

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

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.2060/Del./2015
Assessment Year: 2010-11

M/s. Xerox India Ltd., 5 th & 6 th Floor, Vatika Business Park, Sector-49, Sohna Road, Gurgaon	Vs.	DCIT, Circle-27(2), New Delhi
PAN :AAACM8634R		
(Appellant)		(Respondent)

Appellant by	Shri Tarandeep Singh, Adv.
Respondent by	Shri Surenderpal, CIT(DR)

Date of hearing	21.07.2020
Date of pronouncement	05.08.2020

ORDER

PER O.P. KANT, AM:

This appeal by the assessee is directed against final assessment order dated 29/01/2015 passed by the Deputy Commissioner of Income-tax, Circle-27(2), New Delhi [in short 'the Assessing Officer'] pursuant to the direction dated 18/12/2014 of the learned Dispute Resolution Panel (DRP). The grounds raised by the assessee are reproduced as under:

1. *That on facts and in law the orders passed by the Assessing Officer [hereinafter referred as the "AO"] / Dispute Resolution Panel [hereinafter referred as the "DRP"] / Transfer Pricing Officer*

[hereinafter referred as the "TPO"] are bad in law and void ab-initio.

2. *That on facts and in the law the AO/TPO/DRP erred in making/proposing/upholding an addition to total income of Rs. 15,42,32,773/- under Chapter X of the Income Tax Act, 1961 [hereinafter referred as "the Act"] on account of Advertisement, Marketing and Sales Promotion {hereinafter referred as "AMP"} expenses.*
 - 2.1 *That on facts and in law the TPO/DRP erred in not appreciating that in absence of a "transaction" as envisaged under section 92F of the Act between the appellant and its AE for brand promotion or for establishing marketing intangibles the TPO had no jurisdiction to propose an adjustment on account AMP expenses.*
 - 2.2 *That on facts and in law the TPO erred in holding and the DRP inter alia erred in upholding/observing that the:*
 - (i) Appellant had incurred AMP expenditure of Rs.13,70,95,799/- on promotion of proprietary marks and for development of marketing intangible for the benefit of AE.*
 - (ii) AMP expenditure of Rs.13,70,95,799/- incurred by the appellant is an "International Transaction" u/s 92B of the Act.*
 - (iii) Selling Expenses (for eg. Discounts, Commission) incurred by the appellant are in the nature of AMP expenses.*
 - (iv) AE is directly benefited by any expenditure incurred by assessee on AMP.*
 - 2.3 *That on facts and in law the AO/TPO/DRP erred in not appreciating that benchmarking on the basis of expenses incurred by an assessee is not recognizable as per the provisions of Chapter X.*
3. *Without Prejudice, that on facts and in law the AO/DRP/TPO erred in selecting an inappropriate comparable set for the purpose of benchmarking alleged AMP transactions.*
4. *That without prejudice on facts and in law the TPO/DRP erred in making/upholding the applicability of a markup of 12.50% on the alleged excessive AMP expenses incurred by the appellant on behalf of the Associated Enterprise.*
5. *Without Prejudice, that on facts and in law the TPO/DRP erred in not appreciating that once the main "international transactions"*

executed by the appellant as a Distributor have been accepted to be at ALP then no further adjustment on account of alleged AMP transactions were called for.

- 5.1 *Without Prejudice, that on facts and in law the AO/TPO/DRP erred in not appreciating that the alleged transactions of AMP were "closely linked" with the main activity of Distributorship carried on by the appellant and hence it cannot be segregated and benchmarked on a stand-alone basis.*
6. *That on facts and in law the AO/DRP erred in making/upholding a disallowance of Rs 33,34,814/- being depreciation allowance on capital assets converted into stock in trade.*
7. *That on facts and in law the AO/DRP erred in charging/upholding levy of interest u/s 234B & 234C of the Act.*
8. *That on facts and in law while computing the final tax liability the AO erred in not granting credits for:*
 - (a) Advance Fringe Benefit Tax of Rs. 20,00,000/-*
 - (b) TDS Certificates of Rs. 56,49,994/-*
9. *That on facts and in law, the assumption of jurisdiction by the AO/TPO to determine Arm's Length Price is bad in law and void ab-initio.*

That the appellant prays for leave to add, alter, amend and/or vary the ground(s) of appeal at or before the time of hearing.

2. Briefly stated facts of the case are that the assessee company is one of the company of "Xerox Group". The company operates in document management industry, providing a range of office equipment, software solutions and document management services. The assessee filed return of income on 30/09/2010 declaring total income of ₹ 24,89,29,283/-, which was subsequently revised on 31/03/2012 for claiming more credit of tax deducted at source (TDS). The case was selected for scrutiny and in view of the International transactions reported by the assessee, the matter for determination of their arm's-length was

referred to the learned Transfer Pricing Officer (TPO). The learned Transfer Pricing Officer (TPO) proposed adjustment of ₹ 11,44,61,024/- to the International transaction of 'procedure of finished goods for resale'. While proposing the adjustment, the learned TPO held that most appropriate method for determination of arm's-length price (ALP) of purchase of the finished goods should be "Resale Price Method" (RPM) instead of "Transactional Net Margin Method" (TNMM) applied by the assessee. The learned TPO also observed that the assessee had incurred a huge amount (₹ 16,79,22,000/-) on Advertisement and Market Promotion (AMP) expenses which has created market intangibles including brand value in favour of Associated Enterprises and thus being an international transaction, same need to be benchmarked. He applied Bright Line Test (BLT) for computing the AMP adjustment. The learned TPO allowed the AMP expenses of ₹ 3,08,26,201/- and balance AMP expenses of ₹ 13,70,95,799/- was considered as incurred for creating marketing intangibles in favour of the AE. He applied a markup of 12.5% on the said amount and proposed total AMP adjustment of ₹ 15,42,32,773/-. In the draft assessment order dated 12/03/2014 the Assessing Officer included the adjustment proposed by the learned TPO. In the said draft assessment order, the Learned Assessing Officer also proposed disallowance of depreciation on de-capitalized asset amounting to ₹ 33,34,814/-.

2.1 Aggrieved with the addition proposed, the assessee filed objection before the learned DRP. On the issue of the adjustment to the transaction of purchase of finished goods, the assessee submitted for computation of the correct gross profit margin of

the assessee as huge chunk of the business was coming from the rental income and considerable expenses were incurred on replacement of the spare parts. The learned DRP directed to consider above submission of the assessee. In the effect giving order of the learned DRP, the learned TPO computed nil adjustment to the transaction of purchase of the finished goods. As regard to the adjustment of AMP expenses, the learned DRP rejected the objection of the assessee. The issue of Disallowance of Depreciation on capital assets converted into a stock-in-trade was also maintained by the learned DRP. In compliance to the direction of the Learned DRP, the Assessing Officer has passed the impugned final assessment order, wherein he made addition of ₹ 15,42,32,773/- for adjustment in arm's-length price to AMP transaction and addition of ₹ 33,34,814/- for depreciation disallowed on de-capitalized assets. Aggrieved with the above additions, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. This appeal of the assessee has been heard through videoconferencing facility after due consent of the parties. The learned DR also consented to argue the appeal through videoconferencing.

4. Before us, the learned counsel of the assessee filed a paper-book and other documents electronically. The learned counsel submitted that identical issue of AMP adjustment the case of the assessee has been deleted by the Tribunal in assessment year 2008-09. He referred to Para- 22 to 34 of the order of the Tribunal, wherein the BLT approach for computing adjustment to AMP expenses has been rejected. The learned counsel submitted

that in the decisions cited before the Tribunal in assessment year 2008-09, the existence of international transaction of the AMP has been rejected both on the ground of the excessive spending and use of the logo. The learned Counsel, however, submitted that para 35 of the order of the Tribunal may not be followed as the appeals involving AMP issues have not been heard by the Hon'ble Supreme Court and thus restoring the issue to the TPO for following the decision of the Hon'ble Supreme Court, which yet has not been pronounced, is not justified.

5. The Learned DR, on the other hand, relied on the order of the learned TPO and learned DRP and submitted that facts of the year under consideration are different from the assessment year 2008-09. He submitted that in the year under consideration learned TPO has analyzed creation of the marketing intangibles in view of the evidences brought on record as against the earlier year, where the Tribunal rejected the contention of the revenue mainly on the ground that no evidences were brought on record to support creation of market intangibles. According to him, the decision of the Tribunal is distinguishable on facts. Then, he submitted that impact of explanation to section 92B which has been inserted by the Finance Act, 2012, has also not been considered by the Tribunal in the said decision.

6. In the rejoinder, the learned Counsel of the assessee submitted that in the decision of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. Vs. CIT, (2015) 64 taxmann.com 150 (Delhi) relied upon by the Tribunal, the explanation to section 92B has been duly considered. He also submitted that objection of the cogent material and evidences

towards marketing intangibles have also been considered by the Hon'ble High Court in the cases referred before the Tribunal and therefore decision of the Tribunal is squarely applicable on the facts of the instant case.

7. We have heard rival submission of the parties on the issue in dispute. The Tribunal in assessment year 2008-09 has adjudicated the issue after considering the various decision of the Hon'ble High Court is as under:

“22. Ld. AR for the taxpayer further contended that use of any logo across the globe is not considered equivalent to enhancing a brand. However, ld. TPO proceeded to observe on the basis of general observation that the mandatory use of brand name or logo of the overseas parent company will lead to the creation of a 227 15 ITA No.5528/Del./2012 marketing intangibles in favour of the taxpayer. However, when we examine the facts of this case in entirety, no doubt taxpayer uses “Xerox” logo but all the information in relation to contract address, brand ambassador, product, market and other similar details in the advertisement is confined to India only. So, it cannot be said to promote the Xerox brand world-wide. Moreover, when it is undisputed fact that the taxpayer has not paid any royalty for use of Xerox brand name, incidental benefits, if any, to overseas entity does not call for any compensation for the taxpayer.

23. In case of Valvoline Cummins (P.) Ltd. vs. DCIT (2017) 84 taxmann.com 191 (Delhi), Hon'ble Delhi High Court held that mere use of brand name or logo owned by the AEs by the taxpayer will not automatically lead to influence that any expenses that the taxpayer incurred towards AMP was only to enhance the brand by returning following findings :-

“17. Once the BLT has been declared by this Court in Sony Ericsson India Pvt. Ltd.(supra) to no longer be a valid basis for determining the existence of or the ALP of an international transaction involving AMP expenses, the order of the TPO was unsustainable in law. The mere fact that the Assessee was permitted to use the brand name ‘Valvoline’ will not automatically lead to an inference that any expense that the Assessee incurred towards AMP was only to enhance the brand ‘Valvoline’. The onus was on the Revenue to show the existence of any arrangement or agreement on the basis of which it could be inferred that the AMP expense incurred by the Assessee was not for its own benefit but for the benefit of

its AE. That factual foundation has been unable to be laid by the Revenue in the present case. On the basis of the existing record, the TPO has found no basis other than by applying the BLT, to discern the existence of international transaction. Therefore, no purpose will be served if the matter is remanded to the TPO, or even the ITAT, for this purpose.”

24. When all these objections were raised by the taxpayer before the ld. DRP, same has been dismissed by using same ratio applied by the TPO firstly to declare the AMP expenditure as an international transaction and then to treat the AMP expenditure incurred by the taxpayer in excess of routine expenditure to promote the brand and creating intangibles for its AE by using the BLT, as is evident from para 5.3 of the ld. DRP order. In para 5.8, ld. DRP again applied the BLT to benchmark the international transaction qua AMP expenditure by returning following findings:-

“5.8 We have also considered the assessee's objection about rejection of certain comparables by the TPO. Two of them, namely, MIs Ricoh India Ltd. and MIs Spice Mobile Ltd. are engaged in the distribution of branded goods. We have already mentioned that the TPO has considered the distributors of only the similar unbranded goods to determine the routine marketing and distribution expenditure by them. The AMP expenditure incurred by the distributors of the branded goods would include certain amount of brand promotion expenses. That is why such distributors have not been considered as comparables because o~ aim is to determine the routine marketing and distribution expenses to fix the 'brightline' and ascertain the expenditure incurred by the assessee which is attributable to brand promotion. Only routine distributors are to be taken who are nor engaged in any brand building exercise. The purpose of bright line is to ascertain as to how much AMP expenses would normally be incurred by a manufacturer distributor for carrying on its routine distribution activity. For this it is necessary to select comparables which are not engaged in creation of brand name. In respect of the third company, M/s. Rathi Graphics Ltd., the TPO has observed in the order that it was carrying out AMP activities on behalf of its subsidiaries also. The assessee has not given any arguments to rebut the contention of the AO. Therefore, the assessee's objection regarding rejection of all the three comparables is turned down by the Panel. The assessee has 229 17 ITA No.5528/Del./2012 also given a list of its own comparables for determining the "brightline". However, all the comparables proposed by the assessee are distributors of branded goods and, therefore, for the reasons mentioned above, such comparables cannot be

accepted. However, the Panel, on its own, has carefully examined the functional profile as well as the financials of all the comparables used by the TPO. It has been noted that more than 50% of turnover of M/s Dhoot Industrial Finance Ltd. is from sale of shares. The Panel is, therefore, of the view that it should have not been considered as a comparable.”

25. By now, it is settled principle of law that BLT is not a valid method for determining the existence of international transaction or for determination of ALP of such transactions.

22. Hon’ble Delhi High Court in case of CIT vs. Whirlpool of India Ltd. (2016) 381 ITR 154 (Delhi) decided the identical issue by returning following findings :-

“34. The TP adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE.

35. It is for the above reason that the BLT has been rejected as a valid method for either determining the existence of international transaction or for the determination of ALP of such transaction. Although, under Section 92B read with Section 92F(v), an international transaction could include an arrangement, understanding or action in concert, this cannot be a matter of inference. There has to be some tangible evidence on record to show that two parties have “acted in concert”.

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37. The provisions under Chapter X do envisage a ‘separate entity concept’. In other words, there cannot be a presumption that in the present case since WOIL is a subsidiary of Whirlpool USA, all the activities of WOIL are in fact dictated by Whirlpool USA. Merely because Whirlpool USA has a financial interest, it cannot be presumed that AMP expense incurred by the WOIL 230 18 ITA No.5528/Del./2012 are at the instance or on behalf of Whirlpool USA. There is merit in the contention of the Assessee that the initial onus is on the Revenue to demonstrate through some tangible material that the two parties acted in concert and further that there was an agreement to enter into an international transaction concerning AMP expenses.

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47. For the aforementioned reasons, the Court is of the view that as far as the present appeals are concerned, the Revenue has been unable to demonstrate by some tangible material that there is an international transaction involving AMP expenses between WOIL and Whirlpool USA. In the absence of that first step, the question of determining the ALP of such a transaction does not arise. In any event, in the absence of a machinery provision it would be hazardous for any TPO to proceed to determine the ALP of such a transaction since BLT has been negated by this Court as a valid method of determining the existence of an international transaction and thereafter its ALP.”

26. Hon'ble Delhi High Court in case of Maruti Suzuki India Ltd. vs. CIT (2015) 64 taxmann.com 150 (Delhi) also decided as to how the international transaction qua AMP expenditure is to be determined and as to how the price of international transaction qua AMP expenditure is to be determined by returning following findings :-

“68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a 'mirage'. First of all, there has to be a clear statutory mandate for such an exercise. The Court is unable to find one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to Section 92F (ii) which defines ALP to mean a price "which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions". Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the BLT. In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in 231 19 ITA No.5528/Del./2012 uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly in light of the fact that the BLT has been expressly negative by the Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT.

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70. What is clear is that it is the 'price' of an international transaction which is required to be adjusted. The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international

transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an ALP adjustment.

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74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to Section 92B of the Act. The problem does not stop here. Even if a transaction involving an AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the sample agreements produced before the Court by the Revenue) or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for?"

27. In case of *Honda Siel Power Products Ltd. vs. DCIT* (2015) 64 taxmann.com 328 (Delhi), Hon'ble Delhi High Court held that:-

"25. If the BLT is kept aside as a valid means of determining the existence of an international transaction concerning AMP expenses, the Revenue would have to make out its case on the basis of the other tangible material which might show the existence of any 'arrangement' or 'understanding' or any conduct of either party to show that they were 'acting in concert' as far as the Assessee having to promote the brand of the foreign AE is concerned.

28. In case of *LE Passage to India Tour & Travels (P.) Ltd.* (2017) 391 ITR 207 (Delhi), Hon'ble Delhi High Court again held 232 20 ITA No.5528/Del./2012 that all transactions reporting AMP cannot be treated as international transaction and the fact of each case would have to be examined independently by returning following findings :-

"4. This Court is of the view that whilst *L.G. Electronics India Pvt. Ltd.* (supra) indicated that AMPs were or did constitute the basis for an inquiry into the international transaction and indicated a "bright line" test for it, *Sony Ericsson Mobile Communications India Pvt. Ltd.* (supra) overruled that decision. This per se does not mean that every endeavour will be to conclude that all transactions reporting AMPs are to be treated

as international transactions, the facts of each case would have to be examined for some deliberations. Whilst the TPO and the DRP undoubtedly held that the international transactions existed - that understanding apparently was passed upon the pre-existing regime, propounded in L.G. Electronics India Pvt. Ltd.(supra) with greater clarity on account of this Court's decision in Sony Ericsson Mobile Communications India Pvt. Ltd.(supra). The I.T.A.T. in our opinion, should have first decided whether in the circumstances of this case, the nature of the AMP reported, could lead to the conclusion that there was an international transaction. When doing so, it should have remitted the matter back for examination to the A.O. in this case. Accordingly, following the decision of Sony Ericsson Mobile Communications India Pvt. Ltd.(supra) and a subsequent decision in Daikin Airconditioning India Pvt. Limited v. Assistant Commissioner of Income Tax in ITA 269/2016, decided on 27.07.2016, this Court hereby remits the matter for a comprehensive decision by the I.T.A.T. In other words, the I.T.A.T. will decide whether the reporting of the AMP in regard to the outbound business constitutes an international transaction for which ALP determination was necessary and if so, the effect thereof. The parties are directed to appear before the I.T.A.T. on 01.02.2017. The appeal is partly allowed in the above terms."

29. *Hon'ble Delhi High Court in Valvoline Cummins (P.) Ltd. vs. DCIT (supra) further decided the issue in favour of the taxpayer that merely because of the fact that AMP expenditure incurred by the taxpayer was in excess, existence of international transaction 233 21 ITA No.5528/Del./2012 cannot be inferred. Operative part of the findings is extracted as under :-*

"15. The decision in Le Passage to India Tour & Travels (P) Ltd.(supra) turned on the fact that there was no determination by the TPO in the first place whether there was an international transaction. In the present case, however, the TPO did apply his mind to the existence of an international transaction involving AMP expense. The only ground on which the conclusion was reached by the TPO was that the AMP expenditure incurred by the Assessee was in excess of that incurred by the comparables. His conclusion was not based on any other factor. In other words, it was not as if the conclusion arrived by the TPO was based on two or three grounds, one of which was the BLT.

16. *This Court in Sony Ericsson India Pvt. Ltd.(supra) categorically found that the BLT was not an appropriate*

yardstick for determining the existence of an international transaction or for that matter for calculating the ALP of such transaction. The decision of the Full Bench of the ITAT in L.G. Electronics India Pvt. Ltd. v. ACIT (2013) 22 ITR (Trib.) 1 which sought to make BLT the basis was set aside by this Court.”

30. *In the instant case, there is not an iota of material on the file apart from relying upon the fact that by incurring huge AMP expenses to the tune of 6.93%, taxpayer has enhanced brand value and created intangibles in favour of its AE, no cogent material is there to treat the incurring of AMP expenses as international transactions. TPO has also not returned the finding that how the benefit of AMP expenditure incurred by the taxpayer have benefited AE, no calculation has come on record, so in these 234 22 ITA No.5528/Del./2012 circumstances when we discarded the BLT the entire case of ld. TPO/DRP fell flat.*

31. *In view of what has been discussed above and following the decisions rendered by Hon'ble High Court discussed in the preceding paras, we are of the considered view that firstly, there is not an iota of material with ld. TPO to prove the existence of an international transactions involving AMP expenses by the taxpayer. TPO rather proceeded on the premise that the AMP expenditure incurred by the taxpayer were far excess of AMP expenses incurred by the comparables.*

32. *TPO has also applied the BLT which has been discarded by the Hon'ble High Court in a number of judgments. Even otherwise, in the absence of any agreement, arrangement or understanding between the taxpayer and its AE, expressed or implied, that AMP spent of the taxpayer would also be beneficial to the AE or it would enhance the brand value of the AE in any manner, no international transaction can be inferred.*

33. *Moreover, on the other hand, the taxpayer has come up with specific pleading that it has analysed a principal to principal relationship with its AE and at no point, it has acted as agent of the AE. If this is so, AMP expenses which the taxpayer has incurred to boost up its sales cannot be treated to enhance the brand value and to create 235 23 ITA No.5528/Del./2012 intangibles in favour of the AE. All these facts stand proved from the growing sale pattern of the taxpayer which shows that benefit of AMP activities accrued in favour of the taxpayer. Moreover when TPO has failed to prove that there is an existence of international transaction between taxpayer and AE, the addition on account of AMP expenses cannot be made on the basis of the fact that AMP expenses of the taxpayer are far excess than the AMP expenses of comparables.*

34. Even otherwise, the mere use of logo of AE is per se not international transaction. Consequently, we are of the considered view that AO/DRP/TPO have erred in making addition of Rs.36,41,27,428/- which is not sustainable in the eyes of law, hence ordered to be deleted. Hence, grounds no.3 to 25 are determined in favour of the taxpayer.”

7.1 We are of the considered opinion that issues raised by the Learned DR have already been considered in the decision of the Hon'ble High Court's cited in the order of the Tribunal (supra). In view of the binding precedent, following the decision of the Tribunal, we hereby direct to delete adjustment made on account of AMP transactions. The corresponding grounds raised are accordingly allowed.

8. On the ground of depreciation allowance disallowed on capital asset treated as a stock-in-trade, the learned Counsel submitted that issue in dispute is covered in the favour of the assessee by the order of the Tribunal for assessment year 2007-08. The learned DR, however, relied on the order of the lower authorities.

8.1 We have heard rival submission of the parties on the issue in dispute. Before the Assessing Officer, the assessee submitted that certain items of the tradable inventory were converted to capital goods for self use and depreciation was claimed on the same. This conversion of the inventory to fixed asset was referred as capitalization. After having capitalized inventory as capital goods/fixed assets, sometimes the assessee transferred these assets back to inventory, which was termed as de-capitalization. The main reason for such conversion include assets gone out of order or damaged, asserts no longer required. The finding of the

Assessing Officer on dealing of recapitalized asset by the assessee is reproduced as under:

“After de-capitalization, assets which are converted in inventory are dealt with as under:-

(i) where the asset is in working condition:-

- *sold with or without carrying our serfice(or small repair work) of the asset so as to make it fit for selling ;*
 - *re-converted in Capital Goods(i.e.capitalised) for*
 - (a) self use in same or different location;*
 - (b) any other revenue generating printing contract;*
- Such selling or re-conversion of the asset can take place in the same or in the subsequent financial years.*

(ii) Where asset is not in working condition and same is repairable, it is repaired and thereafter it can be (a) sold or (b) used for self use or for revenue generating contracts;

(iii) Where it is not in working condition and same is irreparable; such assets are cannibalised (i.e.dismantled). After cannibalisation working parts are taken out for selling or for carrying out repair work. Non-working or damaged parts are written off and thereafter scarapped and sold to scrap dealers.”

8.2 The Assessing Officer held that the depreciation cannot be allowed to the assessee even after sale of the goods. The learned DRP distinguished the decision of the Tribunal (for AY 2002-03) relied upon by the assessee observing as under:

“14.3. It is observed that there is a decision of Hon'ble High Court of Delhi in the case of assessee for AY 2002-03 wherein the appeal of the revenue against the decision of the ITAT in the assessee's own case was dismissed holding that no substantial question of law arises. However the issue before the ITAT was factually different. The issue before the Hon'ble ITAT was "that on the fact and circumstance of the case LD CIT Appeal has erred confirming the disallowance of depreciation of Rs.9252253 on fixed assets "written off by the Appellant company during the year." (emphasissupplied). However, the facts in the present case are not similar to the facts mentioned in the ITAT decision referred to by the assessee. In that case the issue was disallowance of depreciation on fixed assets written off on account of their vanishing on physical verification. Where as in the instant case the issue is of depreciation on decapitalized assets i.e., those assets that are converted from capital goods to stock in trade. Therefore the case law cited by the assessee is distinguishable on facts. Moreover in that case, the

issue has been set aside with directions to A.O and not deleted outrightly as claimed by the assessee.

In view of the above factual position the panel is not inclined to accept the case of the assessee for issuing any direction. The proposed disallowance is therefore maintained.”

8.3 The Tribunal in the assessment year 2007-08 has considered objection of the Revenue in details and decided the issue as under:

“5. In the ground no.2, the issue involved is confirming the disallowance by DRP of depreciation of Rs.28,21,208/- on de-capitalised assets.

6. While pleading on behalf of the assessee, ld. AR submitted that certain fixed assets were not capable of use for captive consumption and were discarded from block of assets and converted into stock-in-trade. This conversion was done at a nominal value which was deducted from the opening WDV from the block on which the depreciation was claimed. He further submitted that the assets converted into stock-in-trade are generally used assets and incapable of any further use, therefore, the saleable or market value of these is negligible. Since these assets are being technology products. Therefore, these assets tend to become obsolete in a very short span of period as new and more advanced technology comes into operation. He further submitted that most of the assets which are converted into stock-in-trade had either been outlived their useful functional life or were not cost effective. Further, certain assets became defective due to which they had to be de-capitalised. In these circumstances, the assessee was justified in reducing the nominal value from running WDV of the block of the assets under which such assets fell. He further submitted that for the tax treatment, the depreciation under the amended provisions of section 32 of the Act is calculated by applying the specified rate to the WDV of block of assets. He further submitted that after introduction of depreciation on block of assets concept w.e.f. 01.04.1988, depreciation is available on the relevant block of assets and not on individual assets as the individual item or asset loses its identity when it is mixed with the block of assets. The depreciation is allowable on the WDV at the end of the relevant previous year for a block of assets which was computed by adding to the opening WDV of the said block of assets, actual cost of the assets acquired during the year and deducting therefrom moneys payable including scrap value, if any, in respect of assets sold or discarded during the year. It is submitted that the phrase “moneys payable” refers to the cash

received on account of sale or scrapping of the asset. Ld. AR draw our attention to the provisions of section 43(6)(c) of the Act where the WDV has been defined. He further submitted that the provisions of law clearly suggests that where the asset whose WDV is Rs.100/- is de-capitalised and valued at Rs.1/-, depreciation on the remaining Rs.99/- shall be continued to be allowed even though the asset does not physically exist in the block of assets. This concept of depreciation of block of assets was introduced and the assets forming part of the block of assets need not be identifiable, however, it will continue to form a part of the assets. If any asset is sold then the block of assets reduced by the selling price of the asset and depreciation shall be allowable on the remaining WDV of block of assets. Thus, he pleaded that it is clear from the provisions of law that it is not necessary to continue to exist or should continue to be used for the business purposes for the claim of the depreciation. Once the asset is a part of block of assets, the depreciation can be continued to be allowed even if the same is sold or de-capitalised or demolished or destroyed. He further submitted that where the assets have been transferred to inventory and duly accounted for and whenever they are sold, the profit on their sale shall be accounted for in the profit and loss account. Therefore, there shall be no loss to the revenue by this transaction which is completely according to the provisions of Income-tax Act, 1961. He further submitted that in earlier provisions of the Act, there was a clause for terminal depreciation which was allowable in the year of sale of the asset. Under the concept of block of assets, the terminal depreciation concept has been done away with and now the loss on sale of assets is not booked in the year in which asset is sold. The depreciation on such assets constituted in the block is continued to be allowed till the block remains in the books of account. He submitted that such proposition of law has been accepted by the ITAT in the assessee's own case in ITA No.680/Del/2006 for assessment year 2002-03. In that year, certain fixed assets could not be located on physical verification and assessee wrote off the same in the books of account. Finally, the ITAT held that even though these fixed assets were written off, the depreciation shall be continued to be allowed on the block of assets after deducting the scrap value of these assets from the block of assets, if any. The assessee's case of de-capitalisation / discarding of assets from the block of assets is also covered by the decision of ITAT in assessee's own case, hence, depreciation cannot be disallowed on the assets so discarded during the year under consideration. He finally submitted that the legal position on allowability of depreciation on the assets forming a part of the block of assets which have been sold or written off or not found, discarded or destroyed or demolished that once an asset is a part of the block of assets and it is put to use, the depreciation will be allowed till the block of assets continued to exist even if the relevant assets are sold, discarded, destroyed or

demolished. Such a proposition has been upheld by Hon'ble Delhi High Court in assessee's own case where an asset forming part of the block of assets is not found or is not traceable or is lost, then also depreciation continued to be allowed on such assets as long as the block of assets do exist. In this case, the assessee has discarded the assets from the block of assets at a value of Rs.1/- and has taken to inventory as stock-in-trade at Rs.1/-. Therefore, depreciation will continue to be allowed on these assets which have been taken into inventory. Reliance was placed on the decision of Hon'ble Delhi High Court in the case of Yamaha Motor India Pvt. Ltd. reported in 328 ITR 297 (Del.). He further submitted that there was no loss to the revenue as the asset taken at Rs.1/- in the inventory whenever these were sold, the entire difference between sale price and cost of Rs.1/- shall be offered to tax as income and ultimately, the revenue will be the net gainer. The assessee has submitted complete details which have been discarded and taken to inventory. The assessee has strong internal controls to record all the entries. He pleaded to delete the addition.

7. On the other hand, the ld. DR relied on the orders of the authorities below. He submitted that the assets were having marketable value. It has been converted to stock-in-trade on nominal value. The actual value of asset has to be reduced from the block of assets as these assets were transferred to stock-in-trade. These assets were not discarded or destroyed. It was also submitted that certain assets have been leased out again and these have been re-capitalised in the block of assets at the value at which such assets were de-capitalised. Thus, the actual value was not reflected on transfer. He also submitted that depreciation cannot be allowed on the assets which are forming part of the stock-in-trade. He finally relied on the orders of the authorities below.

8. We have heard both the sides on the issue. The assessee is engaged in the business of trading of Xerographic Equipments, Printers, Scanners, Faxes, Multi Functional Devices and consumables parts thereof. The assessee leased out the equipments to the customers on an operating lease basis and these equipments are capitalized and depreciation is claimed for tax purposes in accordance with the provisions of the Act. These operating leased assets were returned to the assessee either on the termination of the lease or otherwise after a period of six months, then the assessee is following a practice to convert these assets into stock-in-trade at a nominal value of Rs.1/- as these used assets are not having any readymade market for further leasing. This nominal value is reduced from the block of assets. In some of the cases, these assets are again leased out then they are recapitalized in the block of assets at the nominal value at which these were decapitalised. However, certain used assets remained in stock-in-trade and whenever these

are sold, the profit is offered for taxation. This method of accounting is being followed consistently by the assessee. When the assets are recapitalized at the nominal value at which it is decapitalised then there is no effect on the taxability of the assessee. Similarly, whenever these used assets are converted into stock-in-trade and sold subsequently and the surplus on the sale is offered for taxation then there is no harm to the revenue. Considering all these facts, we allow this ground of assessee's appeal.

9. In the ground no.3, the issue involved is disallowance of depreciation of Rs.6,03,122/- on the fixed assets which has been written off in the books of account and where the assets ceased to exist. The Assessing Officer made an addition of Rs.20,99,837/- in respect of fixed assets written off during the year. The DRP in its direction dated 24.08.2011 has reduced the amount to Rs.6,03,122/-. The DRP sustained this amount on the basis that this disallowance has past history and the matter has travelled up to High Court and the department's appeal has been disposed off and the High Court order is awaited.

10. We have heard both the sides on the issue. At the outset, ld. AR submitted that this issue is covered in favour of the assessee by the decision of Hon'ble Delhi High Court in assessee's own case. In the subsequent year, i.e. assessment year 2008-09, the DRP itself has given the relief to the assessee which is evident from its order dated 30.08.2012. The relevant para is 3 to 3.2 of the order. The issue has already been decided in favour of the assessee by the Hon'ble jurisdictional High Court. The DRP, in the assessment year 2008-09, while disposing off the objections of the assessee on the same issue, has held as under :-

"3. The AO has proposed to disallow an amount of Rs.8,89,960/- on account of depreciation claim in respect of fixed assets written-off during the year.

3.1 It was submitted that the assessee could not locate certain fixed assets having book value of Rs.22,24,899/- on conducting physical verification. Therefore, the assessee decided to write off the book value of the fixed assets in its profit and loss account. Since there was no scrap value for such assets no adjustment was made to the written down value of the respective block of assets for computing depreciation under the provisions of the Act. The assessee further submitted that out of these assets around 92% (in terms of cost) were purchased prior to year 2000 and another 7% were purchased before 2005 but after 2000. These assets which were written off were tangible movable assets which over a period of time would have broken or lost. The assessee

also clarified that same issue has already been: decided in favour of the assessee in the asstt. year 2002-03 by Hon'ble ITAT (Delhi bench). It was also made clear that the appeal of the Revenue before jurisdictional Delhi High Court against stands decided in favour of the assessee. It was further submitted that in the asstt. year 2004-05 identical disallowance has been deleted by the Commissioner of Income tax (Appeals).

3.2 We have considered the material on record. The Hon'ble Delhi High Court vide its order dated 27.07.2011 has held that tax authorities were not justified in working out the depreciation on block of assets by reducing the value of assets which have either to be discarded or destroyed or sold or written off. The ITAT's decision to remit the matter back to the A.O. to recompute the depreciation only after ascertaining the scrap value of assets which have been discarded or written off in the books during the year under consideration was endorsed by Delhi High Court assessee submitted that the assets written off do not have an scrap value and section 43(6)(c) which defines WDV of a block assets states that the WDV of the assets has to be reduced by the money payable in respect of any asset falling within that block which is sold or discarded or demolished or destroyed during the previous year together with the amount of scrap value, if any. The assessee submitted that there is no value of these assets and hence no reduction needs to be made. Similar issue had come up in the asstt. Year 2007-08 and DRP-II vide its direction dated 24.08.2011 decided not to interfere with the draft asstt. order as the order of the High Court was awaited. But now the order of Delhi High Court has been received and the Assessing Officer vide her letter dated 06.08.2012 has submitted that proposal for filing SLP against the order dated 27.07.2011 of Delhi High Court was sent to the Directorate of Legal & Research, New Delhi but the same was not approved for filing SLP. Thus the issue has attained finality in favour of the assessee. Therefore, the proposed addition of Rs.8,89,960/- on this issue is directed to be deleted."

Since the facts of the case are same and the issue is covered in favour of the assessee by the decision of Hon'ble jurisdictional High Court in assessee's own case, therefore, we allow this ground of assessee's appeal and direct to re-compute the depreciation and allow the necessary relief to the assessee."

8.4 As the issue in dispute is squarely covered in the favour of the assessee by the above decision of the Tribunal (supra), we accordingly allow the ground of the appeal and direct the AO to recompute the depreciation and allow the necessary relief to the assessee. The ground No.6 of the appeal is accordingly allowed for statistical purposes.

9. The ground No. 7 of the appeal is consequential in nature and therefore, we are not required to adjudicate upon.

10. In ground No. 8 the assessee has sought for allowing the credit of the advance fringe benefit tax and TDS. Allowing of the credit of the taxes paid by the assessee is matter of the verification by the Assessing Officer and therefore, accordingly we direct the Learned AO for verification of the taxes paid and allow the credit in accordance with the law. This ground of the appeal is also allowed for statistical purposes.

11. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 5th August, 2020.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 5th August, 2020.

RK/-(D.T.D.S.)

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi