IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'B': NEW DELHI)
(THROUGH VIDEO CONFERENCING)

BEFORE SHRI G.S. PANNU, PRESIDENT
AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No. 2072/Del/2008
ITA No. 330/Del/2012
(Assessment Year(s): 2004-05 & 2005-06)

Frick India Limited, 809, Surya Kiran Building, 19, Kasturba Gandhi Marg, New Delhi.	Vs.	Deputy Commissioner of Income Tax, Circle 11(2), New Delhi.
APPELLANT		**RESPONDENT**
PAN No: AAACF0410C		

Date of Hearing : 06.12.2021
Date of Pronouncement : 30.12.2021

Assessee By : Shri Tarandeep Singh, Advocate and
Shri Pulkit Verma, Advocate
Revenue By : Shri Sumit Kumar Varma, Sr. DR

PER RAVISH SOOD, JM:

The present appeals filed by the assessee company are directed against the respective orders passed by the Ld. CIT(A)-XIII, New Delhi dated 17/03/2008 for AY 2004-05 and for AY 2005-06, dated 09.12.2011, which in turn arises from the respective assessment orders passed u/s 143(3) the Income Tax Act, 1961 ("the Act", for short), dated 26.12.2006 AND u/s 263 read with section 143(3) of the Act, dated

28.12.2010, respectively. As certain common issues are involved in the captioned appeals, therefore, the same are being taken up and disposed off by way of a common order. We shall first take up the appeal filed by the assessee for A.Y. 2004-05 in ITA No. 2072/DEL/2008, wherein the assessee has assailed the impugned order on the following grounds of appeal before us:

"1. That on the facts and in law the CIT(A) erred in not accepting the disallowance of Rs. 32,268 offered by the appellant u/s 14A of the Income Tax Act, 1961 (hereinafter the 'Act') and instead enhancing the disallowance of Rs. 30,97,000/- made by the AO to Rs. 1,04,16,000/- by relying upon the order dt. 31-01-2007 of the Hon'ble ITAT in ITA No. 4106/Del/2004 for the Assessment Year 2001-02 in the assessee's own case.

1.1. That on facts and in law the CIT(A) erred in assuming jurisdiction to enhance when the conditions precedent thereto were not met.

1.2. That further, without prejudice and in the alternative, even on the basis of the order dt. 31-1-2007 of the Hon'ble ITAT as modified by the order dt. 14-3-2008 in MA No. 23/Del/2008 the disallowance works out to Rs.12.14 lacs only.

1.3. That without prejudice the CIT(A) erred in determining the disallowance u/s 14A of the Act at Rs. 1,04,16,000/- instead of Rs.78,43,000/- as relevant to the year under consideration which was correctly proposed by him as per notice u/s 251(2) of the Act dt. 2-1- 2008.

2. That on the facts and circumstances of the case and in law the CIT(A) erred in confirming the disallowance made by the Assessing Officer of the sum of Rs.82,73,814/- paid to M/s Vilter Manufacturing Corporation USA as fee for user of knowhow by treating it as capital expenditure.

2.1 That the CIT(A) erred in not dealing with ground No.3.1, which was taken without prejudice, to the effect that the Assessing Officer erred in not allowing depreciation on the entire amount of consideration payable under the agreement.

2.2 That on the facts and circumstances of the case and in law the CIT(A) erred in holding that 25% of the assumed royalty is to be taken to the capital account without appreciating that no royalty was payable or paid and claimed as deduction, that no disallowance as such was made in respect thereof by the AO.

3. That on the facts and circumstances of the case and in law the CIT(A) erred in upholding the addition of Rs.35,76,000/- (correct amount being Rs.34,67,000) on account of alleged interest on Inter Corporate Deposits

4. That on the facts and circumstances of the case and in law the CIT(A) erred in confirming the action of the AO in treating the refund of Excise Duty of Rs. 1,00,00,000/- as income.

5. That on the facts and circumstances of the case and in law the CIT(A) erred in assuming jurisdiction to issue notice/(s) proposing enhancement of income by Rs. 1,38,131 /- u/s 94(7) of the Act.

5.1 That on the facts and circumstances of the case and in law the CIT(A) erred in not considering the objections filed against the notice u/s 251(2) dt. 19-10-2007 on 2-1-2008 and unilaterally making enhancement of income by Rs. 1,38,131/- in blatant disregard of the powers conferred on him.

6. That the orders passed by the A.O. and the CIT(A) are bad in law and void ab-initio.

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

2. Briefly stated, the assessee company which is engaged in the business of manufacturing and sale of Air-conditioning & Refrigeration equipments had filed its return of income for A.Y. 2004-05 on 28.10.2004, declaring an income of Rs. 57,78,730/-. Subsequently, the assessee filed a revised return of income on 20.03.2006. Thereafter, the case of the assessee was selected for scrutiny assessment u/s 143(2) of Act.

2.1 Assessment was thereafter framed by the AO vide his order passed u/s 143(3) of the Act, dated 26.12.2006 after making the following additions/disallowances:

Disallowance u/s 14A	Rs. 30,97,000/-
Disallowance of technical know how fee	Rs. 62,05,360/-
Disallowance of Intt. On corporate deposit	Rs. 35,76,000/-

Additions of account of refund from Excise Deptt.	Rs 1,00,00,000/-

2.2. Aggrieved, the assessee assailed the aforesaid Assessment Order before the CIT(A). The CIT(A) not finding favor with the contentions advanced by the assessee with respect to the aforesaid additions/disallowances not only upheld the same, but also enhanced the income of the assessee qua two issues, viz. (i). addition as regards dividend stripping u/s 94(7) of the Act of Rs. 1,38,131/-; and (ii). disallowance u/s 14A of Rs. 1,04,16,000/- as against that computed by the A.O at Rs. 30,97,000/-.

3. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We shall hereinafter deal with the issues qua the additions/ disallowances made by the A.O, as well as the enhancements carried out by the CIT(A), as under:

(A). <u>Re; disallowance u/s 14A of the Act</u> :

3.1 As is discernible from the records, the assessee company had during the year under consideration earned an exempt income from various streams amounting to Rs. 1,23,67,853/- and had claimed the same as exempt u/s 10(34)/10(35) of the Act. On a perusal of the records, it was observed by the AO that the assessee had disallowed only an amount of Rs. 100/- u/s 14A of the Act. On being queried, it was submitted by the assessee that it had not incurred any indirect expenditure on earning of the exempt income in question. However, the AO did not find favour with the aforesaid claim of the assessee, and was of the view that the expenses aggregating to Rs. 784.34 lakhs could be allocated towards earning of exempt income by the assessee. Backed by his

aforesaid conviction, the AO, on a po-rata basis i.e. by applying the percentage of the exempt income to the total receipts worked out the disallowance u/s 14A of the Act at an amount of Rs. 30,97,000/-.

3.2 On appeal, it was observed by the CIT(A) that the Tribunal while disposing of the assessee's appeal for A.Y. 2001-02 in ITA No. 4106/Del/2004 had directed the AO to take 10% of the total administrative expenses as attributable to earning of the exempt dividend income by the assessee. Accordingly, the CIT(A) after putting the assessee to notice as to why the disallowance worked out by the AO u/s 14A of the Act may not be enhanced by the following the view taken by the tribunal in the assessee's own case for A.Y. 2001-02, therein worked out the disallowance at Rs. 1,04,16,000/- i.e. @ 10% of the total administrative expenses of Rs. 1041.60 lacs.

3.3. Aggrieved, the assessee has assailed the disallowance u/s 14A of the Act before us. It was submitted by the Ld. AR that the Ld. CIT(A) qua the disallowance u/s 14A of the Act, had lost sight of the fact that the order of the tribunal that was passed while disposing off the assessee's appeal for A.Y. 2001-02 in ITA No. 4106/Del/2004 had thereafter being rectified on a miscellaneous application filed by the assessee vide its order passed in M.A. No. 23/Del/2008, dated 14.03.2008. It was submitted by the Ld. AR, that the Tribunal while rectifying its mistake qua the quantification of the disallowance u/s 14A, had observed, that the disallowance under the said statutory provision to the extent relatable to 'administrative expenses' was to be sustained to the extent of 10% of the dividend income earned by the assessee. In order to drive home his aforesaid claim the Ld. AR had drawn our attention to the order passed by the

tribunal in M.A. No. 23/Del/2008 dated 14.03.2008. It was further submitted by the Ld. AR that the aforesaid order passed by the tribunal had thereafter attained finality as the revenue has not carried the matter any further in appeal. It was submitted by the Ld. AR that following the aforesaid order of the tribunal for A.Y 2001-02, the tribunal had thereafter while disposing off the assessee's appeal for A.Y 2005-06 in ITA No. 4902/Del/2010 and 4622/Del/2010, dated 03.02.2012 had followed the said order and after taking cognizance of the fact that the disallowance u/s 14A of the Act was to be restricted to 10% of the amount of dividend income, had restored the matter to the file of the AO for deciding the issue afresh after giving the assessee a reasonable opportunity of being heard.

3.5 Per contra, the learned Senior Departmental Representative ("Ld. Sr. DR", for short) relied on the orders of the lower authorities.

3.6 We have heard the Ld. Authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record qua the aforesaid issue in question. Admittedly, it is a matter of fact borne from the record that the tribunal had vide its order passed in ITA No. 4106/Del/2004, dated 31.01.2007 r.w its order passed while disposing of M.A. No. 23/Del/2008, dated 14.03.2008 had directed that the disallowance u/s 14A be sustained to the extent of 10% of the amount of the dividend income earned by the assessee company. Also, we find that the aforesaid order of the tribunal had thereafter been followed by it while disposing off the assessee's appeal for A.Y. 2005-06 in ITA No. 4902/Del/2010 and 4662/D/2010, dated 03.02.2012, wherein the tribunal after taking cognizance of the fact that the CIT(A) had

restricted the disallowance to 10% of the amount of dividend income, therein, restored the matter to the file of the AO for passing a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard. As the facts of the issues involved qua the issue in question remain the same, therefore, in our considered view, going by the principle of of consistency the matter in all fairness requires to be restored to the file of the AO, on the same terms, with direction to redetermine the disallowance u/s 14A of the Act after considering the judgment of the Hon'ble Supreme Court in the case of Maxopp Investmnts Ltd., as per the extant law. Before parting, we may however observe that the disallowance determined by the A.O in the course of the set-aside proceedings shall in no way exceed 10% of the amount of dividend income. The **Ground of appeal no. 1** is allowed for statistical purpose in terms of our aforesaid observation.

(B) <u>Re; Addition of interest on ICD</u> :

4. Shorn of unnecessary details, the assessee company had made Inter-Corporate Deposits ("ICD's", for short) to C.T. Cotton Yarn Ltd., Credential Finance Ltd. and Vasu Tech Ltd. on 12.04.1996, 27.06.1996 and 25.04.2000, wherein amounts of Rs. 1,00,00,000/-, Rs. 25,00,000/- and Rs. 1,25,00,000/-, respectively, were advanced to them by the assessee company. As the aforementioned companies had repaid only part amount, therefore, the assessee company had initiated legal action against the said parties by filing criminal complaints u/s 138 of the Negotiable Instrument Act, 1881 and u/s 420 of the I.P.C as the cheques issued by the said parties were dishonored. Also, the assessee company had initiated recovery suit against M/s Vasu Tech Ltd. by

filing a complaint with Hon'ble High Court of Delhi. As the unpaid amount totalling to Rs. 1,49,00,000/- was not received by the assessee from the abovementioned three parties, therefore, the same was shown by it as doubtful of recovery and no interest was provided on the same. However, the AO did not accept the explanation of the assessee company, and was of the view that the assessee's company had not yet given up its claim as it had initiated criminal proceedings a/w launching of recovery suits against the aforesaid defaulting parties, therefore, it was required to account for the interest income on the said amounts as per the mercantile system of accounting that was followed by it. Accordingly, the AO backed by his aforesaid conviction therein worked out an addition of Rs. 35,76,000/- towards interest income i.e. @ 21% of the impugned deposits in question.

4.1 On appeal, the Ld. CIT(A) finding no infirmity in the view taken by the AO, therein upheld the aforesaid addition.

4.2 We have heard the Ld. Authorized Representatives for both the parties qua the aforesaid issue i.e. addition of interest on ICD's which were doubtful of recovery. Admittedly, it is a matter of fact borne from the record that ICD's aggregating to Rs. 1,49,00,000/- had been rendered as doubtful of recovery, as a result whereof the assessee company was compelled to initiate legal proceedings against the aforementioned defaulting parties. Controversy qua the issue in question lies in a narrow compass i.e. now when the ICD's made by the assessee with the aforementioned three companies in itself had been rendered as doubtful of recovery, then, would it be obligatory on the part of the assessee company that was following the

mercantile system of accounting to account for the interest income on the said deposits on an accrual basis in its books of accounts. We find that the Hon'ble High Court of Delhi in the case of CIT vs. Vasisth Chay Vyapar Ltd. 196 Taxman 169 (Del), had held, that as the principal amount of ICD that was made by the assessee before them had become doubtful of recovery, it was correct on the part of the assessee to infer that the interest income on the same had not accrued. Be that it as may, as stated by the Ld. AR, and rightly so, the CIT(A) while disposing off the appeal in the case of the assessee for the succeeding years i.e AY 2006-07 to AY 2013-14 had taken a shift from the view that was earlier taken by his predecessor while disposing off the appeal for year in question i.e A.Y. 2004-05, and had after drawing support from the judgment of the Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd. Vs. CIT (1997) 225 ITR 746 (SC) a/w the judgment of the Hon'ble High Court of Delhi in the case of, viz. (i) CIT Vs. Goyal M G Gases Pvt. Ltd. (2008) 303 ITR 159 (Del); and (ii) CIT Vs. Eicher Ltd., ITA No. 231/09 dated 15th July, 2009, had concluded that there was no justification on the part of the AO to bring to tax the interest income on accrual basis qua those ICD's whose recovery had become doubtful. For the sake of clarity, the relevant observations of the CIT(A) as regards the aforesaid issue in hand while disposing off the appeal of the assessee for A.Y. 2006-07 in Appeal no. 242/2008-09, dated 30.11.2010 is culled out as under:-

> "In the facts of the instant case, It is observed that die appellant has filed complaint under S. 138 of Negotiable Instruments Act & u/s 420 of I.P.C. on 22.03.02 against CT Cotton yam Ltd. against whom the outstanding loan as on 31.03,06 was Rs, 57 Lakhs & on 04.12.1996 against Credential Finance Ltd. & against whom outstanding loans was Rs. 12,00,000/- as on 31.03.06. The fact that the appellant in the instant case has not given up his claim and was hopeful of its

> recovery as he had not written off the amount in the books, may accordingly not be the determinant factor to hold that the interest income has accrued to the appellant. The reason being that the appellant having taken recovery proceedings cannot possibly take the risk of writing off the amount till the case is over as it could amount to giving up the claim and may hold in favour of the defaulting loanees.
>
> It is thus noted that the facts of the appellant's case are similar to that of Goyal M.G. Gases P. Ltd.(Supra), as seen from the following observations made by the Delhi H.C. in the later case : "That both the Commissioner (Appeals) as well as the Tribunal had come to the conclusion that there was no real accrual of interest. It had been noted that the interest had not even recorded by the assessee in its books of account Die assessee had also issued a notice to the parties under section 138 of the Negotiable Instrument Act, 1881 for dishonor of cheques issued by all (except one of the debtor) followed by initiation of appropriate proceedings, The debts were written off as bad debts and were also allowed by the AO in the subsequent years Therefore realization of even the principal amount was in jeopardy and .therefore there could not be said to be any real accrual of income by way of interest.
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> In view of the aforesaid, I hold that the AO was not justified in bringing to tax interest income on accrual basis in the facts of the case. The addition of Rs. 17,37,000/- is accordingly directed to be deleted."

As observed by us hereinabove, the CIT(A), thereafter, had consistently while disposing off the appeals in the case of the assessee for assessment years 2007-08 and 2013-14, had followed the view that was taken by their predecessor in assessment year 2006-07 and had vacated the additions of the interest income that were made by the A.O on an accrual basis qua the ICD's in question whose recovery had become doubtful. At this stage, we may herein observe, that as stated by the ld. AR, the aforesaid view taken by the CIT(A) in the abovementioned years i.e. A.Y 2006-07 and A.Y 2013-14 had not been assailed any further in appeal by the department, and thus, had attained finality. In the backdrop of the aforesaid facts, we are of the considered view, that now when the department itself had accepted that no addition qua the interest income on accrual basis with respect to the ICD's in question could be made, therefore, we have no

hesitation in vacating the addition of Rs. 35,76,000/- made by the AO during the year under consideration. The **Ground of Appeal no. 3** is allowed in terms of our aforesaid observation.

(C). <u>Re; Addition of Excise Duty Refund</u> :

5. We shall now advert to the addition of Rs. 1 crore made by the A.O as regards the refund of Excise Duty received by the assessee during the year consideration. Briefly stated, the assessee company had during the year received refund on account of Excise Duty in pursuance of order of the Hon'ble Supreme Court, dated 10.11.2003, though subject to a condition that the assessee shall furnish a bank guarantee for the said sum from a nationalized bank and keep it alive and in full force till the main appeals before the Hon'ble Apex Court are finality disposed off. Consequently, the assessee furnished the Bank Guarantee No. 432/2003, dated 20.11.2003. Backed by a written opinion that was obtained by the assessee company from M/s S.R. Dinodia & Co., Chartered Accountants, New Delhi, as per which the aforesaid amount of refund of excise duty so received would not be exigible to income tax, the assessee did not offer the said amount for tax. However, the AO was of the view that as the assessee had claimed the excise duty as a deduction in an early year, therefore, the refund of the same had to be taxed during the year under consideration and it was not necessary for the department to await the final order of the Hon'ble Apex Court. In support of his aforesaid view, the AO, had, inter alia, relied on the judgment of the Hon'ble Supreme Court in the case of Polyflex (India) Pvt. Ltd. vs. CIT (2002)257 ITR 343 (SC) .

Accordingly, the AO backed by his aforesaid conviction made an addition of Rs. 1 crore in the hands of the assessee company.

5.1 On appeal, the CIT(A) finding no infirmity of the view taken by the AO, upheld the same.

5.2 Before us, the ld. AR fairly admitted that the issue in question was covered against the assessee by the judgment of Hon'ble High Court of Delhi in the case of CIT vs Bharatpur Nutritional Products Ltd 356 ITR 285 (Del.) it was submitted by the Ld. AR, that the Hon'ble High Court, had observed, that the furnishing of bank guarantee when payment has been received, will not make any difference as the language of Section 41(1) is clear that the amount should have been received either in cash or in any other manner. At the same time, it was submitted by the ld. AR that the assessee had acted in a bonafide manner on the written opinion that was obtained from M/s S.R. Dinodia & Co., Chartered Accountants, New Delhi, wherein they had opined that the refund of the excise duty of Rs. 1 crore that received by the assessee company was not exigible to Income-Tax during theyear under consideration.

5.3 Per contra, the Ld. Sr. DR relied on the orders of the lower authorities.

5.4 We have heard the Ld. Authorized representatives for both the parties qua the issue in hand, perused the orders of the lower authorities, as well as considered the judicial pronouncements that have been brought to our notice by them. As observed by us hereinabove, it has been the claim of the assessee that as the refund of excise duty was received by it subject to furnishing of bank guarantee for the said sum from a

nationalized bank, which was to be kept alive and in full force till the main appeal before the Hon'ble Apex Court was finally disposed off, therefore, the receipt of the said refund would not fall within the domain of section 41(1) of the Act, and thus, would not be exigible to tax during the year under consideration. As observed by us hereinabove, the issue in question i.e. receipt of excise duty refund against providing of bank guarantee by the assessee is squarely covered by the judgment of Hon'ble High Court of Delhi in the case of CIT vs Bharatpur Nutritional Products Ltd. (supra), wherein involving identical facts, we find, that the Hon'ble High Court had observed that furnishing of bank guarantee when the excise duty refund had been received will not make any difference as per clearly worded Section 41(1) of the Act. For the sake of clarity the observations of the Hon'ble High Court are culled out:

> "8. We may notice that the facts in the case of *Polyflex (India) (P.) Ltd.* (*supra)* are identical or similar to the facts in the present case. In the said case also there was a dispute between the assessee and the Excise Department and the duty which was paid had been refunded but the Excise Department had preferred a SLP before the Supreme Court. The fate of the SLP was not known. The dispute, therefore, was pending before the appellate forum. In the present case also, as per the facts noticed above, the dispute was pending before the appellate forum, i.e., the Division Bench but the excise duty had been refunded and paid to the assessee, subject to furnishing of the bank guarantee. In our view, the furnishing of bank guarantee when payment has been received, will not make any difference as the language of Section 41(1) is clear that the amount should have been received either in cash or in any other manner."

We, thus, respectfully following the aforesaid view of the Hon'ble High Court, therein uphold the order of the CIT(A), who had rightly concluded that the refund of the excise duty of Rs. 1 crore was liable to tax during the year under consideration. The G**round of appeal no. 4** is dismissed.

6. We shall now take up the grievance of the assessee that the CIT(A) had grossly erred in law by traversing beyond the scope of his jurisdiction and enhancing the income of the assessee company by an amount of Rs. 1,38,131/- u/s 94(7) of the Act. Shorn of unnecessary details, the CIT(A) while disposing off the appeal had observed, that the assessee had shown income under the head "Capital Gains" totaling to Rs. 58,807/- which was arrived at after deducting a loss of (Rs. 1,38,131/-) arising from short term capital assets from an amount of Rs. 1,96,938/- relating to short term capital gains. Backed by the aforesaid facts, the CIT(A) called upon the assessee to explain as to why the short term capital loss of (Rs. 1,38,131/-) should not be disallowed in view of the provisions of section 94(7) of the Act. Accordingly, the CIT(A) after validily putting the assessee to show cause as to why its income may not be enhanced by making an addition u/s 94(7) of the Act of Rs. 1,38,131/-, therein called upon it to put forth an explanation as regards the same. Objecting to the validity of the jurisdiction assumed by the CIT(A) qua a source of income which was neither disclosed in the return of income filed by the assessee nor in the assessment order, the assessee assailed the purported action of the CIT(A). However, the CIT(A) not finding favour with the claim of the assessee disallowed the STCL of (Rs. 1,38,131/-) and accordingly, directed the AO to enhance the income of the assessee company to the said extent.

6.1 Aggrieved, the assessee has assailed before us the enhancement of its income qua the aforesaid issue i.e. dividend stripping u/s 94 (7) of the Act. It is the claim of the ld. AR that the CIT(A) had clearly exceeded the scope of his jurisdiction and, enhanced the income of the assessee company. In order to buttress his aforesaid claim,

the ld. AR had drawn support from certain judicial pronouncements. Our attention was specifically drawn by ld. AR to the order of the ITAT, Delhi Bench "E" in the case of Hari Mohan Sharma vs. ACIT 179 ITD 310 (Del). Drawing our attention to the aforesaid order of the tribunal, it was submitted by the ld. AR that after relying on a host of judicial pronouncements including that of the Hon'ble High Court of Delhi and that of the Hon'ble Apex Court, it was observed by the tribunal that CIT(A) was not competent to enhance assessment by taking an income which was not considered expressly or by necessary implication by the AO while framing the assessment. Backed by his aforesaid contention, it was averred by the ld. AR that the enhancement made by the CIT(A) being devoid and befit of any force of law cannot be sustained and was liable to be vacated for want of jurisdiction.

6.2 Per contra, the ld. Sr. DR relied on the order of the Ld. CIT(A).

6.3 We have heard the ld. Authorized Representatives for both the parties qua the issue in question i.e. assumption of jurisdiction by the CIT (A) for enhancing the income of the assessee company with respect to an issue which was not the subject matter of the original assessment. We find that the aforesaid issue in hand is squarely covered by the order of the Hon'ble Jurisdictional High Court in the case of Gurinder Mohan Singh Nindrajog vs. CIT 348 ITR 170 (Del). In the said order, it was observed by the Hon'ble High Court that the CIT(A) has a power of enhancement in respect of such itemS or items of income which has been dealt with in the body of the order of the assessment, and arose for his consideration as per the grounds of appeal raised before him, being the subject matter of appeal. In sum and substance, it was therein observed that the

power of the CIT(A) to enhance the income of the assessee could be validly exerciseD only qua such item or items of income which had been dealt with by the A.O while framing the assessment and arose for the consideration of the first appellate authority as per the grounds of appeal raised before him. For the sake of clarity the relevant observation of the Hon'ble High Court are culled out as under:-

"19. We have considered the submissions of both the parties. There is no doubt about the fact that while framing the assessment even under section 143(3) of the Act, the Assessing Officer may omit to make certain additions of income or omit to disallow certain claims which are not admissible under the provisions of the Act thereby leading to escapement of income. The Income-tax Act provides for remedial measures which can be taken under these circumstances. While framing an assessment under section 143(3) of the Act, any of the following situations may occur:

(a) the Assessing Officer may accept the return of income without making any addition or disallowance; or

(b) the assessment is framed and the Assessing Officer makes certain addition or disallowance and in making such additions or disallowances, he deals with such item or items of income in the body of order of assessment but he under assessed such sums; or

(c) he makes no addition in respect of some of the items, though in the course of hearing before him holds a discussion of such items of income;

(d) yet, there can be another situation where the Assessing Officer inadvertently omits to tax an amount which ought to have been taxed and in respect of which he does not make any enquiry;

(e) further another situation may arise, where an item or items of income or expenditure, incurred and claimed is not at all considered and an assessment is framed, as a result thereof, a prejudice is caused to the Revenue, or

(f) where an item of income which ought to have been taxed remained untaxed, and there is an escapement of income, as a result of the assessee's failure to disclose fully and truly all material facts necessary for computation of income.

20. To ensure for each of such situations, an income which ought to have been taxed and remained untaxed, the Legislature has provided different remedial measures as are contained in sections 251(1) (a), 263, 154 and 147 of the Act.

21. In the category stated in (a), obviously if an income escapes an assessment, the provisions of section 147 of the Act can be invoked, subject to the condition stated in the proviso to the said section. In the category of cases falling in category (b), section 251(l)(a) provides the Commissioner of Income-tax (Appeals) could enhance such an assessment qua the under assessed sum, i.e., where the Assessing Officer had dealt with the issue in the assessment and was the subject-matter of appeal. In category falling in (c) and (e), the Commissioner of Income-tax has been

empowered to take an appropriate action under section 263 of the Act In the category of cases falling under clauses (d) and (f), appropriate action under section 147 of the Act can be taken to tax the income which has escaped assessment or had remained to be taxed. There can be situations where an item has been dealt with in the body of the order of assessment and the assessee being aggrieved from the addition or disallowances so made, had preferred an appeal before the Commissioner of Income-tax (Appeals) against the said addition and disallowance, the said disallowance and addition being the subject- matter of appeal before the Commissioner of Income-tax (Appeals) in such cases, the Commissioner of Income-tax (Appeals) has been empowered under section 25l(l)(a) of the Act to enhance such an income where the Assessing Officer had proceeded to make addition or disallowance by dealing with the same in the body of order of assessment by under assessing the same as the same was the subject- matter of the appeal as per the grounds of the appeal raised before him. In other words, the Commissioner of Income-tax (Appeals) has a power of enhancement in respect of such item or items of income which has been dealt with in the body of the order of the assessment, and arose for his consideration as per the grounds of appeal raised before him, being the subject-matter of appeal."

6.4 Also, we find that a similar view was way back taken by the Hon'ble High Court of Delhi in the case of CIT v. Union Tyres [1999] 240 ITR 556 (Delhi). In its aforesaid order, the Hon'ble High Court had after drawing support from the judgment of the Hon'ble Apex Court in the case of CIT vs. Shapoorji Pallonji Mistry 44 ITR 891 (SC), and CIT vs. Rai Bahadur Hardutroy Motilal Chamaria 66 ITR 443 (SC) observed, that the power of enhancement u/s 31(3) of the Indian Income-tax, Act, 1922 was restricted to the subject matter of the assessment or the sources of income which had been considered expressly or by clear implication by the Income-tax Officer from the point of view of taxability of the assessee, and that it is not open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the Income-tax officer with a view to find out new sources of income and the power of enhancement under s. 31(3) of the Act is restricted to the sources of income which have been the subject-matter of consideration by the Income-tax Officer from the point of view of taxability. At this stage, we may herein observe

that the aforesaid order of the Hon'ble High Court of Delhi in the case of Union Tyres (supra) had thereafter being confirmed by the "Full Bench" of the court in the case of CIT vs. Sardari Lal & Co., 251 ITR 864 (Del). Also, we may herein observe, that the coordinate Bench of the Tribunal i.e. ITAT, Delhi Bench "E" in its order passed in the case of Hari Mohan Sharma (supra) had after exhaustive deliberations concluded, that CIT(A) is not competent to enhance assessment qua an issue that was not considered expressly or by necessary implication by the AO during assessment proceedings. In the backdrop of the aforesaid facts read with the settled position of law, we are of a strong conviction that as the enhancement carried out by the CIT(A) qua the issue of dividend striping u/s 94(7) of the Act was never considered by the AO in the course of assessment, therefore, the CIT (A) was not vested with any jurisdiction to have enhanced the income of the assessee company in exercise of the powers vested with him u/s 251(1)(a) of the Act. We, thus, not being able to persuade ourselves to uphold the enhancement of Rs. 1,38,131/- carried out by the CIT(A) qua the issue of dividend striping u/s 94(7) of the Act, vacate the same. The **Ground of appeal no. 5** is allowed in terms of our aforesaid observations.

7. We shall now deal with the grievance of the assessee that the CIT(A) had erred in confirming the disallowance of Rs. 82,73,814/- that was made by the A.O of the amount paid by the assessee to M/s Vilter Manufacturing Corporation, USA as fee for user of know-how by treating it as a capital expenditure.

7.1. Briefly stated, the assessee company had entered into an 'agreement', dated 13.12.2002 with M/s Vilter Manufacturing Corporation, 5555, South Packard Avenue, Cudahy, Wisconsin, USA which thereafter was amended vide a Supplementary agreement, dated 05.11.2003. As per the 'agreement' the assessee had paid a sum of Rs. 82,73,814/- towards part consideration for technical know-how fees to M/s Vilter Manufacturing Corporation (supra), and treating the same as a deferred revenue expenditure in its books of accounts had debited 1/8th of the total amount of consideration i.e Rs. 32,32,960/- in its profit & loss a/c for the year under consideration. However, the assessee had in its computation of income added back the aforesaid amount of Rs. 32,32,960/- and claimed the entire amount of Rs. 82,73,814/- as a revenue expenditure. Holding a conviction that pursuant to the amendment to Sec. 32(1)(ii) of the Act, vide the Finance (No.2) Act, 1998 the expenditure incurred by the assessee company towards technical know-how was to be held as a capital expenditure, the A.O called upon the assessee to put forth an explanation as regards the same. In reply, the assessee by drawing support from the judgments of the Hon'ble Supreme Court in the case of Ciba of India Ltd., 69 ITR 672 (SC) and Alembic Chemical Works, 177 ITR 377 (SC), as well as the judgment of the Hon'ble High Court of Delhi in the case of Shriram Refrigeration, 127 ITR 746 (Del), though tried to impress upon the A.O that its claim for deduction of the technical know-how fees of Rs. 82,73,814/- as a revenue expenditure was in order, but the same did not find favor with the A.O. Observing, that the judicial pronouncements relied upon by the assessee were prior to insertion of clause(ii) to Sec. 32(1) of the Act, i.e vide the Finance (No.2) Act, 1998

w.e.f 01.04.1998, the A.O rejected the claim of the assessee and held the amount paid by the assessee company to M/s Vilter Manufacturing Corporation, USA as a capital expenditure and restricted the assessee's claim for deduction to the extent of the depreciation of Rs. 20,68,453/- i.e @25% of the aforesaid capitalized amount of Rs. 82,73,814/-.

7.2 Aggrieved, the assessee assailed before the CIT(A) the re-characterizing of its claim for deduction of the technical know-how fees by dubbing the same as a capital expenditure by the A.O. Before the CIT(A), it was the claim of the assessee that vide Clause 3.1 of the 'agreement' the foreign company, viz. M/s Vilter Manufacturing Corporation, USA had granted a non-transferable license to use the technical know-how and Intellectual Property Rights (IPR's) for the purpose of, viz. (i). manufacturing the products and parts in India; and (ii). to market, sell or otherwise dispose off the products and parts in the specified territory. It was further submitted before the CIT(A) that as per Clause 5 of the 'agreement' M/s Vilter Manufacturing Corporation, USA was the sole and exclusive owner of all rights, title and interest in the technical know-how and nothing contained in the said 'agreement' shall be deemed to convey to the assessee company, viz. M/s Frick India Ltd. any right or legal title to the technical know-how or the improvement thereof. In sum and substance, it was the claim of the assessee that as the object of the 'agreement' entered into by the assessee company with M/s Vilter Manufacturing Corporation, USA was to facilitate running of its existing business in a more profitable and a technically viable manner, therefore, the expenditure therein incurred being in the nature of a revenue expenditure was

allowable as a deduction in its hands. Further, it was the claim of the assessee that the A.O had grossly misconstrued the scope and gamut of Clause (ii) to Sec. 32(1) of the Act, as was made available on the statute vide the Finance (No.2) Act, 1998 w.e.f 01.04.1998, and the same would not come into play in respect of every expenditure incurred by an assessee towards technical know-how, but was confined only to such expenditure of a capital nature that was, inter alia, incurred by the assessee on acquisition of know-how. It was, thus, the claim of the assessee that it was not the simpliciter incurring of the expenditure towards technical know-how, but the fact that the expenditure so incurred by the assessee was in the nature of a capital expenditure that would trigger the application of Clause (ii) to Sec. 32(1) of the Act. In order to support his aforesaid contention the assessee had drawn support from the explanatory notes to the Finance (No.2) Act, 1998, as provided in the CBDT Circular No. 772, dated 23.12.1998, which explained that pursuant to the insertion of Clause (ii) to Sec. 32(1) of the Act, the deductions in respect of any expenditure of a capital nature that was incurred on the acquisition of patent rights or copyrights under Sec. 35A; and deduction in respect of capital expenditure incurred on know-how was withdrawn w.e.f 01.04.1999 i.e from A.Y 1999-2000. Backed by the aforesaid insertion of Clause (ii) to Sec. 32(1) of the Act and withdrawal of deduction of the capital expenditure incurred by an assessee towards acquisition of know-how, the assessee tried to impress upon the CIT(A) that the scope of applicability of Clause (ii) to Sec. 32(1) was confined to allowing of depreciation only qua the capital expenditure that was incurred by the assessee on acquisition of a know-how, which prior thereto was allowed as a deduction

under Sec. 35AB of the Act. To sum up, it was the claim of the assessee that the Clause (ii) to Sec. 32(1) had no bearing on the entitlement of the assessee for claim of deduction of the technical know-how fees that was paid by it to M/s Vilter Manufacturing Corporation, USA, as the same was in the nature of a revenue expenditure. Also, support was drawn by the assessee from the judgment of the Hon'ble High Court of Kerala in the case of CIT Vs. Cochin Refineries Ltd, 135 ITR 278. As regards the judicial pronouncements that were pressed into service by the assessee, the CIT(A) observed, that as the same were distinguishable on facts and/or delivered prior to insertion of Clause (ii) to Sec. 32(1) of the Act, therefore, the same would not assist the case of the assessee before him. Observing, that M/s Vilter Manufacturing Corporation, USA had granted a license, dated 13.12.2002 a/w a supplementary agreement, dated 05.11.2003, it was observed by the CIT(A), as under :

> "As per the agreement, the foreign company also agreed to keep the Indian company posted with the latest and modern developments in the field of air conditioning. Under the said agreement, the appellant company has agreed to pay as consideration fee for the drawings and design aggregating to the sum of US $ 460,500 and the fee shall be payable by way of one lump sum payment of US$ 110,000 on 31-12-2002 payment of US$ 37, 750 no later than March 31, 2003 one payment of US$ 37, 750 no later than June 30, 2003, one payment of US$ 55,000 no later than December 31, 2003 and the remainder payable in semi-annual payment of US$ 27,500 each commencing June 30, 2004 until the total drawing and design fees have been paid in full.

- The agreement has also specifies the territory in which the appellant company can function. The duration of the agreement' is initially fixed for 10 years which can be extended further on mutual agreement and subject to the necessary approvals. Both the parties subsequently entered into a supplementary agreement dated 5-11-2003 as per which the clauses relating to consideration, delivery of technical know how, duration etc. have been substituted/amended.
- On going through the contents of above agreements, I am of considered

> opinion that the AO is right in rejecting the contention of the appellant for treating the Technical Know How Fee and the Royalty payment as revenue in nature. The payment made thereof has to be considered as capital assets and should form part of block of assets as Finance (No.2) Act, 1998 has substituted sub section (1) of section 32 and provision has been made to allow depreciation on intangible assets like know how, patents., copy rights, trade marks, licenses, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after first day of April 1998."

Backed by his aforesaid observations, the CIT(A) was of the view that the A.O had rightly rejected the assessee's claim for treating the technical know-how fees and royalty payment as a revenue expenditure. Accordingly, the CIT(A) was of the view, that the payment made by the assessee company towards technical know-how fees to M/s Vilter Manufacturing Corporation, USA was to be capitalized and would form part of the 'block of assets' on which depreciation would be allowed as per Clause (ii) to Sec. 32(1) of the Act. The Ld. CIT(A) further referring to the Clauses of the 'agreement' in the backdrop of the judgment of the Hon'ble Supreme Court in the case of, viz. CIT Vs. Southern Switchgear Ltd., 232 ITR 359 observed, viz. that the technical knowledge that was obtained by the assessee company from M/s Vilter Manufacturing Corporation, USA ,vide 'agreement', was in the nature of an enduring advantage and benefit that was available to the assessee for its manufacturing and industrial processes; that the technical assistance contemplated in the agreement covered the establishment of the factory and the operation thereof for the manufacture of industrial refrigeration systems of all kinds and types; that the foreign company also made available to the assessee its procedures, designs, experience and technical know-how in respect of the same; that though the duration of the 'agreement' was initially fixed for 10 years, however, the

same was thereafter reduced to 8 years, and the import of technical drawings, technical equipment, components and raw materials shall have to compulsorily conform to the import policy and procedures of government of India; that the assessee company even after expiry of the period especially on account of change of control of M/s Vilter Manufacturing Corporation, USA shall have perpetual, royalty free right to continue to use the methods of production, procedure, experiments, improvements which had been made available to them in pursuance of the agreement; that the assessee company had acquired knowledge of an enduring nature; that apart from the technical know-how supplied by the foreign company, viz. M/s Vilter Manufacturing Corporation, USA, and the grant of IPR's, the said foreign company had also agreed not to manufacture in India any of the scheduled products or to grant or make available to any other person, firm or company any manufacturing information, licenses, rights for any one of the scheduled products in India, thus, conferring an exclusive benefit on the assessee company to manufacture and sell scheduled products in the territories specified as per the terms of the 'agreement'. After referring to the aforesaid terms of the 'agreement', and specifically the one which as per the CIT(A) conferred the exclusive right on the assessee company to manufacture and sell the products in the specified territories in India, the CIT(A) after drawing support from certain judicial pronouncements observed, that conferment of the said exclusive right vide the 'agreement' entered into by the assessee company with M/s Vilter Manufacturing Corporation, USA cannot be held as a part of a mere know-how agreement. On the basis of his aforesaid observations the CIT(A) concluded that the payments made by the assessee company to M/s Vilter

Manufacturing Corporation, USA for drawings and designs were to be held to be in the nature as that of a capital expenditure. Backed by his aforesaid observation, the CIT(A) directed the A.O to allow depreciation on the aforesaid capitalized amount of technical know-how within the meaning of Sec. 32(1)(ii) of the Act. Apart from that, it was observed by the CIT(A) that as the assessee had paid royalty for the acquisition of an exclusive privilege of manufacturing and selling the products, therefore, 25% of the royalty paid was to be taken to the capital account on which depreciation would be allowed.

7.3 The assessee being aggrieved with the aforesaid view taken by the CIT(A), viz. (i). that the A.O had rightly rejected the assessee's claim for deduction of the technical know-fees paid to M/s Vilter Manufacturing Corporation, USA as a revenue expenditure, and had correctly held the same as a capital expenditure on which depreciation was to be allowed u/s 32(1)(ii) of the Act; and (ii). that 25% of the royalty paid was to be taken to the capital account on which depreciation was to be allowed; has carried the matter in appeal before us. We have heard the ld. Authorized Representatives for both the parties at length in respect of the aforesaid issue under consideration, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. At the very outset, we may herein observe, that as stated by the ld. A.R, and rightly so, as per Clause 2(b) of the Supplementary Agreement, dated 05.11.2003, in addition to the fees for technical know-how it was though admittedly agreed that royalty would be paid by the assessee to M/s Vilter

Manufacturing Corporation, USA, viz. five (5) percent of internal sales; and eight (8) percent of export sales of products and parts, however, a material aspect that had been lost sight of by the ld. CIT(A) is that the aforesaid royalty was to be paid for a period of 5 (five) years from the date of commencement of commercial production; during the subsistence of Intellectual Property License and Non-Compete Agreement. However, as certified by the auditors in "Note No. 9" of their audit report, Page 25 of the "Annual Report" of the assessee company, which reads as under :

> "Total amount of License fee for using Technical know-how, Trade mark and Intellectual Property Right to M/s Vilter Manufacturing Corporation, USA....."

, no payment of royalty was made by the assessee company to M/s Vilter Manufacturing Corporation, USA during the year under consideration. On the basis of the aforesaid facts, we are of the considered view, that the observation of the CIT(A) that 25% of the amount of royalty paid to M/s Vilter Manufacturing Corporation, USA is to be taken to the capital account on which depreciation shall be allowed, being based on misconceived and incorrect facts cannot be sustained and is herein vacated.

7.4 We shall now deal with the observations of the CIT(A) that the A.O had rightly rejected the assessee's claim for deduction of the technical know-fees paid to M/s Vilter Manufacturing Corporation, USA as a revenue expenditure, and had correctly held the same as a capital expenditure on which depreciation was to be allowed u/s 32(1)(ii) of the Act. We have given a thoughtful consideration to the view taken by the CIT(A), and concur with the claim of the ld. A.R that both the lower authorities had failed to appreciate the scope and gamut of Clause (ii) to Sec. 32(1) of the Act that was made

available on the statute vide the Finance (No. 2) Act, 1998 w.e.f 01.04.1998. As stated by the ld. A.R, and rightly so, it is not a mere incurring of an expenditure by an assessee towards fees for technical know-how, but the incurring of such expenditure being in the nature of a capital expenditure that would trigger the application of Clause (ii) to Sec. 32(1) of the Act. As observed by us hereinabove, the aforesaid intent of the legislature can safely be gathered from the explanatory notes to the Finance (No.2) Act, 1998 as provided in the CBDT Circular No. 772, dated 23.12.1998, wherein the purpose of inserting Clause (ii) to Sec. 32(1) of the Act a/w the withdrawal of deduction u/s 35AB of the amount of capital expenditure on the acquisition of know-how w.e.f 01.04.1999 i.e A.Y 1999-2000, therein, clearly revealed that it was only where the assessee had incurred certain capital expenditure towards acquisition of technical know-how, it was only then that the aforesaid post-amended Sec. 32(1) would come into play. Backed by our aforesaid observations, we are unable to persuade ourselves to subscribe to the view taken by the lower authorities that the insertion of Clause (ii) to Sec. 32(1) of the Act would take within its sweep all expenditure incurred by an assessee towards technical know-how. Accordingly, as stated by the ld. A.R, and rightly so, in case the expenditure incurred by an assessee towards technical know-how is in the nature of a revenue expenditure, then, the same would not fall within the realm of the Clause (ii) to Sec. 32(1) of the Act and, would be allowed as a deduction for computing the income of the assessee.

7.5 We shall now advert to the terms of the "Intellectual Property License and Non-Compete Agreement", dated 13.12.2002 entered into by the assessee company with

M/s Vilter Manufacturing Corporation, 5555, South Packard Avenue, Cudahy, Wisconsin, USA a/w those of the Supplementary agreement, dated 05.11.2003. On a perusal of the aforesaid respective "agreements", we are unable to persuade ourselves to concur with the CIT(A) that the A.O was justified in rejecting the claim of the assessee for deduction of the technical know-fees paid to M/s Vilter Manufacturing Corporation, USA as a revenue expenditure, and had correctly held the same as a capital expenditure on which depreciation was to be allowed u/s 32(1)(ii) of the Act. Insofar the reliance placed by the CIT(A) on the judgment of the Hon'ble High Court of Madras in the case of CIT Vs. Southern Switchgear Ltd, 148 ITR 272 (which thereafter had been upheld by the Hon'ble Supreme Court in CIT Vs. Southern Switchgear Ltd 232 ITR 359), which in turn had relied on its earlier judgment in the case of Transformer and Switchgear Ltd. Vs. CIT, 103 ITR 352, we find that the facts involved in the latter case are totally distinguishable as against those involved in the case of the assessee before us. Unlike the present case wherein the fees for technical know-how had been paid by the assessee company, viz. Frick India Limited to M/s Vilter Manufacturing Corporation, USA for running its ongoing business already in existence in a more technically viable manner and to facilitate improvements for yielding larger profits, the expenditure incurred towards technical fees in the case of Transformer and Switchgear Ltd. (supra) was towards establishment, starting of work and operating of the factory, therefore, it was in the backdrop of the facts involved in the said case that the Hon'ble High Court, had observed, that the expenditure therein incurred was in the nature of a capital expenditure. On a similar footing are the facts that were involved in the case of MR

Electronics Components Ltd. Vs. CIT, 136 ITR 305 (as was referred in the case of Southern Switchgear, 148 ITR 72), wherein in the backdrop of the fact that the foreign company had undertaken to advise the assessee on the erection of the factory, that the Hon'ble High Court of Madras, had observed, that 25% of the fees was to be held as being in the nature of a capital expenditure. At this stage, we may herein observe, that the CIT(A) while disposing off the assessee's appeal had wrongly observed that the fees for technical know-how was to be paid by the assessee for establishment of its factory. On being confronted by the aforesaid claim of the ld. A.R, the ld. D.R did not rebut the same. Apart from that, we concur with the claim of the ld. A.R that even otherwise the aforesaid fact as alleged by the CIT(A) i.e the fees for technical know-how was to be paid by the assessee to M/s Vilter Manufacturing Corporation, USA for establishment of its factory is not borne out from the records. On the contrary, it is a matter of an admitted fact that the business of the assessee i.e manufacturing of air conditioning and refrigeration equipments was already in existence and the technical know-how received by it from M/s Vilter Manufacturing Corporation, USA was for carrying out its business in a more technically viable manner and to increase its profitability. In order to dispel any doubt as regards the existence of the ongoing business of the assessee company during the year under consideration, the ld. A.R had taken us through an order passed by the 'Special bench' of the tribunal in the assessee's own case for A.Y 1971-72, reported as (1983) 3 SOT 64 (Del), wherein it was observed that the assessee was engaged in the business of manufacturing air-conditioning equipments. Backed by our aforesaid observations, we are of the considered view that as the assessee

company had availed the technical know-how from M/s Vilter Manufacturing Corporation, USA for running its ongoing existing business in a more technically viable manner and to facilitate improvements for yielding larger profits, therefore, the facts involved in the case of the assessee are clearly distinguishable as against those relied upon by the CIT(A), as in all the said cases, as observed by us hereinabove, the technical know-how was received from the foreign companies for establishment, setting up of factory/business etc. Accordingly, the support drawn by the CIT(A) on the aforesaid case laws, in our considered view being clearly distinguishable on facts would by no means justify the adverse inferences drawn by him on the said count in the hands of the assessee.

7.6 Insofar the observations of the CIT(A) that as per the terms of the 'agreement' the import of the drawings, technical equipments, components and raw materials by the assessee shall have to necessarily confirm to the import policy of the government of India are concerned, the same, as stated by the ld. A.R, and rightly so, is beyond our comprehension as to how the same would justify, much the less assist, the re-characterization of the payment of the technical know-how fees by the assessee company to M/s Vilter Manufacturing Corporation, USA as a capital expenditure? Be that as it may, the said observation of the CIT(A) not being in context and relevant to the issue in hand, thus, would not assist the case of the revenue before us.

7.7 As regards the observation of the CIT(A) that as the assessee even after the expiry of the period of the agreement, especially on account of change of control of Vilter shall have the perpetual, royalty free right to continue to use the methods of

production, procedures, experiments, improvements which had been made available to them in pursuance of the agreement, therefore, it had acquired knowledge of an enduring nature, the same in our considered view had been arrived at by the CIT(A) by wrongly divorcing few lines from the context with reference to which the same were used. On a perusal of Article 18.3 of the 'agreement', we find that it is therein in clear and unambiguous terms stated that the assessee upon the termination or expiry of the agreement shall forthwith cease and desist using the technical know-how, IPR's or any part thereof granted to it by Vilter in any manner whatsoever; cease and desist from manufacturing and assembling the products and parts; cease and desist from marketing and/or selling the products or parts in any manner whatsoever; and cease and desist from using the trademark. It is only thereafter, provided, that in case the agreement is terminated by the assessee company on account of change of control of Vilter in which York or its affiliates are the acquiring entity, then, the assesee shall have a perpetual royalty free right to use the technical know-how and IPR's (other than the trade mark or the name VILTER) to manufacture and assemble the products and parts for sale in the specified territory. In the backdrop of the aforesaid complete factual matrix, we are of the considered view that the clause referred to by the CIT(A), as stated by the ld. A.R, and rightly so, only vests rights on the contingency of any change of control of Vilter. We find that the CIT(A) had conveniently bypassed the specific mention in the 'agreement' that on expiry or the termination of the agreement, the assessee, viz. Frick India Ltd. shall cease and desist from using the technical know-how, IPR's or any part thereof granted to it by Vilter in any manner whatsoever, as well as desist from

manufacturing and assembling the products and parts, as well as marketing and/or selling the products or parts in any manner whatsoever, and also from using the trademark to which it was entitled during the subsistence of the 'agreement'. As the aforesaid clause of the agreement makes it abundantly clear that M/s Vilter Manufacturing Corporation, USA had only made available a non-transferrable and non-exclusive technical know-how to the assessee for carrying out its ongoing business in a more technically viable and profitable manner, therefore, the aforesaid observations of the CIT(A) which had been arrived at by divorcing certain lines from the context in which they were used, and reading them in isolation, can by no means be acted upon. We, thus, in terms of our aforesaid observations vacate the adverse inferences drawn by the CIT(A) on the basis of his aforesaid misconceived, or in fact self-suiting misinterpretation of the terms of the agreement entered into by the assessee with M/s Vilter Manufacturing Corporation, USA.

7.6 We shall now deal with the observation of the CIT(A), that as per the terms of the 'agreement' the foreign company, viz. M/s Vilter Manufacturing Corporation, USA had apart from supplying the technical know-how and IPR's to the assessee company, viz. Frick India Ltd., had also agreed not to manufacture in India any of the scheduled products or to grant or make available to any person, firm or company any manufacturing information, licenses, rights for any one of the scheduled products in India, thus, conferring an exclusive benefit on the assessee company to manufacture and sell the scheduled products in the territories specified as per the terms of the agreement, conferment of which exclusive right to manufacture and sell the articles as

per the CIT(A) could not be held to be a part of a mere know-how agreement. Again, we find that the CIT(A) had absolutely misconceived or in fact misread the terms of the agreement. On a perusal of both of the aforesaid agreements, viz. agreement, dated 13.12.2002; and the supplementary agreement, dated 05.11.2003, we do not find any such conferment on the assessee company of any exclusive right to manufacture and sell the articles in the territories specified in the terms of the agreement. On the contrary, we find that Clause 3.1 of the 'agreement', dated 13.12.2002 states that M/s Vilter Manufacturing Corporation, USA had granted to the assessee company a non-exclusive and non-transferable licence to use the technical know-how, and there is nothing in either of the aforesaid agreements wherein it is stated that M/s Vilter Manufacturing Corporation, USA had agreed not to manufacture in India any of the scheduled products or to grant or to make available to any other person such technical know-how. Accordingly, finding no substance in the aforesaid observation of the CIT(A), which had weighed in his mind for drawing of adverse inferences in the hands of the assessee and characterizing the amount paid by it to M/s Vilter Manufacturing Corporation, USA for the technical know-how provided by the latter as a capital expenditure, we herein vacate the same.

7.7 In the backdrop of our aforesaid observations, we are of the considered view, that as the payment made by the assessee company to M/s Vilter Manufacturing Corporation, USA was for the technical know-how services provided by the latter for facilitating carrying out the ongoing/existing business of manufacturing of refrigeration products by the assessee in a more technically viable and profitable manner, therefore,

the same was rightly claimed by the assessee as a revenue expenditure for computing its income for the year under consideration and had wrongly been dubbed as a capital expenditure by the lower authorities. Our aforesaid view i.e where an assessee who is engaged in the business of manufacturing and selling certain products had made a payment to a foreign company for merely acquiring a right to use technical know-how, whereas the ownership and intellectual property rights in the said know-how remained with the foreign company, then, the payment in question would be in the nature of a revenue expenditure, is supported by the judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Hero Honda Motors Ltd., (2015) 372 ITR 481 (Del). We, thus, in the backdrop of our aforesaid observations not finding favour with the view taken by the lower authorities wherein they had rejected the assessee's claim for deduction of the payment made for the technical know-how to M/s Vilter Manufacturing Corporation, USA as a revenue expenditure, and had dubbed the same as a capital expenditure, set-aside the order of the CIT(A) and direct the A.O to allow the assessee's claim for deduction of the aforesaid amount of payment of Rs. 82,73,814/- as a revenue expenditure. The **Grounds of appeal Nos. 2 to 2.2** are allowed in terms of our aforesaid observations.

8. The **Ground of appeal no. 6** being general is dismissed as not pressed.

9. Resultantly, the appeal filed by the assessee is partly allowed in terms of our aforesaid observations.

ITA No. 330/Del/2012
A.Y 2005-06

10. We shall now take up the appeal of the assessee company for A.Y 2005-06, wherein it has assailed the impugned order passed by the CIT(A) on the following solitary effective ground of appeal before us :

> *"1. That on the facts and circumstances of the case and in law the CIT(A) erred in confirming the action of the Assessing Officer in treating the sum of Rs. 67,00,716 paid vide agreement dt. 13-12-2002 to M/s Vilter Manufacturing Corporation USA as capital expenditure."*

11. As the facts and the issue involved in the present appeal, i.e re-characterization of the assessee's claim for deduction of the revenue expenditure i.e payment of technical know-how fees to M/s Vilter Manufacturing Corporation, USA, as a capital expenditure by the lower authorities, therein remains the same as were there before us while disposing off the Ground of appeal No. 2 of the assessee's appeal for the immediately preceding year i.e A.Y 2004-05 in ITA No. 2072/Mum/2008, therefore, our order therein passed while disposing off the said issue shall apply mutatis mutandis for the purpose of disposal of the aforesaid issue in the present appeal of the assessee i.e ITA No. 330/Mum/2008. Accordingly, the aforesaid **Ground of appeal No. 1** is on the same terms allowed.

12. Accordingly, the appeal filed by the assessee is allowed in terms of our observations recorded hereinabove.

13. Resultantly, the appeal of the assessee for A.Y 2004-05 in ITA No. 2072/Del/2008 is partly allowed, while for its appeal for A.Y 2005-06 in ITA No. 330/Del/2012 is allowed in terms of our observations recorded hereinabove.

Order pronounced in the open court on 30/12/2021.

Sd/-	**Sd/-**
(G.S. PANNU)	**(RAVISH SOOD)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 30/12/2021