaged in manufacture of whitening agents & coupling components which had different and wider applications and therefore could not be considered to be broadly comparable with the tested party and hence rejected the same.

- Grauer & Weil (I) Limited :From the annual report of this company, the Ld. CIT(A) noted that it is engaged in the manufacture of diverse products including electroplating Machinery and Parts, paints enamels and varnishes and also found its FAR profile to be vastly different. In view of the diverse functional profile this company was rejected as a comparable by the Ld. CIT(A).

- Metrochem Industries Ltd and Rohan Dyes & Intermediates Ltd : The Ld. CIT(A) rejected this comparable identified by the assessee since the assessee was unable to demonstrate their respective functional comparabilities.

- Kiri Industries Limited : The Ld. CIT(A) after perusing its product profile and the raw materials involved in production, found it to be not a good comparable.

32. Before us the Ld. DR could not lend any factual material to convince us to hold that finding recorded by the Ld. CIT(A) suffered from any factual error or was perverse. We therefore do not find infirmity in the Ld. CIT(A)'s order wherein he rejected the comparables identified by the TPO which were functionally not similar. For the reasons set out above Ground No. 5(iii)(b) & (c) of the Revenue's appeal are therefore dismissed.

33. In the result, the appeal of the Revenue in ITA No. 1362/Kol/2017 is partly allowed.

34. Now we proceed to deal with the Revenue's appeal in ITA No. 1363/Kol/2017 for AY 2011-12. Ground Nos. 1& 2 of the appeal relate to the disallowance of royalty to the extent of Rs.4,86,34,165/- paid by the assessee pursuant to the technical collaboration agreements with its holding company, M/s DIC Asia Pacific Pte Ltd and ultimate holding company, M/s DIC Corporation, Japan holding it to be capital in nature. At the outset the Ld. AR of the appellant pointed out that the royalty payments were made to these entities, pursuant to the agreements executed in the years 2000 & 2007 respectively and in all the past income-tax assessments, framed u/s 143(3), royalty paid as a specified percentage of the net sales was allowed as revenue deduction in computing business income of the respective years. The Ld. AR further submitted that in the assessment order for AY 2010-11 also the AO had allowed the deduction for royalty payment in the assessment completed u/s 143(3). Consequent to passing of the order u/s 143(3) for the relevant AY 2011-12, an order u/s 263 was passed by the Ld. Pr.CIT-4, Kolkata for AY 2010-11 holding that the assessment order was erroneous and prejudicial to the interests of the Revenue because the royalty paid to these two entities under the same technical collaboration agreements was liable to be disallowed on the ground of being capital in nature. Being aggrieved, the matter was taken up before this Tribunal, which in its decision dated 05.04.2017 in ITA No.136/Kol/2017 quashed the revision order of the CIT. Following this appellate order, this Tribunal in assessee's own case in its order dated 14.02.2018 in ITA No. 552/Kol/2017 for the subsequent AY 2012-13 similarly deleted the disallowance of royalty payment by observing as under:

“The assessee paid a sum of Rs. 2,14,29,108/- to the holding company DIC Asia Pacific PTE Ltd., Singapore and Royalty of Rs. 7,03,28,595/- to another holding company DIC Corporation, Japan. The total royalty paid by the assessee was therefore Rs. 9,17,57,703/-. According to the AO by paying the aforesaid royalty the assessee acquired intangible assets technical knowhow for upgrading manufacturing technology and also got right to use the trading names, brand names and marks for a period of seven years. The agreement between the recipient of the payments of the assessee in this regard is dated 01.07.2008. The AO therefore held that payment in question was in the nature of capital expenditure. He allowed 25% depreciation on the capitalized value of intangible assets and thereby made disallowance of Rs.6,88, 18,277/-. A sum of Rs.6,88,18,277/- is 75% of the sum of Rs.9,17,57,703/- paid by the assessee as royalty for licence to use technology knowhow and by using brand names etc.

9. On objection by the Assessee before the DRP, the DRP confirmed the order of the AO. At the time of hearing the ld. Counsel for the assessee brought to our notice that in A.Y.2010-11 similar royalty payment made by the assessee under the very same agreement to the very same parties was allowed as deduction by the AO in the order of assessment. The CIT passed an order u/s 263 of the Act holding that the payments were capital in nature as the assessee acquired intangible rights of technology know-how brand name etc. Therefore the only capitalized value of the intangible right should be allowed as deduction and the entire sum should not be allowed as deduction as it was a capital expenditure in nature. Order u/s 263 of the Act was the subject matter of challenge by the assessee before ITAT in ITA No.126/Ko/2017. This tribunal by its order dated 05.04.2017 quashed the order u/s 263 of the Act taking a view that the expenditure in question was a revenue expenditure. The following were the conclusions of the tribunal :

"9. We have heard the rival submissions and perused the materials available on record including the paper book filed by the assessee. We find Coates of India Limited was the erstwhile name of DIC India Limited (assessee herein) . We find from the technical collaboration agreement entered into between assessee and DIC Corporation, Japan on 5.12.2000 that assessee is engaged in the business of manufacturing of printing inks and allied products in India in its various factories located at Calcutta, Delhi, Mumbai, Chennai, Noida and Ahmedabad. The assessee was desirous of upgrading its overall technology and introduction of new technology for manufacturing printing inks and allied products of all types viz., manufacturing of flushed pigments, sheetfed offset inks, gravure inks, web offset inks, news inks, screen printing inks, varnishes of all types including flush varnish, adhesives including packaging adhesives on a continuous basis. The assessee had approached DIC Japan to make available to it the said technical knowhow for the purpose of upgrading its manufacturing technology for the existing as well as future products relating printing inks and allied products on a continuous basis in its plants located at Calcutta, Mumbai, Noida, Ahmedabad , New Delhi , Madras or any other future place as may be determined by assessee from time to time. It is further stated that the DIC Japan would make available to assessee the technical knowhow as aforesaid and the right to use the trade names and brand names. In this regard, the following clauses in the said agreement would be relevant:-

1.3. "Products" will also include the right of COATES to use the Trade Names, Brand Names relevant to the Products, whether the same be registered or otherwise (hereinafter referred to as "Trademarks"), provided, however, it shall be the responsibility of COATES to ensure compliance with local laws relating to use of such names and marks.

1.4. Licensed Information means such technical information in possession of, and at free disposal of , DIC, on the Effective Date of the Agreement in relation to the Products towards manufacturing, formulation and application and shall also include formulation, production process, quality control, sourcing of input materials, material safety data sheet, safety, health and environment protection measures.

2.LICENSE

2.1. DIC hereby grants COATES a non-exclusive license to use Licensed Information for the manufacture of Products in Territory..

2.2. COATES is granted a non-exclusive right to sell Products in any countries except the countries where DIC has its plant, its subsidiaries or other joint venture arrangements for the manufacture of Products, where DIC is engaged in the ordinary sales activity of Products, and where DIC licenses the exclusive sales right to a third party. However, in the event DIC

agrees in writing on the prior written request of COATES, COATES may export Products to such countries as expected above.

2.3. COATES in not granted a right to sublicense to any third parties and shall not make Licensed Information available to any third parties.

4. Compensation

4.2 DIC may from time to time help COATES by purchasing the said products directly or through its group/associate companies at such prices as may be mutually agreed upon but not less than the actual cost plus reasonable profit margin. Provided however COATES shall be under no obligations to accept such orders from DIC or its associates and DIC shall not be entitled to any royalty on such transactions.

.....

7. SECRECY

7.1. COATES agree to keep the Licensed Information provided hereunder by DIC as secret and confidential and agrees not to disclose it to any third party provided that the information of the following nature shall be excluded from these secrecy obligations:

- a. Information that is in public domain.*
- b. Information that COATES has in its possession at the effective date which is not subject to an Agreement of Confidentiality.*
- c. Information which COATES has received rightfully from other sources before or after at the effective date.*

7.2. The obligation under this article shall survive any termination of this Agreement for ten (10) years.

9. Period of Agreement

9.1. The Agreement will remain in force for 7 years from the effective date, provided that DIC, directly or indirectly owns more than fifty (50) percent of the shares of COATES.

9.2 One (1) year prior to the expiration of this Agreement, the parties shall meet and shall decide jointly either to renew this Agreement for the further period for five (5) years at the expiration of this Agreement or whether it shall not be renewed after the normal date of expiration.

10. Termination

10. I, Either party may terminate this Agreement forthwith:

- (1) if the other party is in breach of any of the provisions of this Agreement and fails or is unable to remedy the same within 30 days after receiving notice in writing thereof from the other party.*
- (2) if the other party becomes insolvent, bankrupt or is placed liquidation.*

10.2. If under the provisions of this Agreement COATES ceases to be entitled to use the Licensed Information COATES shall deliver up to DIC all such Licensed Information in tangible form which may then be in its possession and will keep no copies thereof.

9.1. We find from pages 27 to 29 of the Paper Book, a copy of the approval, from Government of India, Ministry of Commerce & Industry , Department of Industrial Policy & Promotion Secretariat for Industrial Assistance vide approval No. S(2001)719(2000/PAB-IL ,New Delhi

dated 3.1.2001, of technical collaboration agreement dated 5.12.2000 . Later the technical collaboration agreement was renewed with effect from 1.7.2008 with DIC Asia Pacific Pte Ltd, Singapore with the same terms and conditions. Similarly there was yet another License Agreement entered on 1.4.2007 between the assessee and DIC Japan on same terms and conditions as in earlier agreement except with change in percentage of royalty agreed upon, which is not in dispute before us. Hence royalty was paid by the assessee to DIC Asia Pacific Pte Ltd, Singapore and to DIC Corporation, Japan. We also find from the Fixed Assets Schedule as on 31.3.2010 (relevant to year under appeal) that there has been a minor addition of Rs 6.58 crores to Plant & Machinery which is hardly 5.23% of Gross Block of Fixed Assets as on 31.3.2010. Hence it could be safely concluded that no new activity by setting up of a new business venture was carried out by the assessee during the year under appeal for which the licensed information was used by the assessee. We find that the ld. CIT had one hand alleged that the assessee had acquired the business / commercial rights in Intellectual Property Rights (IPR) , but in the very same context , he had also stated that the business / commercial rights have been obtained for a period of seven years only. Admittedly the licensed information has been obtained for a period of seven years by the assessee and hence there cannot be any question of acquisition of such licensed information by the assessee. We have gone through the agreement entered into between the assessee and DIC Asia Pacific Pte Ltd, Singapore and DIC Corporation, Japan and we find that nowhere it was mentioned that the assessee had acquired the business/ commercial rights of IPR so as to fall within the ambit of an asset having enduring nature in the capital field. On the contrary it is very clearly stated in both the agreements that DIC Asia Pacific Pte Ltd, Singapore and DIC Corporation, Japan has granted license to use technology, knowhow and other license information for a specified period and hence it cannot be said that the assessee had acquired any business / commercial rights thereon. We find that the ld. CIT had persuaded himself to incorrect assumption of facts that assessee by using the licensed information obtained from DIC Asia Pacific Pte Ltd, Singapore and DIC Corporation, Japan had upgraded its P&M and also changed the setting up of P&M to make its finished products viable for the market. This assumption is factually incorrect and does not emanate out of the jurisdictional facts on record. The ld. CIT had not brought any material evidence on record to justify this incorrect assumption thereby leading to incorrect conclusion. We find that the assessee had all along been in the business of manufacture of printing inks and it had not ventured into any new business as could be evident from its financial statements. We find that the knowhow was provided for upgrading the existing business. This payment of royalty has been allowed as a revenue expenditure in the past by the ld. AO u/s 143(3) of the Act. The ld. CIT merely made a bald statement by stating that the assessee by using the licensed information had entered into new dimensions of business from time to time and hence the payment of royalty could not be equated with the nature of royalty paid in earlier years, which statement is absolutely without any basis and without any material on record. The assessee had submitted before the ld. CIT that the royalty was paid in respect of licensed information obtained from DIC Asia Pacific Pte Ltd, Singapore and DIC Corporation, Japan for manufacture of resins and printing inks and the licensed information pertains to these specific items i.e resins and printing inks alone and cannot be used to venture into new business. The nature of royalty, mode and manner of payment thereon had remained the same since financial year 2007-08 / 2008-09 as the case may be, in which these agreements were entered into by the assessee."

10. The conclusions of the tribunal on the allowability of the aforesaid expenses as a revenue expenditure are contained in paragraph 9.3 to 9.7. The tribunal relied on the decision of the Hon'ble ITAT in the case of Bata India Ltd. In ITA No. 1826 to 1828/Ko/2012 order dated 23.05.2013 which was confirmed by the Hon'ble Calcutta High Court in GA No.3482 of 2013 dated 18.08.2014. The tribunal examined the terms of the license under the agreement

between the parties which are the same in the present AY also. The tribunal in the case of Bata India Ltd. Took the following view:

"18. We have heard the rival submissions. A perusal of the agreement in respect of the technical know-how and the manufacturing process clearly shows that the assessee has derived no enduring benefit nor has assessee obtained any capital asset on the basis of the payment of the royalty as per the agreement, The technical know-how trade-marks denies drawings. notes etc. in respect of the agreement for which the assessee has paid the royalty belongs to the licensor being M/s. Wolverine World Wide, INC. Thus as the assessee has derived no enduring benefit the same cannot be treated as a capital expenditure but is clearly in the name of revenue expenditure and allowable. In the circumstances the AO is directed to allow the royalty paid by the assessee as revenue expenditure as claimed.

11. The Tribunal also placed reliance on the decision of the Hon'ble Calcutta High Court in the case of Timken India Ltd. (2014) 51 Taxman 184 (Cal) in which the Hon'ble Calcutta High Court took the following view:

'10. We have considered the rival submissions of the learned advocates for the parties. The submissions advanced by Ms. Gutgutia are no doubt meritorious and certainly represent one way of looking at the things. Sight cannot however be lost of the fact that the payment made by the assessee is on account of licence fee. By making such payment, the assessee has got a permission use technology. The money paid is irrecoverable. In case the business of the assessee for some reason or the other is stopped, no benefit from such payment is likely to accrue to the assessee. The license is not transferable. Therefore, it cannot be said with any amount of certainty that there has been an accretion to the capital asset of the assessee. In case, the assessee continues to do business and continues la exploit the technology for the agreed period of time, the assessee will be entitled to take the benefit thereof. But in case it does not do so, the payment made is irrecoverable. It is in this sense that the matter was looked into by the High Court of Madras and was endorsed by the apex court in the case of IAEC (Pumps) Ltd. (supra). The point as a matter of fact is covered by the aforesaid judgment. Nothing really is left for us to do the matter.

11. We are, therefore, of the opinion that the question has to be answered in the affirmative and in favour of the assessee.

12. The appeal is thus allowed.'

12. The revenue had placed reliance on the decision of the Hon'ble Madras High Court in the case of CIT vs Southern Switchgear Ltd. reported in 148 ITR 273 (Mds.). That was distinguished by the tribunal in the following words:

'We find that the decision of the Hon'ble Madras High Court in the case of CIT vs Southern Switchgear Ltd. reported in (1984) 148 ITR 273 (Mad) does not come to the rescue of the revenue as in that case, it was categorically found that in addition to the acquisition of technical knowledge, the assessee company got an exclusive right to manufacture and sell its articles without any objection from anyone including the foreign company and this is clearly an advantage of enduring nature. It was further observed in that case that it is well established that even without acquisition of an asset, a right of a permanent advantage could. be acquired and the cost of acquisition of such a right could, he taken to be capital expenditure. In the instant case, the assessee shall not be entitled to use the Licensed Information and it had to deliver up to its AE all such Licensed Information in tangible form which may then be in its possession and will keep no copies thereof. Moreover, assessee in the instant case was given by its AE only a non-exclusive and non-transferable license to use Licensed Information for manufacture of products. Assessee was not granted any right to sublicense to any third parties or make available any licensed information to any third parties and is also directed to maintain the secrecy and confidentiality or the licensed information by

not disclosing to any third party and such secrecy & confidentiality clause shall be binding even after termination of the agreement for ten years. Hence it is a restrictive usage privilege given to the assessee in the instant case and hence the facts before the Hon'ble Madras High Court are squarely distinguishable."

13. In view of the aforesaid decision on the same facts, we are of the view that the claim for deduction as made by the assessee ought to have been allowed by the revenue authorities.

14. The ld. DR submitted that the order of the tribunal relied upon by the ld. Counsel needs a re-look because the decision of the Hon'ble Madras High Court in the case of CIT vs Southern Switchgear Ltd had not been appreciated. He further submitted that a new advantage and acquisition of capital asset by the assessee existed in the present case. The assessee had enduring benefit and has functionally gained advantage and these facts ought to have prompted the tribunal to come to a conclusion that expenditure in question was capital in nature.

15. We have considered the rival submissions and we are arguments put forth by the ld. DR have already been considered of the view that the arguments put forth by the ld. DR have already been considered by the tribunal in the order cited in the earlier paragraphs. We are of the view that the facts and circumstances remain identical. There is no reason for taking a contrary view. We, therefore, do not accept the arguments put forth by the ld. DR. For the reasons given above we hold that the assessee is entitled to claim the entire royalty paid to DIC Asia Pacific PTE Ltd., Singapore and DIC Corporation, Japan. The addition made by the AO is directed to be deleted."

35. Since factual matrix of the case for AY 2011-12 is same as in the preceding and succeeding assessment year, respectfully following the above appellate orders, we uphold the order of the Ld. CIT(A) deleting the disallowance of royalty of Rs.4,86,34,165/-. Ground Nos. 1 & 2 are therefore dismissed.

36. Ground No. 3 of the appeal relates to the disallowance of the sale tax component of Rs.53,795/- included in the bad debts written off debited in the Profit & Loss Account. After considering the rival submissions, it is observed that the issue involved in this ground is identical to Ground No.1 of department appeal in A.Y. 2010-11. The reasons for making the disallowance in the year under consideration are same as discussed in the assessment order for AY 2010-11. The order of the Ld. CIT(A) was also passed on identical lines on which the relief was allowed in the appellate order for AY 2010-11. Therefore, following our conclusions drawn in A.Y. 2010-11, we dismiss this Ground raised by the Revenue and uphold the order of Ld. CIT(A).

37. Ground No. 4 of the appeal relates to the disallowance made on account of depreciation & additional depreciation claimed in respect of electrical installations. After considering the rival submissions, it is observed that the issue involved in this ground is identical to Ground No.1 of department appeal in A.Y. 2010-11. The reasons for making the disallowance in the year under consideration are same as discussed in the assessment order for AY 2010-11. The order of the Ld. CIT(A) was also passed on identical lines on which the relief was allowed in the appellate order for AY 2010-11. Therefore, following our conclusions drawn in A.Y. 2010-11, we dismiss this Ground raised by the Revenue and uphold the order of Ld. CIT(A).

38. Ground No. 5 of the appeal relates to the transfer pricing adjustment made by the TPO in respect of the royalty and import/export of materials/ finished goods. After considering the rival submissions, it is observed that the issued involved in Ground No. 5(i) & (ii) regarding TP adjustment of royalty is identical to Ground No.5(i) & (ii) of department appeal in A.Y. 2010-11. The reasons given by the TPO for rejecting CUP Method and applying TNMM to benchmark the royalty in the year under consideration are same as discussed in the transfer pricing order for AY 2010-11. The order of the Ld. CIT(A) was also passed on identical lines on which the relief was allowed in the appellate order for AY 2010-11. Therefore, following our conclusions drawn in A.Y. 2010-11, we dismiss Ground Nos. 5(i) & (ii) raised by the Revenue and uphold the order of Ld. CIT(A).

39. As regards Ground No. 5(iii)(a), like in AY 2010-11, the Ld. AR fairly conceded that foreign exchange gain cannot form part of the operating income for computation of PLI being OP/OR of the assessee company. Following our conclusion drawn in A.Y. 2010-11, we allow this ground of the Revenue and direct the AO/TPO to re-compute the PLI i.e. OP/OR of the assessee company after excluding foreign exchange gain from the operational income.

40. In respect of Ground Nos. 5(iii) (b) & (c), we note that facts involved and the issue raised are identical to Ground No.5(iii) (b) & (c) of Department appeal in A.Y. 2010-11. The benchmarking exercise conducted by TPO under TNMM in the year under

consideration are same as discussed in the transfer pricing order for AY 2010-11. The order of the Ld. CIT(A) was also passed on identical lines on which the relief was allowed in the appellate order for AY 2010-11. Therefore, following our conclusions drawn in A.Y. 2010-11, we dismiss Ground No.5(iii) (b) & (c) raised by the Revenue and uphold the order of Ld. CIT(A).

41. In the result, both the appeals of the Revenue are partly allowed.

Order is pronounced in the open court on 3rd May, 2019

Sd/-

(Dr. A. L. Saini)
Accountant Member

Sd/-

(Aby T. Varkey)
Judicial Member

Dated : 3rd May, 2019
Biswajit (Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – DCIT, Circle 10(1), Aayakar Bhawan, 3rd Floor, P-7, Chowringhee Square, Kolkata – 700 069.
2. Respondent – M/s. DIC India Ltd., Transport Depot Road, Kolkata – 700 088.
3. The CIT(A),
4. CIT ,
5. DR,

/True Copy,

By order,

Assistant Registrar/H.O.O
ITAT, Kolkata