

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “J”, MUMBAI
BEFORE SHRI SHAMIM YAHYA ACCOUNTANT MEMBER &
SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 2483/Mum/2015 (Assessment year: 2009-10)

M/s Positive Packaging Industries Ltd, 12A-06, B-Wing, Parinee Crescenzo, C-38/39, G-Block, Bandra Kurla Complex, Bandra (E), Mumbai-400 051 PAN : AAACP2836Q	Vs	DCIT Circle 3(2), Room No. 608, Aayakar Bhawan, M.K.Road, Mumbai-20
APPELLANT		RESPONDEDNT

Appellant by	Shri Bhaumik Goda (AR)
Respondent by	Shri Vodal Raj Singh (CIT-DR)
Date of hearing	04-02-2020
Date of pronouncement	22-04-2020

ORDER

Per Pawan Singh, Judicial Member:

1. This appeal by assessee is directed against the order of learned Commissioner of Income-tax (Appeals) {‘CIT (A)’}-57, Mumbai dated 20-02-2015 for AY 2009-10. The assessee has raised the following grounds of appeal:-

- “1. On the facts and circumstances of the case, the Learned CIT(A) has erred in confirming an adjustment of Rs. 9,59,103/- to international transaction of receipt of interest on loans granted by the appellant to Positive Packaging Industries Nigeria Ltd., an associated enterprise.
2. On the facts and circumstances of the case, the Learned CIT(A) has erred in confirming an adjustment of Rs. 97,52,114 to international transaction of sale of colour printing machine (asset forming part of block of assets) by the appellant to its Positive Packaging United (M.E.) FZCO, an associated enterprise.

3. Without prejudice to the Ground No. 2, on the facts and circumstances of the case, the Learned CIT(A) has erred in not considering, for the purpose of comparing with the actual selling price, the recomputed WDV of the colour printing machine after reducing foreign exchange fluctuation loss which has been added as per the provisions of Section 43A of the Act.
 4. On the facts and circumstances of the case, the Learned CIT(A) has erred in confirming an adjustment of Rs. 3,69,096/- to international transaction of sale of pouching machine (asset forming part of block of assets) by the appellant to its Dubai Flex Pack (L.L.C.), an associated enterprise.
 5. On the facts and circumstances of the case, the Learned CIT(A) has erred in considering the quotations of unrelated parties for purchase of machines as the additional evidences and not admitting them without appreciating the fact that they were already submitted to the Transfer Pricing Officer.
 6. Without prejudice to the Ground No. 2 & 4, on the facts and circumstances of the case, the Learned CIT (A) has erred in taxing the difference, between the arms length price determined by the Transfer Pricing Officer and the actual price at which the machines were sold to the associated enterprises, as income of the appellant instead of reducing it from the written down value of the plant & machineries block in view of the provisions of Section 43(6)(c) of the Act.
 7. On the facts and circumstances of the case, the Learned CIT(A) has erred in confirming the disallowance of interest of Rs. 10,048/- paid by the appellant u/s. 201(1 A) on delayed payment of TDS.
 8. On the facts and circumstances of the case, the Learned CIT(A) has erred in not adjudicating the Ground No. 7 raised before him regarding the depreciation on goodwill merely because it was a fresh claim made by the appellant and did not arise from the assessment order.”
2. Brief facts of the case are that assessee is a company engaged in the business of manufacturing of metalized flexible packaging materials, rotogravure cylinders, metalized & cast polypropylene (CPP) films. The assessee, while filing return of income for the relevant assessment year under consideration the assessee in Form 3CEB reported

international transaction with its associated enterprise (AEs) with regard to the payment of interest on loan and for sale of colour printing machine and punching machine to its AEs. Consequent upon reporting international transaction, the AO made reference to transfer pricing officer (TPO) for making transfer pricing adjustment. During the proceedings before TPO, the TPO noted that during the financial year 2008-09, the assessee also received interest on loan provided to its AE in Nigeria. The assessee recovered interest of Rs.68,50,734/- @10% on the loan amount. The assessee has taken a loan from Standard Chartered Bank (SCB) on which interest was payable at 8.40% pa, the assessee advanced the said amount to its AE. The TPO issued show cause notice asking as to why 300 basis points should not be added to the cost of borrowing for other risk factors. The assessee filed its reply dated 10-10-2012. In reply, the assessee stated that the assessee recovered interest of Rs.68,50,734/- during the year which was the rate @10% on loan provided to AE in Nigeria. The assessee also availed loan from SCB at 8.4%. The assessee further contended that as per the loan agreement with SCB, the purpose of availing loan was to finance/ expansion modernisation of the project of the assessee in Nigeria. The assessee paid 8.4% interest to SCB and recovered 10% interest from its AE. Accordingly, the transaction should be considered as at arm's

length price (ALP). The contention of the assessee was not accepted by TPO. The TPO concluded that though the assessee has charged interest from its AE at the higher rate than its cost of borrowing the said rate is not sufficient to secure its interest against various risk factors such as entity risk, currency risk and country risk. The assessee has put a mark up of just 1.6% on its cost of borrowing. It was further noted that it is an internationally known practice to put a mark up of 200 to 300 basis point even on LIBOR driven rate. The TPO considered 3% as reasonable mark up on the cost of borrowing and benchmarked the interest chargeable and worked out the adjustment on difference of Rs.9,59,103/- and made addition to the value of international transaction of loan transaction.

3. The TPO also noted that during the relevant financial year, as reported by the assessee, the assessee sold colour printing machine to its AE i.e. Positive Packaging United (M.E.) FZCO ('PPU'). The assessee furnished the details of equipment and accessory cost of Rs.3.55 crores, preoperative expenses of Rs.2.06 crores and exchange fluctuation cost of Rs.0.94 crores, thus totalling Rs.6.56 crores. The TPO noted that the rate at which machinery was sold to AE was less than the written down value (WDV) of the machinery. Accordingly, the TPO issued show cause notice asking as to why suitable adjustment

should not be made on the basis of book value of the machinery sold. The assessee, vide its reply dated 10-10-2012 contended that the machinery was obsolete and the capacity utilisation over the past three years was less than 20%. The independent valuer valued it at Rs. 70 lakhs and the cost of repair was Rs.1.20 crore and accordingly submitted that the sale of the printer at the sale consideration of Rs.71,10,000/- was at ALP. The contention of assessee was not accepted by TPO, and concluded that the assessee has not followed the independent and objective price discovery mechanism. The assessee has relied on valuation report of independent valuer which is self serving document. The valuer has mentioned technical defect in the machinery which contradicts the assessee's claim for under utilisation of capacity. If there is no sufficient capacity utilisation, the question of wear and tear damage of parts does not arise. However, the valuer without any basis or break-up of component wise cost has estimated repair of Rs.1.20 crores. Accordingly, TPO rejected the submission of assessee and benchmarked the transaction on the basis of written down value of machinery. The written down value of machinery as assessee's submission dated 10-10-2012 was Rs.1,68,62,114/- whereas the sale of consideration was Rs.71,10,000/-. The TPO, considering the written down value concluded that the arm's length price (ALP)

falls outside (+) / (-) 5% of the transaction. Therefore, the difference between the ALP and the transaction value was suggested for adjustment. Accordingly, the TPO suggested adjustment of Rs. 97,52,114/-. The TPO further noted that the assessee also sold one more machine namely pouching machine to its AE in Dubai at Rs. 1,27,980/-. Though, the transaction was reported in Form 3CEB, but no benchmarking was made by the assessee. Further the assessee has not furnished any material to substantiate the cost mechanism. The TPO, in absence of any other material regarding the market price of the machine, the WDV in the books of the assessee, was used to determine the ALP of the transaction. The WDV of this machine was Rs. 4,97,076/-. And the value of transaction was Rs. 1,27,980/-, which was clearly beyond +/- 5% of the transaction value, accordingly the difference of Rs. 3,69,096/- was proposed for adjustment.

4. On receipt of report of TPO, the AO made additions in the draft assessment order dated 04.03.2013. The copy of draft assessment order was served on the assessee. The assessee vide its application dated 26.03.2013 exercised its option to file appeal before Id. CIT (A). The Ld. CIT (A) upheld all three additions, in the impugned order dated 20-02-2015. Thus, further aggrieved, the assessee has filed present appeal before us.

5. We have heard the submission of Ld.AR of the assessee and Ld. DR for the revenue and perused the material available on record. Ground No. 1 relates to transfer pricing adjustment (TP adjustment) on account of interest on loan to AE. The ld. AR for the assessee submits that the assessee has set up its AE in Nigeria and South Africa. The assessee availed a loan of US Dollar 50,00,000/- from Standard Chartered Bank (SCB) @ 8.4% interest rate per annum during financial year under consideration. The loan amount was advanced to its AE in Nigeria for setting up a unit. The assessee entered into a facility agreement dated 16th July 2006 with the Standard Chartered Bank, copy of which was provided to the lower authorities. During the relevant period the assessee received interest of ₹ 68,50,734/-. The assessee charged interest @ 10% from its AE in Nigeria. The assessee reported this transaction in its Form 3CEB. During the Transfer Pricing adjustment, the assessee was asked to show cause as to why 300 basis point should not be added to the cost of borrowing for other risk factor for determining ALP. The assessee explained that there is direct nexus of loan availed and advanced to its AE. This can be demonstrated by way of facility agreement with Standard Chartered Bank, where the purpose of loan is mentioned as for setting up a unit in Nigeria. Further, the assessee had recovered the mark up of 1.6% over the borrowing cost of

8.4% and accordingly the receipt of interest at 10% is to be considered at arm's length. The TPO not accepted the contention of assessee and applied mark up at the rate of 3% on the cost of borrowing and accordingly made adjustment of ₹ 9,59,103/-. The learned CIT (A) also failed to appreciate the submission of the assessee and upheld the adjustment suggested by TPO. The learned AR of the assessee submits that approach of lower authorities is not correct. The transaction of loan is at APL and no adjustment was warranted. The learned AR for the assessee further submits that TPO may be directed to determine ALP by considering LIBOR (London Interbank offered Rate) + 2% as per the decision of Hon'ble Bombay High Court in CIT Versus Aurionpro Solution Private Limited (99 CCH 0070 Bombay).

6. The learned AR for the assessee further submits that arm's length interest rate for loan advanced to foreign subsidiary by Indian company should be computed based on market determined interest rates applicable to currency in which loan has to be repaid as held by Hon'ble Delhi High Court in CIT Versus Cotton Naturals (I)(P) Ltd (55 taxmann.com 523 Delhi). The learned AR also relied upon the decision of Hon'ble Bombay High Court in CIT Versus Tata Autocomp System Private Limited (56 taxmann.com 206 Bombay), wherein it was held that where assessee advanced loans to its AE

situated in Germany, rate of interest was to be determined on the basis of rate prevailing in Germany, where loan had been consumed.

7. On the other hand the learned departmental representative (DR) for the revenue supported the orders of lower authorities. The ld DR for the revenue did not controverted the decisions of Hon'ble Delhi High Court in CIT Versus Cotton Naturals (I)(P) Ltd (supra) and of Hon'ble Bombay High Court in CIT Versus Tata Autocomp System Private Limited (supra).
8. We have considered the rival contention of both the parties and have gone through the orders of authorities below. We have also deliberated on various case laws relied by learned AR of the assessee. The TPO suggested the adjustment by adding mark up of 3% by taking view that the assessee has charged interest from its a at the rate higher than its cost of borrowing, the said rate is not sufficient to secure itself against various risk factors such edge entity risk, currency risk and country risk. The learned Commissioner (Appeals) affirmed the action of TPO by taking view that there is a risk associated with the unsecured loan, one has to take into account the risk while deciding ALP. Accordingly while considering all the risk associated with such transaction the mark up added by TPO is reasonable.

9. The learned AR of the assessee while making his submission vehemently relied upon the decision of Hon'ble Bombay High Court in case of Tata Autocomp System Ltd (supra), Aurionpro Solution Ltd (supra) and Hon'ble Delhi High Court in Cotton Naturals (I)(P) Ltd (supra). In Cotton natural supra the Hon'ble Delhi High Court held that arms length interest rate for the loan advanced to foreign subsidiary by Indian company should be computed based on market determined interest rate applicable to currency in which loan has to be repaid. Similarly in Tata Autocomp System Ltd (supra) it was held that where the assessee advanced loans to its AE situated in Germany, the rate of interest was to be determined on the basis of rate prevailing Germany where loan had been consumed. The Hon'ble Rajasthan High Court in CIT versus Vaibhav James Ltd [2017] 88 taxmann.com 12 (Raj) also held that where assessee extended loan to its AE, adjustment should be made at average LIBOR rate existing at the time. Considering the aforesaid decision of different high courts and the submission of learned AR of the assessee vide the assessing officer /TPO to recompute the adjustment on account of interest on loan to its AEs by taking LIBOR +200 basis point. In the result this ground of appeal is partly allowed.

10. Ground No. 2 to 6 relates to adjustment on account of sale of asset (Colour Printing Machine and Punching Machine) to AE. The learned AR of the assessee submits that during the relevant financial year, the assessee sold colour printing machine to its AE in FZCO for ₹ 71 lakhs and a punching machine at ₹ 1,27,980/-to its AE in Dubai. The assessee sold both the asset at the best available price. The assessee obtained quotations for colour printing machine. The quotations for both the asset i.e. colour printing machine and punching machine was of ₹ 58.00 lakhs and Rs.62.55 lakhs only, which were less than the price charged from AE. The TPO considered the written down value (WDV) of colour printing machine amounting to ₹ 1.68 crore as per Income Tax Act, against the ALP of ₹ 71 lakhs as determined by assessee. With regard to the punching machine, the TPO considered WDV of ₹ 4.97 lakhs as per Income Tax Act against the ALP in respect of the said machine. The learned AR of the assessee submits that both the asset were sold at the best price of available from the AEs, which were higher than the comparable quotation of available in the market and the same should be considered at ALP. Further, there was a business rational and commercial expediency for selling colour printer to its AE as the existing version of colour printing machine had been phased out. The repair and maintenance of colour printing

machine was very high being an obsolete item was very high. The assessee also furnished the report of independent Chartered Engineer/valuer for the valuation of colour printer. The TPO disregarded the report of valuer and made adjustment on the basis of WDV both the assets. The TPO has no right to disregard the valuation report, if the valuation report was not acceptable to the TPO, he should have refer the issue to the expert. In support of his submissions the Id AR for the assessee on the point that valuation report of expert should not be rejected, relied on the following decisions;

- ACIT Vs Positive Packaging Industries Ltd (ITA No. 4641/M/2016,
- CIT Vs Titan Time Product Ltd (2015) (58 taxmann.com313 Bombay),
- First Advantage Quest Research Limited Vs ACIT (ITA 1546/M/2017).

11. The Id AR for the assessee on the point that valuation report is at ALP relied on the following decisions;

- GKN Sinter Metals (P) Ltd Vs ACIT [2016] 71 taxmann.com 297 (Pune- Trib),
- ACIT Vs Interump Hydraulics India (P) Ltd [2017] 82 taxmann.com (Chennai –Trib),
- ACIT Vs Koch Chemical Technology Group (india) Ltd [2015] 64 taxmann.com 464 (Mumbai Trib),

- TRUMPF India (P) Ltd Vs ACIT [2015] 53 taxmann.com 515(Mumbai Trib)
- Tecumash Product India (P) Ltd Vs ACIT [2014]41 taxmann.com 385,
- ACIT Vs Caparo Engineering India Ltd (P) Ltd [2018] 91 taxmann.com 330 (Delhi- Trib),
- ACIT Vs Sarens Heavy Lifts (I) (P) Ltd [2018] 93 taxmann.com 431(Delhi Trib).

12. On the other hand the ld. DR for the revenue supported the order of the lower authorities. The ld. DR for the revenue has not made any comment on the various decisions relied by ld. AR for the assessee.

13. We have considered the rival contention of both the parties and have gone through the orders of authorities below. We have also deliberated on various case laws relied by learned AR of the assessee. First, we are taking up the claim/ issue/ adjustment related with the transaction of sale of colour printing machine. The TPO suggested adjustment of Rs. 97,52,114/- by taking view that WDV of colour printing machine was ₹ 1.68 crore , however, the assessee charged from its AE of ₹ 71 lakhs only. Thus, the transaction is not at arm's length price (ALP) being falls outside (+) / (-) 5% of the tolerance range. The TPO accordingly suggested the difference between the WDV and the cost recovered by the assessee for adjustment. The TPO has not made reference of valuation report in his order. The ld CIT(A) affirmed the action of the

TPO by taking the similar view. The Id. CIT (A) not accepted the report of valuer by taking view that it is a self serving document. The Id. CIT (A) also held that in the valuation is nothing but more than estimation and that there is no item wise valuation. The copy of the quotations furnished by the assessee to substantiate the cost was not considered the Id CIT(A) by taking view that these documents were not filed before and treated as additional evidence. It was held that no application for admitting additional evidence under Rule 46A for admitting such additional evidence was filed by assessee. Before us, the Id. AR for the assessee vehemently argues that the valuation report should not ordinarily be rejected and made reliance on various case law including in assessee's own case for AY 2010-11 in ITA No. 4641/M/2016 (supra) and other cases, which we have mentioned above.

14. The coordinate bench of Tribunal in assessee's own case for AY 2010-11(supra) in para-6 of the order held that if the TPO was not agreeing with the view of the independent valuer, he should have referred it to the expert instead of undertaking the value himself, he is neither technically qualified nor competent to undertake the valuation. Further, the coordinate bench of Tribunal in First Advantage Quest Research Ltd Vs DCIT (sura) while considering the valuation report of

unquoted shares with regard to sale of shares by assessee to its AE held that that for fair valuation of unquoted shares of a corporate entity only one factors should not be considered. In other words share price depends upon many factors. It is said that the mere capitalization of actual past earnings would not produce a reasonable result in such cases and that the emphasis has to be on prospective earning capacity rather than actual past earnings-although naturally the latter has to be used as a starting point to calculate the former(para 3.5). It was further held that the purpose behind introducing the TP provisions in the Act was to ensure that goods/ services purchased/sold or rendered/availed by the group entities should be at market rate. It was found that to avoid taxes the AE.s were not showing the market price of IT.s (international transactions). So, to curb the misuse of proximity of group concerns located in India and outside India provisions of chapter X were included in the statute. What the legislature wanted was that the price of IT.s with AE should be at arm's length i.e., that an independent person in the market would pay/receive the same price as paid/received by the group entity for the good/services. If the surrounding circumstances lead to the conclusion that price charged by the AE.s is not the normal fair market value, the departmental authorities can make adjustment to the price shown by the assessee.

But, the adjustments cannot be made without any basis. In short, the basis of TP adjustment is determining fair market value of IT.s entered in to by the assessee. (para 3.5.1).

15. Coordinate bench of Pune Tribunal in GKN Sinter Metals (P) Ltd Vs ACIT (supra) while considering the grounds of appeal, where the TPO made suggested adjustment by disregarding the report of independent valuer held as under;

“6. We have heard the submissions made by the representatives of rival sides and have perused the orders of the authorities below. We have also considered the decision on which the Id. AR of the assessee has placed reliance. The only issue raised in the appeal before the Tribunal is with regard to the valuation of capital asset purchased by the assessee from its AEs. The assessee in support of his submissions has placed reliance on the valuation certificate issued by an Independent Chartered Engineer at UK whereas the Revenue has placed reliance on the valuation made by TPO by extrapolating the arithmetic mean of operating margin of the companies manufacturing similar machine in India and applying CUP method to markup the import price at ALP.

7. The contention of the Id. AR is that the authorities below have disbelieved the valuation certificate issued by an independent Chartered Engineer, whereas the same has been accepted by the customs authorities and even in the subsequent assessment year i.e. assessment year 2009-10 the valuation certificate issued by the same Chartered Engineer has been accepted by the TPO.

We are of the considered view that if the TPO was not satisfied with the valuation certificate given by an independent Chartered Engineer at UK, the TPO should have referred the matter to DVO who is an

expert to determine the value of such capital assets. The TPO has erred in extrapolating the average arithmetic mean of operating profit of companies manufacturing similar machines in India.

8. The Chennai Bench of the Tribunal in the case of *Coastal Energy (P.) Ltd. v. Asstt. CIT* [\[2011\] 12 taxmann.com 355/46 SOT 286 \(URO\) \(Chennai\)](#) for the assessment year 2006-07 decided on 13-07-2011 has occasion to deal with the issue, where the TPO refused to accept the value adopted by the Customs Authority. The Tribunal has held that the value adopted by the customs authorities should be accepted as the customs authorities assign value to the imported goods on scientific formulated method and their valuation is not an arbitrary exercise. The relevant extract of the observations of the Chennai Bench of the Tribunal are as under:

"6. The next question to be considered is whether this price variation noticed by the TPO should be taken as the basis for making adjustment in the transfer pricing. The grievance of the assessee is that the comparable price has been obtained by the TPO from the customs authorities and the valuation of the customs authorities need not necessarily be realistic as that department is more interested in collecting import duties. We should state without fear of contradiction that the customs authorities are assigning values to the imported goods on the basis of scientifically formulated methods and they are responsible for making a fair assessment value of the imported goods. The valuation made by the customs authorities is not an arbitrary exercise. But on the other hand, it depends upon large volume of international data classified according to internationally accepted protocol. Therefore, it is not possible to say that the credibility of the price rate furnished by customs authorities needs to be discounted."

The view taken by the Chennai Bench of the Tribunal has been followed by the Delhi Bench of the Tribunal in the case of *C-Dot Alcatel-Lucent Research Centre (P.) Ltd. (supra)*.

9. The Hyderabad Bench of the Tribunal in the case of *Tecumseh Products India (P.) Ltd. (supra)* in a similar case where the value of imported machine was not accepted by the TPO, the Tribunal held that to determine the value of machinery the best way is to refer the machinery to valuation officer. Without doing so, the TPO or DRP cannot determine value at Nil and consequently deny depreciation claim to the assessee. The relevant extract of the findings of the Tribunal are as under :

"(F) (i) As briefly stated above, Assessee has imported certain machinery (old as well as new machinery) from TPC USA. The purchase price of these machineries was based on fair market value and supported by an independent valuer's report M/s SGS Global Trade Solutions Inc., who certified second hand machinery procured by Assessee. As Assessee submitted before the authorities, the comparative analysis of the machinery prepared indicates that purchase price paid to M/s TPC USA is lower than the value determined by M/s SGS Global Trade Solutions. Assessee paid customs duty and also countervailing duty and the valuation was accepted by the authorities at the time of import. Though TPO as well as DRP were of the opinion that the machinery does not have any value, we do not understand on what basis they have come to this opinion. There is no dispute with the fact that the machinery was imported and used in Assessee's business for manufacturing of its compressors/parts, so, there is no dispute with reference to usage of second hand machinery. It is also not the case of the revenue that machinery imported was kept idle and Assessee unnecessarily paid the amount to the AE. This being so, the value paid by Assessee duly supported by valuation report

cannot be ignored. In case of any doubt on the matter, the best way is to refer the machinery to the valuation officer under the IT Act. Without doing so, the TPO or the DRP has no base to determine the value at Nil and consequently denying the depreciation claim of the assessee while at the same time, the payment of custom duty and countervailing duty are considered as value of cost. Not only that, as submitted by Assessee and as seen from the Table furnished, new machinery worth US\$ 500,965 was also treated as old machinery and valuation was determined at Nil. This shows non-application of mind by TPO as well as by DRP."

10. The Mumbai Bench of the Tribunal in the case of *Koch Chemical Technology Group (India) Ltd. (supra)* the Tribunal has held that before rejecting the valuation report, the TPO is duty bound to refer the valuation of machinery to DVO. The TPO not being an expert to determine the value of machine cannot ascertain the fair market value of machine. The relevant extract of the findings of the Tribunal are reproduced here-in-under :

"7. It is to be noted that the invoices submitted by the assessee indicate that the assessee has paid the price for purchase of machineries to the A.E. as claimed by the assessee. It is also to be noted that the purchase price paid by the assessee is supported by report of approved valuer from the U.S.A. Therefore, it is very much evident that to substantiate the price paid for purchase of certain second hand machineries from the A.E., the assessee has produced documentary evidences including the valuation report. Whereas, the Transfer Pricing Officer, apart from making some general observations to the effect that the details of date of purchase by the A.E., depreciated value in its books are not available, has quantified the value of the two machineries at 50% of the value claimed by the assessee. On what basis he adopted 50% of the value as ALP

has not been provided by the Transfer Pricing Officer. In our view, when the assessee has submitted a report from the approved valuer indicating the fair market value of machineries purchased, before rejecting such valuation report, the Transfer Pricing Officer was duty bound to refer the valuation of the machineries to the DVO as per the procedure laid down under the statute. The Transfer Pricing Officer not being an expert to determine the value of machineries and there being no other material brought on record by him to demonstrate that he made enquiry of any kind to ascertain the fair market value of machineries, he could not have quantified the value of the machineries at 50% of the value shown by the assessee. The DRP, in our view, has also sustained the disallowance without proper application of mind and in a mechanical manner. "

The Tribunal further remarked that since the TPO failed to make reference to the DVO for valuation of asset and made 50% disallowance of purchase value of machinery in an arbitrary manner, there is no point in remitting the issue back to the TPO and give him second innings. The observations of the Tribunal in this regard are as under:

"7.2 We may observe, the learned Departmental Representative had submitted before us that at this stage also, the matter can be remitted back to the file of the Transfer Pricing Officer for making a reference to the DVO for valuation of assets. However, we are unable to accept such contention of the learned Departmental Representative for the simple reason that when the Transfer Pricing Officer has failed to refer the valuation to the DVO and on the contrary has proceeded to quantify the value of the machineries at 50% by adopting a method which is not in conformity with the statutory provisions, in our view, the matter cannot be restored back to him again for giving him a second

innings. Considering the fact that 50% disallowance made out of the purchase value of machineries is without any basis and in violation of statutory provision, we are inclined to delete the addition made on account of adjustment made by the Transfer Pricing Officer by disallowing 50% of purchase value of second hand machineries. Accordingly, ground raised by the assessee is allowed."

11. In the present case, we observe that the TPO has made upward adjustment of the international transactions in respect of valuation of capital asset purchased by the assessee from its AEs. The said adjustment has been made by the TPO without making reference to the DVO and rejecting the valuation report from an independent Chartered Engineer furnished by the assessee. Undisputedly the valuation report was accepted by the Customs Authorities for the purpose of levy of import duty. We do not concur with the action of TPO for making such adjustment. The Act provides for reference to Valuation Officer for valuation of capital assets in case of any doubt. The TPO has erred in extrapolating avg. operating margin of Indian manufactures and applying CUP method to markup import price and determine ALP.

In so far as objection of TPO with respect to variation in the book value of capital asset and the price at which assessee has purchased the capital asset is concerned, it is not necessary that book value and market value of the capital asset are at par. Our view is further fortified by the decision rendered by the Bangalore Bench of the Tribunal in the case of *Intel Asia Electronics Inc. India v. Asstt. DIT* [\[2011\] 9 taxmann.com 197/46 SOT 48 \(URO\) \(Bang.\)](#).

We observed that the DRP while dealing with the objections of the assessee in respect of valuation of capital asset has not properly appreciated the facts and circumstances. The DRP has merely examined one aspect of the transaction relating to pricing of capital

asset i.e. the price paid by assessee to acquire old machine viz-a-viz price of new model of same machine. The DRP has failed to take holistic view of the transaction.

12. Thus, in view of the facts of the case and various decisions discussed above, we set aside the findings of the authorities below on this issue and direct the Assessing Officer to delete the addition made on account of adjustment in the value of capital asset. Accordingly, ground no. 3 raised in the appeal by the assessee is allowed.”

16. In view of the aforesaid factual and legal discussion and respectfully following the same, we are of the view that if the TPO was not satisfied with the valuation report by an independent Chartered Engineer, the TPO should have referred the matter to DVO who is an expert to determine the value of such capital asset. Considering the ration of decisions of coordinate bench as referred above, we direct the AO/TPO to delete the addition/ adjustment made on account of sale of Colour Printing Machine.

17. So far as adjustment on account of transaction of Punching Machine to AE in Dubai is concerned, the ld. AR for the assessee has not specifically submitted that any expert report of valuer was obtained nor any supporting evidence is brought to our notice, to take contrary view. No case law is brought our notice. Therefore, we affirm the findings of the lower authorities with regard to the adjustment on international

transaction of Punching Machine. In the result these grounds of appeal are partly allowed.

18. Ground No. 7 relates to disallowance of interest under section 201(1A) on delayed payment of tax deducted at source (TDS). During the submissions the ld. AR submits that he is not pressing this ground of appeal. Considering the submissions of the ld. AR for the assessee this ground of appeal is dismissed as not pressed.
19. Ground No. 8 relates to not adjudicating the issue regarding the depreciation on Goodwill {Ground No. 7 before ld CIT(A)}. The ld AR for the assessee submits that the assessee raised specific ground of appeal before ld CIT(A). The ld CIT(A) dismissed the ground by taking view that the same is not emanating from the order of assessment. The ld. AR submits that this ground may be admitted for adjudication as additional ground of appeal, the facts relating to this ground of appeal is available on record as the amount of goodwill is entered in the block of asset and no new facts are required to be brought on record. The ld AR further submits that similar depreciation was allowed by ld CIT(A) in appeal for AY 2008-09 and no further appeal was filed by the revenue. In support of his submission the ld AR relied on the order of the ld CIT(A) for AY 2008-09 dated 24.03.2011. The ld counsel also relied on the decisions of Bombay High Court in

CIT Vs Pruthvi Brokers & Shareholders [2012] 349 ITR 336 (Bom) and CIT Vs B.G. Shirke Construction Technology (P) Ltd [2017] 395 ITR 371(Bom).

20. On the other hand the ld DR for the revenue relied on the order of ld CIT(A). The ld DR for the revenue further submits that in case the additional ground is admitted, the issue may be restored to the file of AO/CIT(A) for adjudication afresh in accordance with law.
21. We have considered the rival contention of both the parties and have gone through the orders of authorities below. We have also deliberated on various case laws relied by learned AR of the assessee. We have noted that the ld CIT(A) rejected the corresponding ground of appeal by taking view that there is no reference of issue in the assessment order. The ld. AR for the assessee vehemently submitted that the facts relating to this ground of appeal is available on record as the amount of goodwill is entered in the block of asset and no new facts are required to be brought on record. This fact is not controverted by ld. DR for the revenue. Thus, considering the facts that no new facts are required to be brought on record and the decision of Bombay High Court in CIT Vs Pruthvi Brokers & Shareholders (supra), we admit this ground of appeal.

22. We have further seen that similar depreciation was allowed by Id CIT(A) in appeal for AY 2008-09. Considering the facts that we have admitted the additional ground of appeal, therefore, we restore this issue to the file of assessing officer to decide the claim/ issue afresh in accordance with law. Needless to order that before deciding the claim/ issue the assessing officer shall grant opportunity of hearing to the assessee and would pass the order in accordance with law. In the result this ground of appeal is allowed for statistical purpose.
23. In the result the appeal of the assessee is partly allowed.

Order pronounced in the open court on 22-04-2020.

Sd/-

Sd/-

(Shamim Yahya)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 22 April, 2019

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai