आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव,लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं./ ITA No. 1865/PUN/2013

निर्धारण वर्ष / Assessment Year : 1999-2000

Mercedes Benz India Private Limited.
(formerly known as Daimler Chrysler
India Private Limited)
E-3, MIDC Chakan, Phase-III,
Chakan Industrial Area, Kuruli &
Nighoje, Tal : Khed,
Pune-410 501.
PAN : AABCM 1789L

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,
Circle-9, Pune.

.....प्रत्यर्थी / Respondent

Appellant by : Shri Percy Pardiwala &
Shri Darpan Kirpalani

Respondent by : Shri S. B. Prasad

सुनवाई की तारीख / **Date of Hearing : 23.07.2019**		घोषणा की तारीख / **Date of Pronouncement : 01.08.2019**

आदेश / ORDER

PER D. KARUNAKARA RAO, AM

This appeal filed by the assessee is directed against the order of CIT(Appeals)-V, Pune dated 18.07.2013 for the assessment year 1999-2000. This is the second round of the proceedings before the Tribunal.

2. In the first round, the Tribunal remanded the issue to the file of Assessing Officer in ITA No.968/PN/2003 dated 21.01.2009. The Assessing Officer passed the assessment order giving appeal effect of the order of Tribunal making repeating various additions including the **disallowance of the claim of the payment** of technical know-how fees. Assessee has been making such a claim of deduction u/s.35AB of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). Another addition made by the Assessing Officer relates to the assessee's claim with regard to business loss/expenditure relatable to **abandonment of the proposed engine factory**. The CIT(A) confirmed the said additions. In this above background, the assessee raised following grounds:

> *"Based on the facts and circumstances of the case, the Appellant respectfully submits that the learned CIT(A) has erred on the following grounds which are independent of and without prejudice to each other.*
>
> 1. *The learned CIT(A) erred in upholding the action of the Assessing Officer of not granting the **deduction under section 35AB o**f the Act in the year under consideration.*
>
> 2. *The learned CIT(A) erred in confirming the action of the Assessing Officer of ignoring the legal position despite the matter being covered in favour of the Appellant in AY 1995-96 and the specific directions of the Hon'ble ITAT that, the allowability of expenditure under section 35AB of the Act has to be decided in the first year (i.e. AY 1995-96) and the subsequent years need to simply follow the position taken in the first year.*
>
> 3. *The learned CIT(A) erred in confirming the action of the Assessing Officer of **disallowing the business loss/expenditure** amounting to Rs.4,77,19,411 incurred by the Appellant on abandonment of the **proposed engine factory by treating the same to be capital loss**.*
>
> 4. *Without prejudice to the above, the learned CIT(A) erred in not allowing depreciation on the said disallowance of expenditure even after holding the same to be capital in nature."*

From the above, it is evident that ground Nos. 1 and 2 relates to claim of deduction u/s.35AB of the Act and ground Nos. 3 and 4 relates to allowability of claim of business loss relatable to abandonment of the

proposed engine factory. While ground No.2 is argumentative, the ground No.4 is raised as an alternative one only.

3. **Denial of claim of deduction u/s.35AB of the Act :** Relating to the claim of deduction amounting to Rs.13,25,71,334/- u/s.35AB of the Act, the Ld. Counsel submitted that this issue is identical to the one already raised and adjudicated by the Tribunal in ITA No.1381/PUN/2003 for **assessment year 1998-99** decided on 08.08.2018. In this regard, the Ld. Counsel narrated various facts relevant to this issue and submitted this is a case where assessee Mercedes Benz India (MB India) received technical know-how from the Mercedes Benz AG (MBAG) a related Company, Germany in respect of which the assessee allotted shares in kind to the Daimler Benz AG (DBAG) company. Assessee submitted a brief fact sheet in writing and the contents of Para A relating to "Background/history" (Para 1.2 to 1.6). The said Para and Sub-paras are extracted as follows:

> "*1.2 MB India was incorporated on 22 November 1994 as a joint venture between Daimler-Benz AG (now known as Daimler AG) and TATA Engineering and Locomotive Co. Ltd. (hereinafter referred to as 'Telco').*
>
> *1.3 In accordance with the Joint Venture Agreement (dated 22 April 1994), and the Contribution Agreement (dated 17 June 1994Lentered between Daimler Benz AG ('DBAG'), Mercedes-Benz AG ('MBAG'), another group company of Daimler Group, and TELCO, the following facts emerge:*
>
> *-MBAG was to provide MB India technical know-how for manufacture of cars once MB India is incorporated and an agreement in this regard was concluded between MB India and MBAG for a certain consideration.*
>
> *-DBAG shall have an option to bring in (i.e. convert) this sum payable by MB India to MBAG under the technical know-how agreement as its capital contribution.*
>
> *A separate Technical Know-how agreement in this regard was concluded between the Assessee and MBAG for consideration as mentioned in clause 17.1 of the agreement and reproduced below (the agreement for acquisition of technical know-how was executed on 12 December 1994. Refer page 56 & 570f the Paper Book):*
>
> *"(a) a lump sum consideration of OM 56.6 million Deutsche Mark net of taxes*

Payable in four installments as follows:

(i) OM 18.8 million one month after effectiveness of this agreement

(ii) OM 18.8 million upon handing over of technical product documentation as per Article 3, however, not earlier than April 1, 1995

(iii) DM 12.4 million on commencement of commercial production of the industrialized Licensed Vehicles according to Phase III of Annex 2 envisaged to take place in July 1996 but in any case not later than four years after effectiveness of this Agreement

(iv) OM 6.6 million on April 1, 1997 but in any case not later than four years after effectiveness of this Agreement

(b) a running royalty in the amount of 2.75% gross of taxes for a period of seven years ... "

Out of the above, instalments (iii) and (iv) were subsequently waived off when the Amended and Restated Agreement on the Transfer of Technical Know-how was signed (in December 1999).

1.4. The first instalment of the lump sum consideration for the technical know-how acquired was booked as payable in MB India's books in FY 1994-95 (ie AY 1995-96) as per the agreement (ie this was expenditure that MB India incurred on technical know-how in FY 1994-95). In accordance with the above JV and Contribution agreements, DBAG opted to contribute this sum payable by MB India to MBAG as its capital contribution and accordingly, was allotted 3,72,42,800 equity shares on 27 November 1995 after obtaining No Objection Certificate from the AO and also after deducting applicable taxes at source. TDS certificate was issued in the name of MBAG, being the entity from whom the technical know-how was acquired ***(refer page 102 and 107 of Paper Book for No Objection Certificate issued by the AO and TDS certificates)***

1.5 The second installment of the lump sum consideration for the technical know-how acquired was booked as payable in MB India's books in FY 1995-96 (i.e. AY 1996-97) as per the agreement (ie this was expenditure that MB India incurred on technical know-how in FY 1995-96). In accordance with the above JV and Contribution agreements, DBAG opted to contribute this payable by MB India to MBAG as its capital contribution and accordingly, was allotted 4,23,00,000 equity shares on 16 March 1996 (A Y 1996-97) after obtaining No Objection Certificate from the AO and also after deducting applicable taxes at source. TDS certificate was issued in the name of MBAG, being the entity from whom the technical know-how was acquired ***(refer page 104 and 109 of Paper Book for No Objection Certificate issued by the AO and TDS certificates).***

1.6 The Assessee claimed a deduction in respect of the above technical know-how fees (after inclusion of TDS paid of Rs.15,88,22,400 over and above such fees and the R&D cess of Rs.4,89,81,520) under section 35AB of the Act (1/6th in every year) amounting to Rs.16,72,05,320 for AY 1999-00 in its return of income filed under section 139(1) of the Act.

Out of the above, an amount of Rs.13,25,71,334, pertained to the aforementioned 2 instalments of share allotment, has been disallowed and the balance amount of Rs.3,46,33,986, pertained to technical know-how fees paid in cash, has been allowed."

4. Further referring the order of Tribunal in the first round (supra.), the Ld. Counsel informed that vide Para 20 of the Tribunal's order similar claim made in this year, was not allowed in both round by CIT(Appeals) and the Assessing Officer. After giving backgrounds facts and the decision of the Tribunal on the issue, the Ld. Counsel took us through the contents of Para 20 onwards and submitted that the elaborate arguments raised by the Ld. Counsel before the Tribunal which is equally applicable to the present case under consideration, were not allowed. In this regard, the Ld. Counsel read out at Para 20 to 25 of the Tribunal order. Referring to the written submission by the Ld. DR which is extracted in Para 26 of the said Tribunal's order for assessment year 1998-99, the Ld. Counsel mentioned that arguments raised are equally applicable to the present case as well. Further, the Ld. Counsel submitted that Tribunal decided this issue for assessment year 1998-99 against the assessee as per discussion given in Para 27 to 29 along with its sub-paragraphs.

5. Briefly mentioning the some of the reasons for such adverse views of the Tribunal in the matter, the Ld. AR filed a set of documents i.e additional evidences and prayed for admission of the same. Details of the said additional evidences and relevance of the same are discussed as under:

Preliminary Issue

6. **Issue regarding acceptance of additional evidences:** Filing additional supporting evidences before us, the Ld. Counsel filed a letter dated 20th February, 2019 and prayed for admitting of the said additional evidences. Taking us through the index of the additional evidences (Paper Book –III), the Ld. Counsel submitted that Pages from 367 to 420 relates to the additional evidences and the same are read out as under :

Sr. No.	*Particulars*	*Page No.*	
(1)	*(2)*	*From*	*To*
Ground No.1 and ground No.2 : Disallowance of deduction u/s.35AB of the Act for the year under consideration			
1	*Approval from Government of India (Ministry of Industry) for foreign collaboration with MBAG and DBAG dated 17th August, 1994*	*367*	*372*
2	*Approval from Government of India (Ministry of Industry) for foreign collaboration with MBAG and DBAG dated 13 September, 1994*	*373*	*374*
3	*Invoice raised by MBAG on 9 January, 1995 for technical know how*	*375*	*375*
4	*Telefax from DBAG for payment/issue of shares dated 10 January 1995*	*376*	*376*
5	*Application dated 20 January 1995 filed before RBI for in principal approval*	*377*	*378*
6	*In principle approval of RBI dated 15 January 1995*	*379*	*380*
7	*MBAG ROI for AY 1995-96*	*381*	*400*
8	*MBAG ROI for AY 1996-97*	*401*	*420*

Reading these papers along with the contents of Para 27 and it sub-paras of the Tribunal's Order (supra), the Ld. Counsel submitted that the Tribunal decided this issue for the assessment year 1998-99 against the assessee due to gaps in filing certain documents in support of claim of deduction. In the said order from assessment year 1998-99, apart from others, the Tribunal held that the assessee failed to discharge the onus relating to assessee's failure to make the payment to MBAG (the supplier of technical know-how), the reasons for making the payment in kind to DBAG and not to MBAG. In the present case, the Ld.AR demonstrated the

connection with the additional evidences to the gaps pointed out by the Tribunal in the order dated 08.08.2018.

7. On hearing both the parties on the preliminary issues of admission of the additional evidences, we find the nexus of this papers/ additional evidences to the gaps pointed out by us as discussed in Para 27 of the Tribunal's order. Accordingly, **we are of the opinion that said additional evidences are required to be admitted and used for adjudication of the issue raised in appeal. According, we order**.

So far we have dealt with the issues relating to the background facts, precedent of the Tribunal for assessment year 1998-99 and the preliminary issue. Now, we shall take up the arguments of the parties on the issue raised in ground No.1 and 2.

8. **Arguments of Ld. AR :** The Ld. Counsel filed facts sheet explaining back grounds facts of the case and on the issues under consideration. Stating various developments/ events that took place on the issue over a period, the Ld. Counsel submitted that the issue is identical to the one already adjudicated by the Tribunal in assessment year 1998-99. Further, the Ld. Counsel mentioned that if the additional evidences are considered then the gaps pointed out by the Tribunal would stands filled up and in that case, the decision of the Tribunal required to be reversed and in favour of the assessee. Relying on the written submissions, the Ld. AR made the following arguments:

(i) Once deduction u/s.35AB is allowed in the first year, the same cannot be withdrawn in subsequent year.

(ii) Literal interpretation of Section 34AB refers to 'Consideration' and not 'expenditure'.

(iii) It is a well settled principle that heading of the section does not form a part of the statute and the same does not even have any persuasive interpretative value, where the provision of the statue are clear and unambiguous.

(iv)The term 'consideration' which has been used in section 35AB of the Act is understood to have a wider meaning than 'expenditure'.

(v) The term 'consideration' includes payment in kind.

(vi)Without prejudice to the above, even the term 'expenditure' would include payments in kind.

(vii) Meaning of the term 'lump sum' as used in section 35AB also includes payment of consideration in installments if the same is fixed upfront.

(viii) Once the assesee incurs any cost towards acquisition of the know how, deduction for the same was always intended to be allowed to the assessee.

(ix) Since MB India has issues shares in lieu of a genuine pre existing debit (and not against technical know-how received from MBAG) the issue of shares in fact should be considered for consideration in cash.

(x) Mere discharge of consideration by way of allotment of shares would not change the character of the lump sum consideration paid for acquisition of the technical know-how.

(xi) Decision in the case of CIT Vs. EIMCO KCP Ltd. (2000) 242 ITR 659 (SC) (refer page 869 to 873 of the paper book) relied by the Department to deny deduction to MB India is distinguishable.

(xii) Rebuttal to the observation made by the CIT(A) in the order dated 18th July, 2013 for AY 1999-2000 to the effect that the word 'paid' in section 35AB indicates that consideration has to be paid in cash.

(xii) Intention of section 35AB indicates it is an incentive provided and hence it should be given liberal interpretation. Hence, even on merits of deductibility u/s.35AB in the current facts, MB India believes that the disallowance u/s.35AB of the Act in incorrect.

Referring to the additional evidences, the Ld.AR however, submitted considering principle of natural justice, the matter may have to be remitted to the file of Assessing Officer for fresh adjudication. Otherwise, Ld. Counsel mentioned that the claim of the assessee should be allowed when similar claims were allowed in the past i.e. A.Y.1995-96 which was the first claim of

deduction u/s.35AB of the Act. The Ld. Counsel relied on various decisions in support of the claim of the assessee.

9. **Arguments of Ld. DR:** On the other hand, the Ld. DR heavily relied on the order of Assessing Officer and CIT(Appeals). Referring to the issue came up before the Tribunal in the assessment year 1998-99 (supra.), the Ld. DR submitted that Ground Nos.1 and 2 of the assessee should be dismissed considering the facts that the claim of the assesee was not allowed in that year. Referring to the additional evidences, the Ld. DR submitted that the decision of the Tribunal in this year also, the view of the Tribunal in assessment year 1998-99 are relevant even if the additional evidences are admitted and used by the Assessing Officer. Referring to the said additional evidences i.e. Approval from Government of India (Ministry of Industry) for foreign collaboration with MBAG and DBAG dated 17.08.1994 etc., the Ld. DR submitted that the claim of deduction u/s.35AB of the Act has to be decided strictly in accordance with the provision of the Income Tax Act, 1961. Approval of government for allowing the assessee to make payment in kind to the holding company will not alter the decision of the Tribunal of this year. Referring to the documentation on the waiver of certain installments of payment of technical know-how fee, the Ld. DR submitted these papers relates to the quantum issues and not relate to the allowability of the claim or otherwise.

Decision of the Tribunal

10. We have heard both the parties on the issue of allowability of deduction u/s.35AB of the Act for the year 1999-2000. We have also perused the cited order of Tribunal in the own case, facts sheets, legal proposition of documents filed by the assessee, order of the Tribunal in the

first round of the proceedings in assessee's own case for assessment year 1999-2000 and also perused the additional evidences furnished before us.

11. **Whether it is a Covered Issue:** On perusal of the facts as well as decision of the Tribunal in assessment year 1999-2000 in first round as well and Para 1.14 of the facts sheet and legal proposition, it is an undisputed fact that the **issue is identical** and this is the four years of the claim of deduction u/s.35AB of the Act. Considering the covered nature of the issue, in principle, we find it relevant to extracts Para 20 to its sub Para F which reads as under:

> *"20. **Denial of Claim of deduction u/s.35AB of the Act - Facts :** Regarding the denial of deduction u/s.35AB of the Act in relation to the technical know-how fees paid in kind amounting to Rs.12,55,52,666/-, the background facts include that the assessee was incorporated on 22-11-1994. Assessee (DCIPL) also called as MB-India or MBIPL is a joint venture involving Daimler Benz AG (DBAG) and Tata Engineering and Locomotive Company Ltd. (TELCO) at the time of incorporation. As per the Joint Venture agreement, the 'Contribution Agreement' was entered in June 1994 between Daimler Benz AG, Mercedes Benz AG (MBAG) and TELCO. According to which, MBAG-a subsidiary of DBAG, was to provide DCIPL the Indian Company, the technical know-how for manufacture of passenger cars in India. DBAG had an option to convert the sum payable by DCIPL as its capital contribution. Accordingly, being the Ist installment, DBAG the Panchayat Germany was allotted 3,72,42,800 equity shares worth Rs.37,24,28,000/- (DM 18.8 million) in November 1995. In this connection, the AO granted NOC for such allotment and the TDS amounting to Rs.8.05 crores (rounded off) was done as per the rules on the said allotment. A TDS certificate was issued in the name of MBAG who supplied the technical know-how to the assessee. Subsequently, the second instalment was recorded as payable in the A.Y. 1996-97 and allotted shares worth Rs.42.30 crores. In this connection, assessee made TDS of Rs.8.43 crores (around) as per the rules in this regard. It was informed that two other instalments of the payment were waived. A table showing the details of payment of instalments and the quantitative details of Rs.16,19,41,319/- is given as under :*

Particulars	*First Instalment (Rs.)*	*Second Instalment (Rs.)*	*Total (Rs.)*
Shares allotted	*37,24,28,000*	*42,30,00,000*	*79,54,28,000*
TDS	*8,50,13,600*	*8,43,36,800*	*16,93,50,400*
Less : TDS refund	*(1,05,28,000)*	*--*	*(1,05,28,000)*
R&D Cess	*2,36,14,680*	*2,53,66,840*	*4,89,81,520*
Total	***47,05,28,280***	***53,27,03,640***	***1,00,32,31,920***

The total amount of Rs.1,00,32,31,920 was claimed as a deduction over the assessment years AY 1995-96 to AY 2001-02

AY	*Deduction Claimed (Rs.)*	*Deduction Allowed (Rs.)*	*Deduction under dispute (Rs.)*
1995-96	*8,01,76,046*	*8,01,76,046*	*0*
1996-97	*16,89,59,987*	*3,63,88,653*	*13,25,71,334*
1997-98	*16,89,59,987*	*3,63,88,653*	*13,25,71,334*
1998-99	*16,19,41,319*	*3,63,88,653*	*12,55,52,666*
1999-00	*16,72,05,320*	*3,46,33,986*	*13,25,71,334*
2000-01	*16,72,05,320*	*3,46,33,986*	*13,25,71,334*
2001-02	*8,87,83,941*	*1,82,83,944*	*7,04,99,997*
Total	***1,00,32,31,920***	***27,68,93,921***	***72,63,37,999***

21. In the year under consideration, assessee claimed deduction in respect of technical know-how fee u/s.35AB of the Act amounting to Rs.16,19,41,319/- for the A.Y. 1998-99 in the return of income filed u/s.139(1) of the Act (Ref. table above). Out of this amount, Rs.3,63,88,653/- was paid by way of TDS and there is no dispute about the allowing of claim of deduction in this regard. However, the balance amount of Rs.12,55,52,666/- (Rs.16,19,41,319 –Rs.3,63,88,653) in the subject matter of litigation now. During the assessment proceedings, the said manner of payment towards the liability of technical know-how supplied by MBAG to assessee was not accepted by the AO. AO is of the opinion that the said allotment of shares towards capital contribution in DCIPL-the Indian company, does not amount to expenditure at all to become eligible for claim of deduction u/s.35AB of the Act. AO relied heavily on the judgment of Hon'ble Supreme Court in the case of CIT Vs. EIMCO & KCP Ltd. 242 ITR 659. CIT(A) upheld the said disallowance following his order later for the A.Y. 1999-2000.

22. ***Status of similar issue in earlier A.Yrs. (A):*** *An attempt was made by the Revenue to deny the claim us.35AB of the Act in the A.Yrs. 1995-96, 1996-97 and 1997-98 either under the provisions of section 148 or u/s.263 or u/s.154 of the Act, as the case may be. In all these 3 years, the proceedings were quashed for one reason or the other on technical grounds. In effect, this issue is not yet decided conclusively by the Tribunal or any other judicial body on merits. Therefore, the issue raised in this year requires to be adjudicated for the first time on merits.*

(B) *Further, it is also relevant to note that similar addition was made in the A.Y. 1999-2000 and the matter reached the Tribunal. The Tribunal remanded the issue to the Revenue authorities. In the second round of the proceedings, the issue again reached the Tribunal, which will have to be decided based on the outcome or the issue in this assessment year. Further also, it is mentioned that AOs continued to deny the claim of deduction for the later A.Yrs. 2000-01 and 2001-02 too.*

23. During the Assessment/First Appellate proceedings, as evident from the orders of the AO and the CIT(A), it is evident that the claim of the assessee is not allowed for the reason that the allotment of equity shares towards the liability does not amount to "paid" and further, such squiring up of liability falls short of the meaning of the expression "lump sum consideration" or it

does not amount to "consideration" too. It is the reasoning of the AO that the allotment of shares does not amount to incurring of any expenditure or payment of lump sum consideration. Consequently, as per AO, the assessee is not entitled to deduction u/s.35AB of the Act on account of technical fee for transfer of technical know-how. AO relied heavily on the judgment of Supreme Court in the case of CIT Vs. EIMCO & KCP Ltd. (supra). Further, the CIT(A) dismissed the appeal of the assessee on this issue after considering the submissions made by the assessee's counsel before the CIT(A)/AO in connection with the adjudication of the same issue in A.Y. 1999-2000. (Para 2 and its other paragraphs are relevant). Nothing much is discussed by the CIT(A) in his order for this year.

"2.2 The Appellant's Representative reiterated the arguments given before the Assessing Officer and this issue was also decided in appeal in respect of A.Y. 1999-2000 in the case of the appellant vide appellate No. dated and the issue was considered against the appellant and the disallowance made by the Assessing Officer was confirmed. Following that order being on the same issue the disallowance made by the Assessing Officer is confirmed and the ground of appeal is rejected."

24. Aggrieved with the same, the assessee is in appeal before the Tribunal.

BEFORE THE TRIBUNAL

25. ***AR's Arguments :*** *Shri Pramod Achuthan, Ld. Counsel for the assessee along with his partners appeared before us and filed a written note on this issue giving various propositions. To sum up, it is the case of the Ld Counsel for the assessee was critical of AO relying on the judgment of Supreme Court in the case of CIT Vs. EIMCO & KCP Ltd. (supra) and held that the same is inapplicable to the facts of the present case. According to Ld. AR, therefore, the claim of the assessee should be allowed.*

Further, referring to the judgment of Bombay High Court in the case of CIT Vs. Paul Brothers 216 ITR 548, Ld. Counsel for the assessee submitted that when the claim of deduction u/s.35AB is undisturbed in the first assessment year of the claim of deduction u/s.35AB of the Act, the AO cannot disturb the similar claim in the subsequent years. On merits of the provisions of section 35AB of the Act, Ld. Counsel analysed the provisions of the said section and mentioned that the meaning of expressions "paid" and "lump sum consideration" are met in substance. Further, differentiating the expressions, i.e. "expenditure" and "consideration", Ld. Counsel submitted that the expression "consideration" is not similar in meaning to the "expenditure" as referred to by the AO in his order. Expanding the same, Ld. Counsel submitted that "expenditure" restricts itself to something; whereas the expression "consideration" can be in the nature of mandatory payment or Act or Abstinence from doing something at the desire of the parties. He also relied on the judgment of Supreme Court in the case of Chandroji Rao Vs. CIT 77 ITR 743 which differentiates the terms "expenditure" and "consideration". Applying the same principle to the facts of the present case, Ld. Counsel for the assessee submitted that the expression "consideration" is already defined by the provisions of section 2(d) of the Indian Contracts Act, 1872 and submitted that the word "expenditure" is undefined. He also drew our attention to the provisions of section 269A of the I.T. Act and submitted that the "apparent consideration" is defined and the said definition helps the assessee's line of arguments. On the meaning of "consideration" qua the Indian Contracts Act, 1872, Ld. Counsel relied on various decisions which are extracted in para 27 of the written note. Ld. Counsel relied on the judgment of

Supreme Court in the case CIT Vs. Nainital Bank Ltd. 62 ITR 638 stating that the term "expenditure" includes the payment in kind. It is the argument submitted before us without prejudice to the other arguments. In this regard, stating that the provision of section 35AB of the Act, being a deduction provision needs to be interpreted liberally and for this, Ld. Counsel relied on the decision of Delhi Bench of the Tribunal in the case of All India Lakshmi Commercial Bank Officer's Union and others 150 ITR 1 for the proposition on liberal interpretation. He further submitted the heading of section 35AB of the Act states "Expenditure and know-how" and there is no such requirement in the section that what can be deducted has to be necessarily "expenditure". The term "consideration" used in section 35AB of the Act is understood to have a wider meaning than "expenditure". He submitted that, while expenditure restricts itself to something which is paid out of the pockets of the assessee, the 'consideration' can be in the nature of monetary payment or any act or abstinence from doing something at the desire of concerned parties. He further submitted that the term "consideration" would include payment in kind and swapping of shares for the liabilities. For this proposition, he relied on various decisions. H submitted that meaning of the term "lump sum" used in section 35AB of the Income Tax Act include payment of consideration in instalments if the same is fixed upfront and relied on various decisions.

Further, Ld. Counsel relied on the decision of Pune Bench in the assessee's own case for the A.Yrs. 1996-97, 1997-1998 and mentioned that the Tribunal made some references to the issues under consideration though the re-assessment orders/revisions orders was quashed on technical grounds. Ld. Counsel mentioned that, in the context of the observation of the Tribunal in own case, it is simply a method of accounting, mode of payment the allotment of shares to clear the debt definitely has not changed the character of payment of "lump sum consideration" (para No.37 of the written note) paid for acquisition of the technical know-how. Therefore, the claim of deduction u/s.35AB of the Act is allowable.

Further, on the application of Supreme Court judgment in the case of CIT Vs. EIMCO & KCP Ltd. (supra), Ld. Counsel submitted that the said judgment is inapplicable to the facts of the present case and the details are given in Para No.39 and 40 of the written note. He also furnished rebuttal to the conclusions in the order of CIT(A) for the A.Y. 1999-2000 in his note.

Referring to the expression term "Paid" used in the sub-section (1) of section 35AB of the Act, Ld. Counsel for the assessee submitted that the said expression was defined in section 43(2) of the Act, which means "actually paid" or incurred according to the method of accounting upon the basis of which profits and gains are computed under the head Profit and Gains of Business or Profession". Referring to the provisions of section 35ABA of the Act, Ld. AR further submitted that wherever the legislature intended the payment by transfer of money, it has provided so, i.e. 'actually paid' and, in absence of such specific language the provisions of section 35AB of the Act cannot be interpreted against the assessee. Applying the said definition, Ld. Counsel reasoned that the moment the shares are allotted by the assessee to clear the debt, the payment is completed and therefore, it is a case of "actually paid" and in that case, the conditions specified in the sub-section (1) of section 35AB stands met. Further, elaborating the term "Paid", Ld. Counsel for the assessee relied on the Bombay High Court Judgment in the case of CIT Vs. Raymond Ltd., judgment of Karnataka High Court in the case of Amco Power Systems Ltd.(supra) and the decision of Pune Bench of the Tribunal in the case of Kalyani Steels Ltd. DCIT 59 TTJ 316 (Pune). Ld. Counsel for the assessee made the following prayer :

"Further, where accounts are settled by way of entries in the books of accounts and not 'actually paid by way of money', the same should also be treated as 'paid' or incurred'. In this regard, reliance is placed on the decision in case of Teletherm Instruments Co (P.) Ltd. Vs ACIT (1993) 45 ITD 203 (Mad) (refer page 981 to 984 of the Paper Book) where the definition of the term 'paid' as given under section 43(2) was applied in the context of section 35AB to mean that on execution of the agreement entire amount can be said to have been 'paid' as per the mercantile method of accounting.

Hence, based on the aforesaid judicial precedents, it is our humble submission that the term 'paid' does not require actual payment in cash. The term 'paid' includes even incurrence of liability as per the mercantile method of accounting and the same also includes adjustment by way of accounting entries without actual cash outflow. Accordingly, where the liability towards technical know-how fee is incurred by MB India upon signing the technical know-how agreement with MBAG, and further the said liability is settled by issuing shares to DBAG, the same should be considered to have satisfied the term 'paid' for section 35AB."

It is the argument of the Ld. Counsel for the assessee that, by allotment of shares, by the assessee to Daimler Benz AG at the instance of MBAG who supplied the technical know-how to the assessee as per the contractual agreement, the conditions relating to the "lump sum consideration" and "paid" are met. Therefore, the claim of the assessee relating to deduction u/s.35AB of the Act is allowable.

Further, he submitted that these provisions of section 35AB of the Act, being beneficial one there is a requirement of interpreting the provisions in favour of the assessee. For this proposition, he relied on the following judgmental laws :

1. *Bajaj Tempo Ltd. Vs. CIT 196 ITR 188*
2. *CIT Vs. M/s.Vegetables Products Ltd. 88 ITR 192*
3. *Gannon Dunkerly & Co. Ltd. Vs. CBDT 159 ITR 162 (Bom.)*

Ld. Counsel for the assessee submitted that once the assessee incurs any cost towards acquisition of know-how, the deduction for the same was always intended to be allowed to the assessee. In this regard, he referred to amendment of section 32 by the Finance Act, 1998 which allows the depreciation on the intangible assets, such as know-how acquired on or after 01-04-1998. He submitted that the MB India issued shares in lieu of genuine pre-existing debt and the same should be considered for consideration in cash. In this regard, he submitted that, as per the Company Law provisions, the issue of shares against a genuine debt is held to be "issue of shares for cash".

Ld. Counsel further submitted that mere discharge of liability by way of allotment of shares would not change the character of lump sum consideration "paid" for acquisition of technical know-how. Ld.Counsel relied on the decision of ITAT, Pune in the assessee's own case for the A.Yrs. 1996-97 and 1997-98.

Ld. Counsel distinguished the decision relied on the Revenue authorities for denying deduction u/s.35AB of the Act in the case of CIT Vs. EIMCO KCP Ltd. 242 ITR 659 (SC). The reasons are given below :

a. In the EIMCO case the assessee claimed the deduction under section 37(1) whereas in MB India's case, the deduction is claimed under section 35AB which was introduced later in the point of time due to change in intention of the Government (to attract flow of technology into India) to allow deduction for such payments.

In MB India's case, the transfer of technical know-how for consideration (between MB India and MBAG) and allotment of shares (by MB India to DBAG) are two separate transactions entered after incorporation of the company. However, in EIMCO where there was only a single transaction I obligation of contribution of capital by the subscribers, which was made by EIMCO by way of contribution of technical know-how.

b. Supreme Court decision in EIMCO was in the context of deduction under section 37, which required an item to be "expenditure" in order to be deducted as compared to words "lumpsum consideration" used in section 35AB which is wider than the term "expenditure" .

c. It should be noted that in MB India's case, it was much after incorporation and date of the technical know-how agreement that Daimler Benz AG exercised its option to contribute to share capital in kind by taking over MB India's liability to MB AG towards technical knowhow. However, in case of EIMCO, the subscribers to the memorandum of association at the very outset agreed that share capital would be contributed in kind as a part of subscription capital.

d. Reliance is also placed on the judicial pronouncement of the Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs Reinz Talbras Pvt. Lid. (2001) 252 ITR 637 (Del) (refer page 968 to 970 of the Paper book). While interpreting the ratio of EIMCO decision, the Hon'ble High Court held that the amount attributable to technical know-how which is discharged by way of issue of shares by a new company was not revenue expenditure, but it is to be treated as capital expenditure. Thus, the Delhi HC has not treated technical know-how as contribution towards share capital but a capital expenditure.

e. Hon'ble ITAT in MB India's own case for AY 1996-97 and AY 1997-98 has also rightly observed that the Supreme Court decision in EIMCO (supra) is not applicable to the facts of MB India.

f. Hon'ble Madras High Court in EIMCO's case itself refers to payment of technical know-how as a consideration in two separate places in its order.

He further submitted that AO issued NOC to MB India Ltd., in order to issue equity shares towards remittance of technical know-how fees. Thus, the AO agreed to pay the technical know-how fees by way of issue of equity shares. Also, MB India Ltd. deducted requisite taxes at source while making the said payment. The fact of deduction of TDS evidences the same.

Ld. Counsel referred to the Budget Speech 1985 for explaining the purpose of provisions inserted by Finance Act, 1985 and relied on couple of decisions. Thus, Ld. Counsel for the assessee prayed for allowing deduction u/s.35AB of the Act to the assessee.

*26. **DR's Arguments :** Per Contra, Ld. DR for the Revenue made the following submissions :*

"3. The first installment of this lump sum consideration for the technical know-how was payable in MB India's books in the FY 1994-95, i.e. AY 1995-96 and Daimler AG opted to contribute this sum payable by MB India to MBG as its capital contribution and accordingly, was allotted 3,72,42,800 equity shares on 27th November, 1995 (i.e. AY 1996-97). The second installment of this lump sum consideration for the technical know-how was payable in MB India's books in the FY 1995-96 i.e. AY 1996-97 and Daimler AG opted to contribute this payable by MB India as its capital contribution and accordingly was allotted 4,23,00,000 shares on 16th March, 1996, i.e. AY 1996-97.

4. MB India claimed deductions u/s 35AB of the IT Act for Rs.16,72,05,320 for the AY 1999-2000 out of which Rs.13,25, 71,334/- was disallowed and Rs.3,46,33,986/ - paid in cash was allowed.

5. The contention of the Assessing Officer(now referred as AO) was that technical know-how fees discharged by way of allotment of shares does not amount to 'expenditure' in view of the decision of the Hon'ble Supreme Court in the case of EIMCO K.C.P. Ltd. V. CIT [2000] 109 Taxman 151(SC). Thus the Revenue heavily relied on the above referred judgement and therefore, the reliance is placed on the orders of the AO and the Ld. CIT(A) in this regard by the undersigned.

6. The Ld. CIT(A) vide order dated 29th May, 2003 upheld the disallowance u/s. 35AB. The Hon'ble ITAT vide appeal 968/PN/03 remanded back the matter to the AO stating that adjudication on admissibility of the said deduction can only be done in the first year of the deduction. Now the first year i.e. the FY 1994-95 relevant to the AY 1995-96 the AO reopened the assessment proceedings u/s 147, which was quashed by the Hon'ble ITAT on account of technical grounds as the reassessment proceedings were not held to be valid. The contention of the Revenue therefore, is that adjudication on admissibility on deduction u/s.35AB could not be examined on merits and, therefore, deduction u/s. 35AB cannot be said to have been allowed in the AY 1995-96 i.e. the first year on merit. During the course of the hearing before the Hon'ble ITAT, the judgement of the Hon'ble Supreme Court in the case of DCIT Bangalore Vs ACE Multiaxes System Ltd. [(2017) 88 taxmann.com 69 (SC) was relied upon to make a proposition that each assessment year is a different assessment year, except for block assessment. The Hon'ble Supreme Court on the issue of liberal interpretation has held that construing liberally does not mean ignoring conditions for exemption. The copy of the impugned case law has already been submitted before the Hon'ble Bench during the course of the argument made by the undersigned.

7. During the course of the argument, the undersigned had also relied on the decision of the Hon'ble High Court of Bombay in the case of CIT vs Triumph International Finance (I) Limited [2012] 22 taxmann.com 138 (Born.) to make a proposition that where loan deposit has been repaid merely debiting account through journal entries the assessee has contravened the provisions of section 269T of the Income Tax Act, 1961. During the relevant Assessment Year it was observed that instead of repaying loan and receiving sale price of shares both parties had agreed that the said amount i.e. a loan and sale consideration to be set off in their respective books by journal entries. In the impugned case before us the assessee has the technical know-how fees has been discharged by

way of allotment of shares by merely entering into journal entries and therefore cannot be termed as "lump sum consideration" for payment of technical know-how as per the provision of section 35AB of the I T Act, 1961. The referred order has already been submitted by the undersigned during the course of the hearing.

8. The argument of the Ld. Counsel for the appellant that the word 'consideration' used in section 35 of the Income Tax Act, 1961 includes payment in cash or in kind is difficult to be accepted for the simple reason that heading of section 35AB itself is 'expenditure on know-how'. From the perusal of language of the section 35AB(1) which is reproduced here :

.....
.....

it can be clearly seen that consideration has to be paid in cash and not in kind as claimed by the appellant. The wording in the section 'paid' and amount 'so paid' is quite clear as amount cannot be used in kind.

9. The above issue is also supported by the Hon'ble High Court of Bombay in the case of CIT vs Bharat Bijlee Ltd.(2014) 46 taxmann.com 257 (Born.). The Hon'ble Bombay High Court held that consideration determined by parties in terms of allotment or issue of bonds / preferential shares was not a sale and it was a case of exchange. The copy of the judgement delivered by the Bombay High Court is enclosed."

DECISION OF THE TRIBUNAL

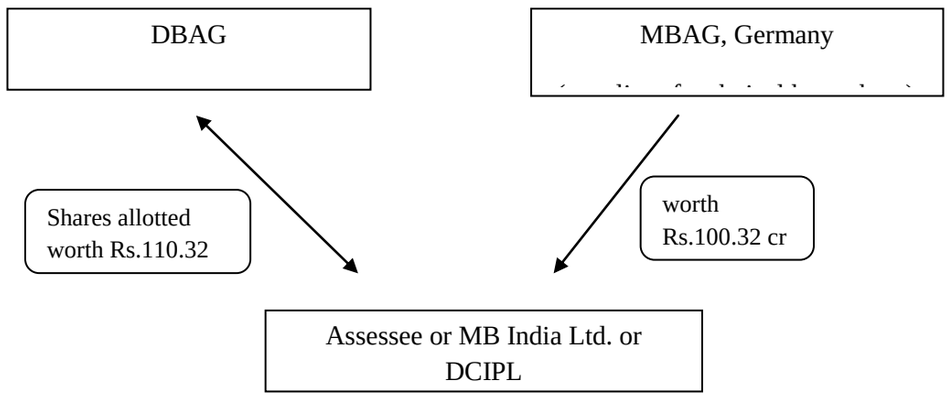
27. We heard both the parties on this legal issue of allowability of deduction u/s.35AB of the Act. We have also perused the written submissions as well as the case laws placed before us by both the representatives. In fact, some of the paragraphs of the written submissions from both the sides are extracted in this order considering the immediate relevant of the same. Therefore, we proceed to adjudicate this issue as per the contents in the succeeding paragraphs.

A. ***The provisions of section 35AB :*** *The provisions of section 35AB of the Act relating to 'expenditure on know-how is extracted here as under :*

"35AB(1) Subject to the provisions of sub-section (2), where the assessee has ***paid*** *in any previous year [relevant to the assessment year commencing on or before the Ist day of April, 1998]* ***any lump sum consideration*** *for acquiring any know-how for use for the purpose of his business, one-sixth of the amount* ***so paid*** *shall be deducted in computing the profits and gains of the business for that previous year, and the balance amount shall be deducted in equal instalments for each of the five immediately succeeding previous years."*

Explaining of the provisions : *The above provision provides for allowing deduction equivalent of 1/6th of the amount paid by the assessee for acquiring know-how for use for the purpose of his business in any previous year specified in the sub-section (1). The said deduction is allowable in six equal instalments on fulfillment of the basis of 'paid' and 'any lump sum consideration'. Expression 'paid' and 'so paid' becomes significant. The balance of the amount, so paid, shall be deductible in equal instalments for each of the five immediately succeeding previous years. In the instant case,*

the above provisions need to be applied in the factual matrix where assessee acquired the know-how from MBAG, a Germany based 100% subsidiary of the DBAG, a flagship company of the group. The consideration involved is DM 56.6 Million. After considering the sum waived of by the supplier, for unspecified reasons, the assessee was to pay DM 18.8 million before 01-04-1995. In terms of Indian Rupees (INR) the total amount payable by the assessee to the supplier of know-how is Rs.100.32 crores. Assessee discharged this liability for issuing the shares worth Rs.47,05,28,280/- in the first instalment and the shares worth Rs.53,27,03,640/- in the second instalment. Discharge of the liability did not happen in terms of actual payment of money in cash or bank to the actual supplier of the know-how. Instead, assessee allotted shares to the flagship company after making requisite TDS worth of amount Rs.17 crores (rounded off) out of total sum payable of Rs.100.32 crores. This amount is credited to the Government too as per the TDS provisions. There is no dispute about it. It is not known as to why assessee did not allot shares to the supplier of the know-how, i.e. MBAG and instead, allotted the shares to the DBAG, the flagship company? Assessee could not demonstrate before us specifying the reasons as to why the assessee did not allot shares to the supplier of the know-how. It is also not known as to under what circumstances, the MBAG mandated the assessee to allot the shares to DBAG. Further, it is not known if the liability of MBAG is discharged or not till day. Ld. Counsel could not file the book entries if any on this issue in the books of account of the supplier of the know-how. In any case, the assessee failed to actually pay the money to MBAG and the liability was not discharged by way of payment of actual money to the MBAG. Further, it is also not known as to why MBAG waived of part of the consideration payable in the context of acquiring of the know-how. DM 19 million was waived of for some unknown reasons and net amount is Rs.100.32 crores only. Assessee considered the same as deduction u/s.35AB of the Act, deductible in various assessment years commencing from 1995-96 onwards. The following chart shows the transaction among MB India Ltd., MBAG and DBAG :



With this legal and factual background of the issue, we proceed to explain if the expression "paid" used in the sub-section (1) of section 35AB covers this arrangement of assessee in not paying the money at all to the supplier MBAG and allotting of shares equivalent of Rs.100.32 crores to the DBAG, the flagship company of the assessee.

*B.**Meaning 'Paid', 'Actually paid' Etc.:** During the proceedings before us, Ld. Counsel for the assessee submitted that the expression 'paid' used in the sub-section (1) of section 35AB is broad enough to include the transactions*

under scrutiny involving the element of shares to the DBAG who is not the actual supplier of the know-how. Know-how is actually supplied by the MBAG. It is an admitted fact that the assessee did not make the payment in cash/banking channels to the MBAG, the supplier of the know-how. It is also an admitted fact that the assessee did not allot any shares leave alone worth of Rs.100.32 crores to the supplier of the know-how. The allotment is done to the DBAG. Nothing is brought to our notice to demonstrate the reasons for making this kind of allotment to DBAG.

Interpreting the meaning of the expression 'paid', Ld. Counsel submitted that the said expression is generic in nature and wide enough to accommodate the above transactions under consideration. It is the case of the Ld. Counsel for the assessee that wherever the actual payment of money/banking channel is involved, the expression 'actually paid' is used in other sections of the Act. In this regard, he brought our attention to the provisions of section 35ABA, relating to 'expenditure for obtaining the right to use spectrum for rendering services'. In the section, the following expression is used when it came to allowing the claim of deduction, i.e. '…… for which the payment has actually been made to obtain a right to use spectrum.' Further, he brought our attention to the provisions of section 43 relating to 'definitions of certain terms relevant to income from profits and gains of business or profession' and submitted that clause (2) defines the term 'paid' and the same is extracted here as under :

(2) " paid" means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under the head" Profits and gains of business or profession"

This definition of 'paid' is applicable to the provisions of section 35AB of the Act. Relying on various decisions including the decision of Kalyani Steels Ltd. Vs. DCIT reported in 59 TTJ 316 and others, Ld. Counsel for the assessee submitted that 'paid' means 'actually paid' or 'incurred' according to the method of accounting.

28. On the other hand, the case of the Revenue is that the expression 'paid' always means 'actually paid' or 'incurred' refers to squiring up the liabilities by way of book entries. In the assessee's case, as per the AO, the amount is not 'actually paid' to the supplier or incurred on accrual basis involving the supplier. The allotment of shares is done to the DBAG who has nothing to do with the supply of the know-how to the assessee. Further, it is the case of the Revenue that even if it is deemed as shares allotted to the MBAG, supplier of the know-how, it is a case of 'exchange' of technical know-how against the allotment of shares and the same is outside the scope of the expressions 'paid' or 'actually paid', as the case may be.

29. On hearing both the sides on the meaning of the expression 'paid', we are of the opinion that the expression 'paid' is already defined in the statute which means 'actually paid'. The use of the expression 'actually paid' in section 35ABA of the Act is necessary in the context of actual payment and not otherwise. Therefore, the expressions used in section 35AB and the expression 'actually paid' in section 35ABA has to be interpreted after considering the definition specifying the said expression 'paid' in section 43(2) of the Act. If the same is considered, in our view, the shares so allotted by the assessee cannot be considered as allotted towards the liability to the MBAG, the supplier of the company. Ld. Counsel for the assessee could not demonstrate as to why the shares were allotted to the DBAG and if the said allotment was done for squaring up of any liabilities between MBAG to DBAG.

On this issue, it is a failure to discharge the onus from the assessee's side. Notwithstanding the same, we also find if the allotment of shares constitute exchange of shares against acquisition of know-how. Normally, the exchange occurs between the parties with reference to the goods. It may involve money worth and certainly not the money alone. In effect, the payment becomes relevant issue only with reference to the money wherever the squaring up of the entries are involved on accrual basis, the expression 'incurred' was used in the provisions of section 43(2) relating to definition 'paid'. In the instant case, the assessee has neither paid nor allotted shares to the supplier of the know-how. Therefore, we are of the opinion that the arguments raised by the Ld. Counsel for the assessee are not legally sustainable on this issue. Accordingly, the same are dismissed.

C. ***Any Lump sum consideration :****Coming to the meaning of the expression 'any lump sum consideration" used in the provisions of section 35AB of the Act, the assessee relies on the provisions of section 269A relating to the definition of 'apparent consideration'. The said definition was given in relation to any immovable property transferred or exchange or taken on lease etc. The same does not imply to define the expression 'any lump sum consideration' used in the provisions of section 35AB of the Act. Further, Ld. Counsel referred to the definition 'consideration vide the Contract Act, (supra) and we find the same is different qua the expression 'expenditure' within the meaning of 'any lump sum consideration' if it covers the impugned transaction of allotment of shares to the DBAG, who is the sister concern. It is a case where assessee never paid money directly to the supplier of the technical know-how or allotted equivalent value of shares to the supplier. In our view, it is not a straight case of making payment/allotting shares to the supplier of the technical know-how. The expression 'consideration' is not synonymous with the word expression 'expenditure' used in section 37(1) of the Act despite the fact the title of section 35AB refers to the word expression 'expenditure'.*

D. ***Liberal Interpretation :*** *Regarding the arguments linked to the liberal interpretation of the provisions of section 35AB of the Act, it is our observation that the said provisions are obviously deduction oriented provisions. The onus is on the assessee to demonstrate the facts leading to the applicability of the said section. As detailed in the preceding paragraphs of this order the information relating to the relationship between the DBAG and MBAG are not coming forth from across the borders. It is an admitted fact that the reasons are absent as to why the shares were allotted to the non supplier of the technical know-how. We understand had the assessee eventually allotted the shares directly to the supplier, our inference could have been different. The payment by way of allotment of shares is never to the supplier of the technical know-how in this case which makes inapplicability of the principle of liberal interpretation to the facts of the present case. The transactions between the assessee on one side and the MBAG and DBAG on other side are not transparent so far as the transactions between the MBAG and DBAG are concerned.*

E. ***Judgment in the case of EIMCO K.C.P. Ltd. :*** *Further, the applicability of the decision of Hon'ble Supreme Court in the case of EIMCO KCP Ltd., reported in 242 ITR 659 (SC), we find the Ld. Counsel for the assessee is right in stating that the said decision was delivered in the context of the provisions of section 37(1) of the Act qua the 'expenditure' and the 'revenue expenditure'. Facts of this case include that the said company was floated originally by the American company as well as Indian company. The technical know-how was supplied to the Indian company against which shares were allotted by the Indian company directly to the Foreign company in lieu of transfer of technical know-how. Allotment was not for the sister*

concern of the American company. The facts of this case are not applicable to the case on hand where the distinguishable facts include (1) the applicability of provisions of section 35AB of the Act; (2) the shares were allotted to the other group concern (DBAG) of the supplier (MBAG) and not to the supplier of the technical know-how; (3) absence of facts/information leading the supplier of the know-how to allot the shares by the assessee company to the DBAG etc. In any case, this decision was relied upon by the AO out of context. Therefore, it is our categorical finding that the AO and the CIT(A) erred in relying on this judgment which is delivered in connection with the 'expenditure' or otherwise and the 'Revenue expenditure' or otherwise.

Further, on the application of ratio of Judgment of Hon'ble Karnataka High Court in the case of Amco Power Systems Ltd., Judgment of Hon'ble Bombay High Court in the case of Raymond Ltd. and the order of the Tribunal in the case of Kalyani Steels Ltd. (supra), we find these decisions were delivered in the context of payments to the supplier of the technical know-how whereas the facts of the present case differ in principle as the shares were allotted not to the supplier of the company but to group concern of the supplier. Further, there is no information on the reasons which led the assessee to make allotment of shares to DBAG and not to the supplier MBAG.

F. Regarding the Ld. Counsel's observation about linking the issue to the Tribunal orders for the A.Yrs. 1996-97 and others are concerned, we find the observation linked to the method of accounting is a casual observation and it does not provide any conclusive ratio which is useful for adjudication of the present appeal. Therefore, the same are dismissed as infructuous."

12. From the above, it is evident that the requisite facts are common to the issue raised in the present appeal. Arguments of both the parties, past history of this claim of earlier assessment year etc are also discussed and find them similar too. Explaining provision of Section 35AB of the Act, we have analysed the discussion on meaning of expression '**paid**' or '**actually paid**' etc. We have also discussed on the expression of **"any lump sum consideration"** and "**liberal interpretation"** of the said section 35AB of the Act, being deduction provision. Distinguishing the judgment of the Hon'ble Supreme Court of India in the case of CIT Vs. EIMCO & KCP Ltd., 242 ITR 659, the claim of the assessee was not allowed in the assessment year 1998-99. Most of the stated arguments of Ld. AR stand attended by our order for the assessment year 1998-99.

In the current assessment year under litigation, the few distinguishing facts includes the (i) the approval of the Government for payment in kind, (ii) the payment to the DBAG (iii) the decisions of Government in waiver of certain installments of technical know how fee. Whether these letters/ approvals alter the said decision of the Tribunal for the year under consideration, is a matter of the remand proceedings ordered by us while dealing with the preliminary issues in the preceding paragraphs of this order. Therefore, we direct the Assessing Officer to adjudicate the issue of additional evidences after granting reasonable opportunity of being heard to the assessee. Thus, subject to the outcome of additional evidences which is being now remanded to the file of Assessing Officer, we find ground Nos.1 and 2 raised by the assessee are required to the dismissed as above. Thus, **ground Nos. 1 and 2 raised in appeal by the assessee are dismissed protanto.**

13. **Allowability of business loss/ expenditure-Abandonment of proposed engine factory**: The facts of the issue raised in ground Nos. 3 and 4 are that MB India is engaged in the manufacture and sale of Mercedes-Benz passenger cars in the Indian market. One of the parts required in manufacturing of cars is the engine. The manufacturing of engines required by MB India was outsourced. MB India had plans to set-up a new plant for manufacturing of engines. The proposed new plant was to be under common management and control, and have common funding and resources and thus was interconnected with the existing business unit/operations. For this purpose, MB India incurred **expenditure for designing and layout** of the proposed plant in AY 1996-97 amounting to Rs 4,77,19,411/-. The said expenditure was treated as capital work in progress in the books of the accounts as MB India was then of the opinion that the

same should be included as cost of plant/building pertaining to the proposed new unit. However, in the subsequent years of Indian operations, it was realized that the entire projections on basis of which the decision to invest into the engine manufacturing project was taken and the planning and layout expenditure was incurred were changed on account of slow-down in the automotive sector, especially for the luxury cars segment.

Thus, in the midst of the above developments and considering the market conditions of the automobile sector, **MB India decided in FY 1998-1999 to abandon setting up of new plant** for engine manufacturing and continue with outsourcing of the product since in addition to above: MB India was operating from a rented premises and incurring of additional expenditure would have resulted in heavy cash outflow which under the then prevailing market circumstances was not feasible It was more viable to continue to operate from rented premises and outsourcing of engine manufacturing rather than setting up a new factory. Thus, the said expenditure ultimately did not result in creation of any asset for MB India. Accordingly, **MB India discarded the said project** and consequentially, **wrote off the expenses incurred for designing** and planning of factory from the profit and loss account in AY 1999-2000. In computing the taxable profits and tax liability for AY 1999-2000, MB India claimed a deduction of the above write off.

14**. Before Assessing Officer/ CIT(Appeals):** The above decision of the assessee was not accepted by the Income Tax Authorities. They are of the opinion that the project claiming the assessee set up expenditure being of capital nature, is not allowable. Aggrived with the said decision of the Revenue, the assessee raised ground No.3 and 4 in their appeal. Ground

No.4 relates to grant of depreciation in case ground No.3 is not allowed. Before us, the Ld Counsels made various arguments/submissions.

15. **Ld. AR's arguments :** The Ld. Counsel made various submissions and also submitted before us written note which reads as under:

> "3.12 ***Writing off of expenditure incurred for a new plant linked to the existing business is akin to loss incurred for running the business-allowable deduction from the profits of the business:***
>
> *Income under the head "Profits and Gains of Business or Profession" is to be computed as per provisions of section 28 of the Act (i.e. the charging section). It has been principally held in numerous judicial precedents that expenditure / losses incurred in connection with business operations are deductible in deriving profits / income of that business even in cases where the same may not be explicitly provided in the Act.*
>
> *Income under the head "Profits and Gains of Business or Profession" is to be computed as per provisions of section 28 of the Act (i.e. the charging section). It has been principally held in numerous judicial precedents that expenditure / losses incurred in connection with business operations are deductible in deriving profits / income of that business even in cases where the same may not be explicitly provided in the Act.*
>
> *As observed by the Hon'ble ITAT in its order dated 21 January 2009 for AY 1999-00, the decision for writing off of expenses of a new plant was based on commercial expediency of the Appellant. Hence, the same has to be treated as business loss deductible under section 28 of the Act. The relevant observations of the Hon'ble ITA T are already reproduced above. Moreover, reliance is also placed on the following judicial pronouncements, which based on the above principle have held that expenditure incurred on project expenses which have been subsequently discarded are allowable as a business loss:*
>
> - ***CIT v. Anjani Kumar Co. Ltd. (2003) 2591TR 114 (Raj) (refer page 257 of the Paper Book)***
>
>   *The assessee had made advance payment for purchase of agriculture land with the intention to set up a boiler factory which later did not materialize and the advance paid became irrecoverable……*
>
> - ***Excel Industries Ltd. vs. Deputy Commissioner of Income Tax (2004) 86 TT J 840 (Mumbai) (refer page 265 of the Paper Book)***
>
>   *In the aforementioned case, the assessee incurred expenses on new projects. The said project expenses were capitalized in the books of accounts in the earlier years and shown as capital work in progress. However, during the year under appeal, these projects were abandoned and the project expense was written off as the projects were found commercially unviable. The*

Hon'ble Mumbai ITAT under the given circumstances held that since the projects abandoned were undertaken in the course of existing business and the assessee had not obtained any advantage in the capital field, the projects expenses written off constituted revenue loss and eligible as business loss under section 28.

.....

- ***CIT vs M/s Idea Cellular Ltd. Appeal No. 516 of 2015 (Bombay HC)*** *In this case, the assesse incurred expenses on projects for setting up construction of cell towers, which was later abandoned due to the site being found unsuitable. The Hon'ble Bombay He held that such cell towers would not have been an independent source of income and since no new asset came into existence, such expenditure is allowable business expenditure. (Refer Para 9 on Page 1011 of the paper book).*

.....

3.14 Judicial pronouncements of various High Courts which have allowed deductibility of feasibility study I drawing. designing and layout expenses for an abandoned project

Without prejudice to the above, reliance is placed on the following judicial precedents wherein expenditure incurred on project feasibility report I drawing and designing were held to deductible where the same pertained to backward I forward integration of the existing operations:

- ***Bralco Metal Industries vs Commissioner of Income Tax (1994) 206 ITR 477 (Bom) (refer page 300 of the Paper Book)***
- ***DCIT v Assam Asbestos Ltd (2003) 263 ITR 357 (Gau) (refer page 306 of the Paper Book)***
- ***CIT v Graphite India Limited (1996) 221 ITR 420 (Cal) (refer page 311 of the Paper Book)***

.....

....

3.18 ***Prayer***

Based on the above, the Appellant prays that the said expenditure / loss be treated as business loss / expenditure and allowed as a deduction in computing taxable profits for the AY 1999-00.

4. ***Ground No.4 : Without prejudice to the above, the learned CIT(A) erred in not allowing depreciation on the said disallowance of expenditure even after holding the same to be capial in nature.***

This ground is not pressed."

16. **Ld. DR's arguments :** On the other hand, the Ld. DR for the Revenue submitted that this issue on allowability of the expenditure is identical in principle to that of the capital work in progress written off by the assessee in assessment year 1998-99. Brining our attention to the contents of Para 30 to 36, the Ld. DR submitted that arguments advanced by the Ld. DR in that appeal is equally applicable to the facts of the present issue. The decision on the remitting of the matter to the file of Assessing Officer has also been demonstrated by the Ld. DR.

Decision of the Tribunal

17. We have heard both the sides on this issue, examined the facts relating to the claim and perused the orders of Revenue Authorities in general and order of the Tribunal in assessee's own case for preceding assessment year on the issue of allowability of the expenditure relatable to the abandonment of proposed engine factory has come up for adjudication. In principle, it is a settled legal proposition that expenditure incurred in connection with any aborted/abandoned project of the assessee constitutes an allowable expenditure. We find Revenue Authorities did not go into the facts relating to the items of expenditure. There is no finding of fact on the capital nature of each of the expenditure. Various decisions including that of the Hon'ble Jurisdictional High Court (supra.) supports the claim of the assesse. Assessee, however, could not file the details of expenditures even before us. The Ld. Counsel for the assessee however submitted before us that no expenditure is incurred for purchasing of fixed assets like land, building or any other similar fixed assets. According to him, expenditure is incurred only on account of fees paid to the purchase of certain intangible rights. However, no evidences are available on record to demonstrate the

above assertions Ld. AR for the assessee. Therefore, we are of the opinion that the issue raised in ground Nos. 3 and 4 are required to be remitted to the file of Assessing Officer with identical directions as given in Para 36 of the Tribunal's order in assessment year 1998-99 (supra.). Accordingly, **ground No.3 and 4 raised in appeal by the assessee are allowed for statistical purposes**.

18. In the result, **appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced on 01st day of August, 2019.

Sd/-	Sd/-
(**विकास अवस्थी** /VIKAS AWASTHY)	(**डी. करुणाकरा राव**/D. KARUNAKARA RAO)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य /ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 01st August, 2019.
SB

<u>आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :</u>

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-V, Pune.
4. The CIT-V, Pune.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, "**ए**" बेंच, पुणे / DR, ITAT, **"A"** Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

निजी सचिव /Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	23.07.2019	Sr.PS/PS
2	Draft placed before author	26.07.2019	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		