IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

Before: Ms. Annapurna Gupta, Accountant Member
And Mr. Siddhartha Nautiyal, Judicial Member

ITA No.2948/Ahd/2010	:	Asstt.Year 2006-09
ITA No.1314/Ahd/2014	:	Asstt.Year 2008-09
ITA No.1148 /Ahd/2015	:	Asstt.Year 2009-10
ITA No.181/Ahd/2016	:	Asstt.Year 2011-12

KHS Machinery Pvt. Ltd. 53, Madbhuban, Nr. Madalpur Underbridge, Ahmedabad-380006 PAN No: AABCK 2513Q **(Appellant)**	Vs.	Asst.CIT (OSD)-1, Range-4 Ahmedabad **(Respondent)**

ITA No.2168 /Ahd/2017	:	Asstt.Year 2012-13
ITA No.2169 /Ahd/2017	:	Asstt.Year 2013-14

Asst.CIT (OSD)-1, Range-4 Ahmedabad **(Appellant)**	Vs.	KHS Machinery Pvt. Ltd. 53, Madbhuban, Nr. Madalpur Underbridge, Ahmedabad-380006 PAN No: AABCK 2513Q **(Respondent)**

Assessee by	:	Shri S.N. Soparkar, Sr.Advocate with Shri Parin Shah, AR, and Ms.Urvashi Shodhan, AR
Revenue by	:	Shri Samir Tekriwal, CIT-DR & Shri Rajdeep Singh, SR.DR

Date of hearing	:	30-05-2022
Date of pronouncement	:	13-07-2022

आदेश/ORDER

PER : ANNAPURNA GUPTA, ACCOUNTANT MEMBER:-

The present six appeals relate to the same Assessee and are against separate orders passed by the Assessing Officer(AO), Addl.CIT,Range-4,

Ahmedabad,(AO) in accordance with the Directions of the Dispute Resolution Panel, Ahmedabad, (in short referred to as DRP), under section 143(3) r.w.s 144C of the Income Tax Act, 1961(hereinafter referred to as the "Act") pertaining to Assessment Year (A.Ys) 2006-07 & 2008-09, 2009-10 and 2011-12 to 2013-14 respectively. While first four appeals have been filed by the assessee, remaining two appeals viz. ITA No.2168 and 2169/Ahd/2017 are filed by the Revenue.

2. At the outset itself it was stated by the Ld.Counsel for the assessee that adjudication of the appeal of the assessee pertaining to A.Y. 2006-07 would take care of the remaining appeals also, since there was a solitary issue in the remaining appeals which was common and identical to that raised in Assessment Year 2006-07, relating to transfer pricing adjustment made on account of determination of the arm's length price of the International Transaction of payment of royalty by the assessee to its Associate Enterprise. It was pointed out that the disallowance was made for identical reasons, in the background of identical facts and circumstances. The ld. D.R. fairly agreed with the same. Therefore, all the appeals were taken up together for hearing with the appeal of the assessee for A.Y. 2006-07 being treated as the lead case. The decision rendered in the ground which is common to the other appeals also will apply *mutatis mutandis* to the other appeals.

3. <u>ITA No. 2948/Ahd/2010 (A.Y.2006-07) (Assessees Appeal)</u>

4. Ground No.1 & 6, it was stated were general in nature. The same are therefore not being dealt with by us.

5. Ground no. 2 reads as under:

> *"The Learned Dispute Resolution Panel, Ahmedabad, has erred in not allowing deduction U/s 80IB of the I.T. Act, 1961 for Rs. 1,06,13,472/-though fully explained. The addition made be deleted."*

6. The issue in the present ground relates to denial of deduction of profits of the undertaking of the assessee amounting to Rs. 1,06,13,472/-,claimed u/s.

80IB of the Act on account of the same (undertaking) not qualifying as an SSI (Small Scale Industry) unit as defined under the section,which is a necessary prerequisite for claiming the said deduction.

7. As transpires from the orders of the authorities below, the entire controversy revolves around whether the assessee qualified as an SSI Unit for being eligible to claim the said deduction, more particularly with respect to its investment in Plant and Machinery being within the limit prescribed for the purposes of qualifying as SSI Unit as per Section 11B of the Industrial (Development and Regulation) Act (IDR Act) read with Notification No. 508-857E dated 10.12.1999 ,issued under the said Act, as per which the investment of an undertaking in plant and machinery should not exceed 1 crore for the purposes of qualifying as SSI unit.

8. The bone of contention is with regard to inclusion of certain items in plant and machinery i.e. tools, jigs, dyes and moulds which the assessee has excluded, relying on the aforestated notification and while as per the Revenue these items being integral to the assessee's manufacturing process could not be excluded from the value of plant and machinery. The Revenue has also included the investment made by the assessee in computer hardware and software for the said purpose on the reasoning that the same also qualifies as Plant and Machinery, being found to be integral to the manufacturing process.

9. Having said so, we shall first bring out certain essential facts pertinent to the issue at hand before proceeding to adjudicate the same. The assessee is in the business of manufacturing machines for Beverage & Brewery industry. It has adopted the 100% outsourcing model for the same and is only involved in assembling and testing the various components of the machines which are manufactured by outsourced parties. The assessee company started its industrial undertaking on 26.09.1998 and its first year of claim of deduction u/s. 80IB of the Act was accordingly A.Y. 1999 – 2000 but a positive claim was made by the assessee only from A.Y. 2003-04 onwards when it had profits and the impugned year i.e. A.Y. 2005-06 was the last year of claim of deduction. The investment in Plant and Machinery ,being the total cost debited

under the head Plant and Machinery by the assessee as per its Books of accounts during the relevant year, amounted to Rs.3,74,00,831/- and the investment in the block of computers was reflected at Rs. 1,24,84,568/-. As per the Revenue, the total of the two i.e. Rs. 4,98,85,399/- was the investment in Plant and Machinery by the assessee for the purposes of determining its SSI Status as per the notification issued under the IDR Act, which exceeding the limit of investment in plant and machinery specified therein of Rs. 1 crore, the assessee did not qualify as an SSI unit and was therefore not eligible to claim exemption u/s. 80IB of the Act. As per the assessee however out of its total investment in Plant and Machinery of Rs. 3.74 crores, only investment of Rs. 46,47,971/- qualified as plant and machinery since the rest being Moulds, Dies, Jigs, Fixtures, Tools etc. were to be excluded as per the notification itself. The calculation submitted by the assessee of its investment in Plant and Machinery as per the IDR Act r.w. the notification issued under it is as under:

Total cost debited under head Plant and Machinery	*Original cost*	*Original cost 3,74,00.831*
Less: Items excluded in terms of Para b (i) of Notification no. SO 857€ dated 10/12/1999		
Mould	*78,02,436*	
Dies	*23,75,327*	
Jig	*17,24,908*	
Fixture	*7,04,134*	
Patterns	*33,18,178*	
Tools	*75,90447*	
Factory equipment being rocks, tables, pallets etc.	*70,68,312*	
Consumables	*1,01,359*	*3,06,85,100*
		67,15,732
Less other exclusions from the cost		
Development cost incurred to develop source of raw material were capitalized to plant and machinery as product development cost	*5,65,960*	
Pre-operative revenue expenses capitalized not forming part of cost of individuals assets	*14,71,865*	
Deletions during the year	*29,936*	*20,67,761*
Net Balance of Plant and Machinery		*46,47,971*

10. The relevant portion of the notification no. S0-857(E) dated 10.12.1999 issued under the IDR Act for the purposes of reckoning the limit of 1 crore investment in plant and machinery is as under:

"Note 2:

In calculating the value of plant and machinery for the purposes of paragraphs (1) and (2) of this notification, the original price thereof, irrespective of whether the plant and machinery are new or second-hand, shall be taken into account.
in the value of plant and machinery, the following shall be excluded, namely: —

" The cost of equipment such as tools, jigs, dies, moulds and spare parts for maintenance and the cost of consumable stores;....

11. Having stated the facts as above, we shall now proceed to bring out in brief the contention of the ld. Counsel for the assessee before us in support of its claim that its investments in Plant and Machinery was well within the limits specified under the IDR Act for qualifying as an SSI Unit, as under:

- This issue was in dispute right from the first year when the positive claim for deduction u/s 80IB of the Act made by the assessee i.e. A.Y. 2003-04 for identical reasons that the Tools, Jigs ,Dies and Moulds excluded by the assessee ought to have been included as per the Revenue for the purposes of determining its investment plant and machinery. That the matter went up to the Tribunal where the issue was decided in favour of the assessee holding that the exclusion by the assessee of Tools, Jigs, Dies and Moulds was in accordance with the Notification issued by the IDR Act itself and therefore was correct.
- That in subsequent year also, i.e A.Y 2004-05, the dispute arose and the ITAT following its order in the preceding year allowed the assessee's claim.
- That in A.Y. 2005-06 again the claim was not allowed by the A.O. but was allowed in first appeal by the ld. CIT(A).

12. In this regard, our attention was drawn to the order of the ITAT in the case of the assessee for A.Y. 2003-04 in ITA No. 2289/Ahd/2006 dated 19/12/2008 , placed before us at paper book page no. 104 to 117 ,more particularly to page No. 106 to 115 where the issue has been dealt with at para 9.3 and 9.3.1 as under:

9.3. In the light of aforesaid provisions, we have to determine the status of taxpayer's industrial undertaking. In the case under consideration is that of manufacturing bottling plants. Therefore, it has to be seen which are the plant and machinery installed for the purpose of manufacturing bottling plants. Only the actual cost of such machinery, as on the last day of the previous year has to be taken into account for determining as to whether the

industrial undertaking owned by the taxpayer is an SSI. The A.O. and the Ld. CIT(A) are of the opinion that the value of such plant and machinery exceeds Rs. One crore. The A.O. has included value of the entire plant and machinery including vehicles computer and computer software as also moulds, dies, jigs consumables etc. while the Ld. CIT(A) has recorded the findings only on inclusion of vehicles computer and computer software. However, the arguments of both the sides with reference to these items of plant and machinery are considered as under:

9.3.1. It is submitted by the Ld.counsel for the taxpayer that in calculating the value of plant and machinery cost of equipment such as tools jigs dies moulds spare parts for maintenance and cost of consumables stores have to be excluded asper clause (1) of note 2(b) of the aforesaid notification no. 857 dated 10.12.1999. The A.O. in his order observed that the taxpayer had reflected net WDV of Rs. 11,90,001/ on account of tools and jigs in annexure B forming part of form 3CD while value of assets as on1.4.2007 reflects total value of plant and machinery at Rs. 1,97,64,660/- besides computers, furniture vehicles and office equipment. In their submissions before the A.O. the taxpayer adopted different value for moulds dies etc. The A.O. declined to exclude the actual cost of tools jigs, dies moulds and spare parts on the ground that these are used in the process of assemble and testing in its business and these are not for maintenance. Such equipment's are main tools in the business of the taxpayer. The Ld. CIT(A) has not adverted to the aspect of tools jigs dies moulds and spare parts in his order and only concentrated on value of vehicles and computers and held that value of plant and machinery exceeded Rs.1 crore Since clause(i) 2(b) specifically excludes cost of tools jigs dies moulds and spare parts for maintenance and the cost of consumables stores, the A.O. is not justified in not excluding the same while determining the value of plant and machinery. In our opinion, the word maintenance is suffixed to only spare parts and not to the other items such as tools jigs dies and moulds as also consumables. Accordingly, the A.O. is directed to exclude the cost of equipment such as tools jigs dies moulds and spare parts for maintenance and the cost of consumables stores while determining value of plant and machinery in order to ascertain the status of industrial undertaking of the taxpayer.

13. Our attention was also drawn to the order of the ITAT in the case of the assessee for A.Y. 2004-05 in ITA No. 79/Ahd/2008 dated 10/02/2012 placed before us at paper book page no. 118 to 135, particularly to page no. 124, para 8, wherein following the order of the ITAT in the preceding year, the claim of the assessee was allowed.

14. As for the Revenue's contention of inclusion of computers as plant and machinery it was contended that this issue was also considered in A.Y. 2003-04 by the ITAT and the matter restored to the A.O. to determine whether the computers were integral to the manufacturing process or not and to include in the value of plant and machinery if found so. Our attention was drawn to Para 9.3.2 is as under:

9.3.2. As regards computer hardware and software the Ld. A.R. on behalf of the taxpayer argued that computers are installed in office and therefore have to be excluded in terms of decision of the ITAT in the case of Samir Diamond Mfg. P. Ltd.

*67 ITD 25 (Ahd.) There is no finding in the order of either A.O. or Ld. CIT(A) as to whether or not all the computers are installed in office Ld. CIT(A) observed that since computers have not been excluded in the note 2(b) of aforesaid notification 10.12.1999 accordingly these have to be plant and machinery. Hon'ble Jurisdictional High Court in the case of CIT vs. Prabhusdas kishordas Tobecco products P. Ltd. 282 ITR 568 (Guj.) held that for determining the ascertaining the status of industrial undertaking SSI, the actual cost of plant and machinery which is installed in the industrial undertaking and used for the purpose of business of the undertaking has to be adopted. The provision does not stipulate taking the aggregate value of plant and machinery of the business as a whole but which the same to the plant and machinery relatable to the industrial undertaking since there is no finding either in the order of the A.O. or of the Ld. CIT(A) as to whether or not all the computers, including software valuing Rs. 98.14 lacs are installed in the office or are used in the process of manufacturing bottlings plants**. ***In the light of aforesaid decision of Hon'ble Jurisdictional High Court and in the interest of justice, we vacate the findings of the CIT(A) on this aspect and restore the matter to the file of the A.O. with the directions to ascertain as to whether or not all the computers are installed in office or as to whether some of these are installed for the purpose of manufacturing bottling plants in the industrial undertaking and thereafter determine the status of industrial undertaking as an SSI and consequently entitlement to deduction u/s. 80IB of the Act, in accordance with law after alongwith sufficient opportunity to the taxpayer***.

15. That the A.O. after verification upheld the SSI status of the assessee. It was pointed out that this fact was taken note of the DRP also in the proceedings for the impugned year before it.

16. The Ld. D.R. on the other hand contended that these contentions had been made by the assessee before the DRP also wherein the comments of the A.O. was invited to the same who contended that the assessee had actually stripped his main machine into different components and thereafter only accounted for the main body as its Plant and Machinery and rest of the items as Mould, Dies, Tools, Jigs and Fixtures, which was contrary to the intention of the language in the definition of the SSI unit as per IDR Act, to include a machine as a whole and not exclude moulds and jigs which were integral part of the machinery, and further that the verification of computers as per the direction of the ITAT in A.Y. 2003-04 was carried out by an Inspector who was illiterate in computer skill. Ld.DR pointed out that on the AO stating so, the assessee itself requested before the DRP for fresh verification to be carried out by a literate team, which was carried out and the report submitted did not help

the cause of the assessee at all, since the computers and its software were found to be in the nature of customized software/operating systems like ERP, AutoCAD being used in the entire process of the assessee right from allocation of material to requisition of production, issue of inventory and even quality control function which clearly showed that the software's were being used in manufacturing process and the related hardware accordingly was attributable to the production process undertaken by the assessee and that further the assessee was unable to verify the inclusion and exclusion to Plant and Machinery stating that considerable time had elapsed since March 2006 and due to change in location some obsolete machinery had been discarded while some had been redesigned and further that 1700 components were manufactured for the purposes of machines manufactured by the assessee and most of these components were manufactured by various vendors and suppliers ,where the Moulds and Dyes were kept at their premises and hence not verifiable. That the DRP taking note of the same had held that the computers software and hardware needed to be included in the value of plant and machinery and the same itself exceeding 1 crore since it amounted to 1,24,84,568/- that alone disqualified the assessee from the SSI status. Our attention was drawn to the relevant findings of the DRP in this regard at para 5.6 & 5.12(v) is as under:

> *5.6. Various submissions of the assessee have been considered carefully, but the same are found not acceptable. During the course of proceedings before us, as requested by the assessee, the AO was directed to make physical verification and report regarding the Plant & machinery used in manufacturing activities in the relevant financial year. As detailed above, after making physical verification the AO has reported that the list of computer hardware and software owned by the assessee upto 31 .03.2006 was procured and major items were subjected to detailed verification. Upon verification, if was revealed that the assessee is utilizing various customized softwares/operating system like ERP, AutoCAD etc. in the manufacturing process. The ERP all the computers except in the Finance & Account Department. A snap shot of AutoCAD software used for lay out design, filing machines, bottle washing machines, labelling machines etc. was taken and was enclosed with the report. This amply shows that the AutoCAD software is being used for manufacturing of machines. The various inventory management functions such as allocation of material, requisition for production, issue of inventory, production planning, and so on are done with the help of ERP software. The quality control functions are also fully supported by ERP software. A snap shot of all these ERP functions has been taken and was enclosed with the report.*

This clearly shows that the assessee is using software in it's manufacturing process and related hardware are accordingly attributable to the production process undertaken by the assessee.

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5.12 (v) In the light of above said provision of the Act, the argument of the assessee is examined as under:

During the course of its submission over inventory management, the assessee has submitted that its production and management of production including inventory data is managed a specialized inventory software. Since inventory is closely integrated with manufacturing, production without this software is not possible computer along with the inventory software valued at Rs. 1 ,17,64,388/- which therefore form an integral part of plant and machinery, have not boon stated to be part of the plant and machinery although in ifs submissions made, the assessee has stated that the computers and specialized software are used for manage of inventory of raw materials, machine components and products clearly establishing that it is not possible for the assessee to continue manufacturing without the use of computers. The computers have been i of ally ignored by the assessee for the purpose of computation of plant and machinery although the notification referred to by the assessee does not provide exclusion or these from plant and machinery.

17. The Ld.DR further drew our attention to the findings of the DRP rejecting the claim of the assessee of exclusion of Moulds, Tools etc from the value of Plant & Machinery noting the fact that the assessee had failed to discharge its onus of demonstrating its said claim as under:

"Further, the attempt of the assessee has been to strip clown the plant and machinery installed by giving a name and a value to the various integral machine parts and reducing the same from the overall value of [he machinery. What ever remains as the residual skeleton has been categorized as plant and machinery for the purposes of the for SSI. This type of categorisation of basic machine is only treated as plant and machinery for the purpose of the Act which cannot be intention of the legislature.

5.14 The AO in the Draft assessment order has observed that the assessee has not replied to the above notice other than merely reiterating the earlier submission filed by if about the genuineness of its claim and resubmitting the fabric reproduced earlier. As already discussed in earlier paragraphs, important. machines/equipment's have been re-categorized by the assesses into tools, jigs, dies moulds and spare parts in its submission although they are important equipments used in the process of assembly and testing of its business. These are not for the purpose of its maintenance, such equipments cannot be treated as

peripheral or subsidiary tools. They are the actual and main tools being used in the peculiar and specific business of the assessee company.
For Example:
(i).....
(ii) The Vemier Callipers of very high cost of machinery being assembled. These engineering tools are very necessary for correct and accurate joining and erection of different part of big machinery. Without them, assembly cannot take place and constitute the main assembly equipment's. Under no circumstances, they can be treated as tools for maintenance.
[iii] Similarly, there are equipment's like injection mould, the value of one piece of which is Rs.4,25,000/- (as per bill dated 30.06.199? of Precise Metal Works, Ahmedabad). These injection moulds ore very necessary for the purpose of various crates, trays and other finished products in which the assessee is dealing in. they can never be treated as maintenance equipments.
5.15 without prejudice to above, it is observed that before us the assessee has submitted the details of exclusion of plant and machinery as per Government of India's notification no. SO-857(E) dated 10.12.1999 issued under Industrial (Development and Regulation) Act, 1951 as under:

Total cost debited under head Plant and Machinery	Original cost	Original cost 3,74,00.831
Less: Items excluded in terms of Para b (i) of Notification no. SO 857€ dated 10/12/1999		
Mould	78,02,436	
Dies	23,75,327	
Jig	17,24,908	
Fixture	7,04,134	
Patterns	33,18,178	
Tools	75,90447	
Factory equipment being racks, tables, pallets etc.	70,68,312	
Consumables	1,01,359	3,06,85,100
		67,15,732
Less other exclusions from the cost		
Development cost incurred to develop source of raw material were capitalized to plant and machinery as product development cost	5,65,960	
Pre-operative revenue expenses capitalized not forming part of cost of individuals assets	14,71,865	
Deletions during the year	29,936	20,67,761
Net Balance of Plant and Machinery		46,47,971

5.16. From the above, it can been seen that the assesse has excluded the value of Patterns at Rs. 33,18,178/- Fixture at Rs. 7,04,134/- and Factory equipment being rocks, tables, pallets at Rs. 70,68,312/-. It is undisputed that these are treated as plant and machinery used in manufacturing process by the assessee has been excluded as per said information issued under Industrial (Development and Regulation) Act, 1951. However a perusal of said notification will show that

the only the value of tools, jigs, dies, moulds and spare parts for maintenance and the cost of consumable stores are needed to be excluded from the value or Plant & Machinery for the purpose of determining whether the assessee is an SSI Hence in our considered view the assessee's claim of exclusion of value of Patterns at Rs. 33,18,1787-, Fixtures at Rs. 7,04,1347-and Factory equipment being racks, tables, pallets at Rs. 70,68,3127- is not tenable as the some are not tools, jigs, dies, moulds and spare parts for maintenance and the cost of consumable stores, more so when the assessee has already excluded, separately, the value of Mould at Rs. 78,02,436/-, Dies at Rs. 23,75,327/-, Jig at Rs. 17,24,908/-, Tools at Rs. 75,90,447/- and consumables at Rs. 1,01,359/-. Hence it is held that the value of Patterns at Rs. 33,18,178/-, Fixtures at Rs. 7,04,134/- and Factory equipment being racks, tables, pallets are required to be included in the value of plant and machinery for determining the status of SSI Unit.

5.17. Further the assessee has also excluded Development cost incurred to develop source of raw material which were capitalized to plant and machinery as product development cost at Rs. 5,65,960/- and Pre-operative revenue expenses capitalized at Rs. 14,71,865/-. We are of the view that these expenses cannot be excluded from the value of Plant & Machinery as the assessee is claiming depreciation on same. The value of plant and machinery cannot be different for claiming depreciation and for determining the status of assessee as a SSI.

18. Having heard both the parties and considering all the contentions made before us and the different documents relied upon, we hold that we do not find any merit in the contention of the ld. Counsel for the assessee that its investment in Plant and Machinery did not exceed the specified limit of 1 crore and thus qualified for deduction u/s. 80IB of the Act as an SSI unit. The assesses claim is that its investment in Plant and Machinery was only Rs.46,47,971/- as reproduced in a table above and has vehemently contested the inclusion therein of Moulds ,Jigs ,Dyes etc. to the tune of Rs.3,27,52,860/- as specifically excluded from the definition of Plant and Machinery as per definition of the said term in the IDRA Act and has also contested inclusion of investment in Computers ,both hardware and software, of Rs.1,24,84,568/- as not related to its manufacturing activity and not qualifying therefore as Plant and Machinery. We are not in agreement with the contention of the Ld.Counsel for the assessee. The reason is very simple. It is not denied that as per Section 11B of the IDR Act read with aforesaid notification it is the investment in Plant and Machinery of the industrial undertaking which is to be considered for the qualifying quantum of investment. The term Plant and Machinery has not been defined under the IDR

Act, but on a perusal of the defining section i.e. Section 3 of the IDR , sub-clause(k) states that words and expressions used in the Act but not defined in the Act and defined in the Companies Act shall have the meaning respectively assigned to them in that Act. Therefore it is the Companies Act which has to be looked at for definition of terms not defined in the IDR Act. Admittedly, the Books of accounts of the assessee are in accordance with the Companies Act and in the said Books it has classified its Fixed assets and made a distinction between Plant and Machinery and Tools, Jigs ,Dyes and Moulds. Thus claiming separate rate of depreciation on the said two categories of assets as prescribed in Schedule 14 of the Companies Act. Having done so, all items classified by the assessee as Plant and Machinery and claimed depreciation as per the rate prescribed therein, are for the purposes of the IDR Act also to be treated as Plant and Machinery. What the assessee has attempted to do is to separate and segregate from this Plant and machinery, items which individually qualified as tools, jigs dyes and moulds but were part of machinery as a whole. As per its own admission also it now seeks to segregate assets from Plant and Machinery those assets which qualify as its tools, jigs dyes and moulds but was part of its plant and machinery . If those assets were actually in the nature of tools ,jigs and dyes alone and not part of Plant and Machinery, the assessee would have reflected it separately and claimed a different and higher rate of depreciation on the same as prescribed under the Companies Act. Therefore this claim of the assessee of segregating tools, jigs dyes and moulds originally its included in the value of plant and machinery as reflected in its books of accounts, as per Notification issued under the IDR Act, in our view is not correct. This is not clearly permissible and only assets which actually qualified as tools, jigs dyes and moulds for the purposes of different rate of depreciation as already done by the assessee in its Books needed to be treated as to be in the said nature for exclusion. Our findings as above are further cemented by the fact that when on its own request in proceedings before the DRP an Inspector was deputed to verify the existence of these very tools, jigs dyes and moulds which the assessee had sought to exclude from its plant and machinery value,the assessee offered no cooperation in the matter and provided no assistance and failed to discharge its onus of establishing its claim and simply stated that the

matter being very old relating to year ending March 2006 and the verification being carried out in 2010 during the pendency of proceedings before the DRP and the assessee having shifted its premises in the meanwhile and certain machinery having been sold or become obsolete, the verification was not possible. Therefore it is clearly evident that as per the IDR Act read with Notification issued also, the cost of plant and machinery as reflected in the books of the assessee was to be considered and the Revenue had rightfully considered the said figure at Rs.3,74,00,831/- .

19. Even otherwise taking up each exclusion we find that with respect to computers sought to be excluded valuing Rs.1,24,84,568/-, the only contention of the Ld.Counsel for the assessee was that in A.Y 2003-04,the computers were physically verified by the AO as to whether they could be said to be integral to the manufacturing process ,on the directions of the ITAT, and were not so found. This contention, we find merits no consideration since we find much water has flown since the verification done in AY 2003-04. We have noted from the DRP order that this argument was taken before it also to which the Revenue had countered saying that the Inspector deputed then was not competent to make the said verification of computers. And the assessee therefore had requested fresh verification to be done in the impugned year. The Ld.Counsel for the assessee does not dispute these facts. We have noted that the report of the AO ,submitted after due verification, stated the fact that the assessee was using various customized softwares/operating systems like ERP, Autocad in the manufacturing process. Snapshots of Auto CAD software being used for layout design, fitting machines, labeling machines was enclosed in the report. Similarly the AO reported use of software for inventory management functions right from allocation of materials, production requisition, planning and also quality control function. Snapshots of these functions were also submitted along with the report. The assessee had nothing much to say to counter the AO's report, merely stating that the total cost of the softwares both Autocad and Inventory Management Software(IMMS) was miniscule being Rs.5,91,675/- and Rs.6,51,000/-, and denied having any ERP system ,contending that it was only an IMMS software used only for purposes of day to day store accounting, was a

perpetual inventory software and had nothing to do with manufacturing process.

20. As far as the AutoCad software is concerned, we find, even the assessee does not deny its usage in the manufacturing process. Therefore, the cost of the software alongwith the hardware in which it is used is to be treated as Plant and Machinery for the purposes of SSI status determination. The argument of the assessee that only cost of software be considered as Plant and Machinery ,is highly illogical and merits no consideration. It is common knowledge that software alone is of no use and has utility only when run on the hardware. Therefore both the cost of software and hardware, we hold, used for running Auto Cad software is to be treated as Plant and Machinery.

21. Regarding the IMMS /ERP software the AO vide his letter dated 07-07-2010 has vehemently made out a case for treating it as Plant and Machinery stating that these softwares are utilized for the purpose of handling all activities of the assessee enterprise including manufacturing, inventory management, time scheduling, ordering of items, vendor management, financial solutions, salary payment and attendance logging. He has stated that they are not stand alone systems but are integrated by their very nature with all other systems of the enterprise. That in an ERP implemented environment each production/consumption/ sale/inventory detail needed to be accounted for on a real time basis and the software generated requisite reports including production and inventory forecasting ,production/sales forecasting ,inventory ordering and scheduling etc. That without this system the plant of the assessee cannot be run and therefore these software alongwith hardwares constitute Plant and Machinery. The AO detailed the extensive coverage of these software in the operations of the assessee company noting them to be installed in all areas of operation. He noted integrated manufacturing applications installed in the computers at shop floor which were found to be integrated with all other computers of the company by installing modems as well as Oracle and Lotus Notes softwares. He also noted the fact of huge repair and maintenance charges being paid for maintaining the systems amounting to Rs.2.8 lacs which he noted was charged only on specialzed computer systems. The assessee has

countered by merely contending that only cost of software of IMMS /ERP be considered as Plant and Machinery and that the software was only for handling stores. The DRP /AO, we hold, has rightly held the cost of ERP software alongwith hardware to be included in the value of Plant and Machinery in the aforestated backdrop of the case since the finding of fact of the computers being used in manufacturing process is based on physical verification by the AO who supported his report with snapshots of the software shown to being used in the manufacturing process. The usage of the IMMS software in the entire production process involving allocation of materials ,production requisition and planning has been established as a fact by the AO's inspection and snapshots taken during the inspection and even the assessee admitted to it being used as a continuous inventory management software. The DRP, we hold, has rightly held that that the specialized inventory management software enabled manufacturing process which was dependent on it and thus plant and machinery. Further the DRP has rightly included the investments in hardware alongwith the softwares being used as held by us above in respect of Auto Cad software. Thus we hold that the inclusion in Plant and Machinery of investments in computers to the tune of Rs.1,24,84,568/- was rightly made by the AO/DRP. The investment in computers exceeding Rs. 1 Cr this inclusion in the Plant and Machinery of the assessee itself makes the assessee ineligible to claim the status of SSI . However we shall proceed to deal with the exclusion of other items also from Plant and Machinery by the assessee of Mould, dyes ,Jigs and Tools etc .in accordance with the IDRA notification. The DRP has completely rejected the bifurcation of the assessee regarding its Plant and Machinery amounting to only Rs.46,47,971 out of that shown under the head Plant and Machinery in the Books of Rs.3,74,00,831/- and based it on the following reasoning:

> a) the assessee failed to discharge its onus of physically verifying its claim of assets qualifying as Plant and Machinery which verification was directed by the DRP on the request of the assessee itself. The DRP contended that the assessee himself requesting for physical verification could not then have taken a 'U' turn and stated that after a lapse of so many years physical verification was not possible.

b) Falling back thereafter on material before it ,in the absence of physical verification, the DRP found the assessee itself to be treating assets to the tune of Rs. 3,74,00831 as Plant and Machinery in its Books, categorizing only Rs.5,15,186/- worth of Tools and Jigs separately. The DRP held therefore that as per the assesses own claim only assets to the tune of Rs.5,15,186/- classified as Tools and Jigs and the bifurcation therefore done by the assessee of its stated Plant and Machinery was clearly stripping the Machine only to its Frame taking out many components and claiming them to be Tools ,Jigs and Dyes.

c) that even as per the notification of the IDRA Patterns ,Fixtures, and factory equipment amounting to Rs.33,18,178/-,Rs.7,04,134/- and Rs.70,68,312/- resp., could not be excluded .

d) That the exclusion of development cost incurred to develop source of raw material and pre-operative Revenue expenses of Rs.5,65,960/- and Rs.14,71,865/- resp. aws incorrect as the assessee itself had capitalized these items in the cost of Plant and Machinery and claimed depreciation on the same also.

21. The assessee, we find, had nothing to state in justification of its claim of exclusion of items in the nature of Patterns ,fixtures and Factory equipments which it had itself treated as Plant and Machinery but excluded as per IDRA notification and which the DRP noted did not qualify for exclusion as per the notification. Therefore we find merit in the finding of the DRP on this account. The value of these items aggregates to Rs.1,10,90,624/- and in itself makes the assessee ineligible for SSI status. The decision of the ITAT in the preceding year does not help the assessee since it clearly does not approve exclusion of these items but only those mentioned to be excluded in the notification. Further we agree with the DRP/AO that there is no justification for exclusion of product development cost and preoperative Revenue expenses capitalized ,both added to the cost of Plant and Machinery by the assessee itself. The notification r.w section 11B of IDRA only talks of cost of Plant and Machinery as originally incurred. Once these costs are admittedly incurred for Plant and Machinery there is no scope for excluding them. These costs also aggregate Rs.20,37,825/-

22. Considering our finding above of inclusion of computers cost, patterns, fixtures and factory equipment and product development and preoperative cost, this alone makes the assessee ineligible to SSI status as per IDRA Act and it can be safely held accordingly therefore that the assessee is not eligible to

deduction u/s 80IB of the Act. However we shall deal with the remaining exclusions also

23. With respect to the remaining items disqualified ,we agree with the findings of the DRP that having not discharged its onus of physically verifying its claim of excluding these items as qualifying as Tools ,Jigs and Dyes ,that too on its own request and the financial records of the assessee belying this claim, the said claim also needed to be rejected. The Ld.Counsel for the assessee has been unable to controvert that as per its own financial statements the assessee had separately classified assets qualifying as Tools & Jigs to the extent of only Rs.5,15,136/-.The act of the assessee therefore of splitting the admitted cost of Plant and Machinery of Rs.3,74,00,831 /-,we agree with the DRP, was only breaking down its machine to its components ,reducing the machine in turn to only its frame which surely does not qualify as Plant and Machinery. This is all the more relevant since the assessee has otherwise been unable to justify its claim by way of physical verification done on its own request. The decision of the ITAT also in the preceding years does not come to the assistance of the assessee since all these facts were not there before the ITAT.

24. In view of the above we uphold the findings of the DRP/AO that the assessee did not qualify as an SSI Unit and was therefore not eligible to deduction u/s 80IB of the Act. The order of the AO denying deduction u/s 80IB of Rs.1,06,13,472/- is accordingly upheld. Ground of appeal No.2 of the assessee is dismissed.

25. Ground no. 3 reads as under:

> *" The Learned Dispute Resolution Panel, Ahmedabad has erred in not allowing Upward Revision of Rs. 39,52,277/- and Royalty Payment of Rs. 1,37,75,772/- being computation of arm's length price in relation to international transactions though fully explained. The addition made be deleted."*

26. At the outset it was pointed that that the grievance raised by the assessee in the said ground related to transfer pricing adjustment on two international transactions of the assessee with its associate enterprise.

(i) The payment of royalty to its AE of Rs. 39,52,277/-,ALP determined by AO/DRP at Nil

ii) upward adjustment of Profits to the tune of Rs.1,37,75,772/-on account of purchases from AE

27. Ld. Counsel for the assessee first took the issue of transfer pricing adjustment made on account of payment of royalty to the Associate Enterprise of the assessee. Referring to the facts of the case it was pointed out from the orders of the authorities below that during the impugned year, the assessee had made payment of royalty to its joint venture partners, i.e M/s KHS Germany amounting to Rs.39,52,277 which was referred by the A.O. to the TPO for determination of arm's length price(ALP) of the transaction. The assessee had justified the transaction by adopting the TNMM method for determination of the arm's length price, which was rejected by the TPO who thereafter noted that the A.E. of the assessee had not charged any royalty from its other subsidiaries and accordingly held that the payment of royalty by the assessee in the impugned case was not justified and determined the arm's length price of the transaction at Nil . The same was confirmed by the DRP.

28. Ld. Counsel for the assessee challenged the aforesaid determination of ALP of royalty at nil raising multifarious arguments. Briefly summarized his arguments were to the effect –

(i) identical adjustment made in the case of the assessee in the preceding assessment year i.e. A.Y. 2004-05 in ITA No. 79/Ahd/2009 dated 10/02/2012 was rejected by the ITAT and the Revenues Misc. Application against the same dismissed in M.A. No. 74/Ahd/2012 dated 27/09/2013 . Copies of both the orders were placed before us. That there was no change in the facts and circumstances as in the A. Y. 2004-05 and therefore the decision of the ITAT in the said year squarely applied the present case. Reliance was placed on the following decision in support of its contention.

a) PCIT-4, Pune vs Vishay Components (P) Ltd. Components Pvt. Ltd. vs. [2019] 103 taxmann.com 421.

(ii) That without prejudice to the above, the TNMM method had been wrongly rejected since the assessee had adopted this method from year to year to justify the ALP of its transaction.

iii) Once TNMM method is accepted at entity level, no separate bench marking needs to be done in relation to payment of royalty. Reliance in this regard was placed on the following decisions:

- Kaypee Electronics & Associates (P) Ltd. vs. DCIT Circle-1 [2018] 94 taxmann.com 251
- Sony Ericsson Mobile Communication India Pvt. Ltd. vs. CIT-3 [2015] 55 taxmann.com 240.
- Magneti Marelli Powertrain India Pvt. Ltd. DCIT [2016] 75 taxmann.com 213 (Delhi)

iv) The ALP could not have been determined at NIL by the TPO. Reliance was placed on the following case law –

- CIT vs. Lever India Exports Ltd. [2017]78 taxmann.com 88 (Bom)
- CIT-I Vs. Cushman and Wakefield (India) (P.) Ltd. [2014] 46 taxmann.com 317 (Delhi)
- Eaton Fluid Power Ltd. Vs. ACIT [2018] 92 taxmann.com 158 (Pune Tribunal)

v) Another AE could not have been treated as a comparable.

29. The CIT-DR on the other hand relied on the DRP's order more particularly pointing out the fact that the AE had not charged any royalty from its associate emprise. Therefore the payment of royalty by the assessee to its AE was justifiably treated as not as arm's length.

30. We have heard both the parties, gone through the orders of the authorities below and also the various case laws cited by the assessee before us. We find merit in the contention of the assessee. Undeniably the AO has treated the ALP of the royalty transaction as Nil for the reason that the AE did not recover any such payment from its other AE's. Firstly it is basic and fundamental that ALP of an international transaction refers to the value at which the transaction would have been conducted at arm's length, ruling out any scope of manipulation in the same on account of relation between the two parties entering into it. Therefore there cannot be any determination of the ALP of the transaction by comparing it with an AE of the tested party. In the present case the AO has done exactly this by comparing the royalty charged by the AE of the assessee from its other associated entities. This comparison cannot result in determination of Arms Length Price of the transaction. For this reason alone

the ALP determined by the AO at Nil in the present case needs to be rejected. Even otherwise we find that this issue has been adjudicated in the case of the assessee for A.Y 2004-05 wherein identically the ALP of royalty determined at Nil was rejected by the ITAT noting that similar Royalty consistently paid by the assessee in the past has been allowed, that the AO failed to bring on record the ordinary profits which the assessee could earn in such type of business and the expenditure having been incurred for the purpose of business could not be denied completely. The relevant findings of the ITAT at para 17 of the order are as under:

> *"17. On hearing the parties and perusing the materials available on record, we are of the view that for a transaction to come u/s 92 of the Act, it is necessary to establish that the course of business between resident and non- resident is so arranged that the business transacted between them provides to the resident either (i) no profits or (ii) less than ordinary profits which might be expected to arise in the business. In the present case, the assessee had declared income and therefore it is not case of "no profit". So as regards the adequacy of profits vis-à-vis ordinary profits which might be expected to arise in the business, the same can be found out only, when exercise is done to compare the income of the assessee with other comparable enterprises in India. In the present case, the TPO observed that no royalty was charged by other group entites and accordingly the Arms Length Price for royalty charges was inferred as nil. The AO accordingly disallowed the royalty payment. As argued by the Ld. AR that the technical know-how was provided to the assessee only and the same was not comparable with other entities of the group. The assessee had not made the one-time payment but making the continuous payment to the know-how provider which has been accepted by the Department in the past. The assessee has been charging 5% royalty each and every transaction and therefore the said payment cannot be said to have been paid on the aggregate amount, as argued by Ld. CIT-DR. The findings of the Assessing Officer in considering the royalty charges as nil as arms length price cannot be accepted since the AO in the present case has not brought on record, the ordinary profits which can be earned in such type of business. Therefore in our view the payment of royalty is not hit by the provisions of Section 92 of the Act and there is no reason to hold that the expenses should not be allowed u/s.37(1) of the Act, since the expenditure has been incurred by the assessee during the course of business and is having the nexus with the business of the assessee. Therefore the payment of royalty is a business expenditure which has been incurred wholly and exclusively for the purpose of business of the assessee and same is to be allowed in toto as a matter of commercial expediency. Therefore, the case laws relied upon by the Ld. CIT-DR are of no benefit to the Revenue. The reasonableness of expenditure in the present circumstances and facts of case, cannot be doubted and accordingly the Assessing Officer is directed to allow the claim of the assessee and the order of Ld. CIT(A) is reversed. Thus, ground No.3 of the assessee is allowed.*

31. Moreover we have noted that the Revenues MA against the said finding was also dismissed by the ITAT vide its order in MA no.74 &79/Ahd/2008. There being no change in facts and circumstances pointed out by the Ld.DR the

issue stands covered in favour of the assessee by the said decision. Further the reliance placed by the Ld.Counsel for the assessee on the decision of the Hon'ble Bombay High Court in the case of Lever India(supra) and the Hon'ble Delhi High Court in the case of Cushman and Weikfield (supra) for the proposition that the ALP of the transaction could not have been determined at Nil, is apt. We find that the Hon'ble High Courts have categorically held in the said decisions that it is not part of the TPO's jurisdiction to consider whether or not expenditure incurred passed the test u/s 37(1) of the Act. It has been held that the only authority of the TPO is to conduct a Transfer Pricing analysis to determine ALP and not to determine whether there is a service or not from which assessee benefits.

32. In view of the above the determination of the ALP of the Royalty transaction at Nil by the AO is held to be not in accordance with law. The adjustment therefore made to the income of the assessee amounting to Rs.1,37,75,772/- is therefore directed to be deleted.

33. The other issue raised in the ground relates to the transfer pricing adjustment made to the cost of the purchases made by the assessee from its associated enterprise. The TPO had proposed an upward adjustment on account of purchase payment of Rs. 21,99,689/- accepting TNMM adopted by the assessee as most appropriate method for determining the arm's length price and the Profit Level Indicator (PLI) of PBDIT (Profit Before Depreciation Interest and Tax) to sales. The adjustment was made observing that the comparable of M/s. Praj Industries, acomparable, showed PBDIT to sales of 12.83% as against 10.88% shown by the assessment company. The DRP on the other hand held that the PLI to be adopted should be PBIT (Profit Before Interest to Tax) to sales and on noting that the PLI of the comparables came to 12.06% as against 7.03% assessee, enhanced the adjustment accordingly to Rs.1,37,75,772/-

34. The only contention of the Ld. Counsel for the assessee before us was that it had objected to the adoption of the PBIT of the assessee company @7.03% pointing out that none of the data as regards revenue or cost were matching with the profit and loss account of the assessee and had submitted

summary of the financial information also to the ACIT TPO-2. Our attention in this regard was drawn to the letter of the ACIT TPO-2, Ahmedabad addressed to the assessee pointing out the proposed adjustment to be made to the purchase transaction of the assessee on the direction of the DRP to adopt the PBIT to sales as opposed to PBIT to sales adopted by the assessee, placed before us at paper book page no. 82 to 86. Drawing our attention to Annexure-B of the said letter it was pointed out that the same comprised of computation of the PBIT to sales of the assessee company at 7.03% by the TPO. Our attention was drawn to paper book at page no. 87 & 88 being the objection filed by the assessee in response to the aforesaid calculation of adjustment proposed by the TPO pointing out therein that none of the data taken by the TPO matched with the profit and loss account of the assessee. It was pointed out that the DRP had failed to take note of this objection of the assessee and it was therefore pleaded that the issue therefore be restored back to the TPO for reworking the adjustment in the light of the submissions made by the assessee as above.

35. Ld. D.R. was unable to point out any infirmity in the contentions of the Ld. Counsel for the assessee before us.

36. In view of the above, this issue of arm's length price of the purchase transaction entered into by the assessee with its associate enterprise is restored back to the TPO to rework the arm's length price of the transaction after considering the anomaly pointed out by the assessee in its original calculation. Ground of appeal No.3 is therefore allowed for statistical purposes.

37. Ground no. 4 reads as under:

> *"The Learned Dispute Resolution Panel, Ahmedabad has erred in not considering Service Income as Business Income for the purpose of Deduction u/s 80IB of the I.T. Act, 1961."*

38. In the impugned ground the assessee has challenged the denial of deduction u/s. 80IB to the service income earned by the assessee. The quantum of service income earned and credited to the profit and loss account and on which deduction u/80IB of the Act was claimed amounted to Rs. 3,72,52,132/. The A.O./DRP denied the same noting that it could not be said to

be derived from the industrial undertaking which was the essential prerequisite for claiming deduction under the said section. Accordingly 30% of the service income was treated as the amount of deduction claimed by the assessee on the same, without allowing any benefit of set off of expenses against the said income and deduction denied to the same which came to Rs. 1,11,75,639/- but was restricted to the amount of Rs. 1,06,13,472/- being the entire claim of the assessee to deduction u/s. 80IB of the Act. This denial of deduction was made without prejudice to the denial of claim of the assessee to deduction u/s. 80IB of the Act on account of the finding by the revenue authorities that the assessee did not classify as SSI unit to be eligible to claim the deduction. Since we have held the assessee ineligible to claim deduction u/s 80IB of the Act at para 18-24 of our order above, this ground is of no consequence. Ground of appeal No.4 is therefore dismissed.

39. Ground no. 5 reads as under:

> *"5. The Learned Dispute Resolution Panel, Ahmedabad ' has erred in not allowing Foreign Exchange Loss of Rs. 38,75,690/- though fully explained. The addition made be deleted."*

40. Briefly facts relation to the issue are that during the course of assessment proceedings, it was noticed that the assessee had claimed foreign exchange loss of Rs. 22,56,487/-. Perusal of the ledger account indicated that the assessee had debited an amount of Rs. 61,06,497/- towards foreign exchange loss while an amount of Rs. 38,50,009/- had been credited as gain. The AO noted that the total debits included an amount of Rs. 38,75,690/- on account of re-statement of loans availed for capital work. Holding this amount as being of a capital nature which should have gone either in form of restatement of capital items or restatement of the loan amount, he disallowed the claim of Rs.38,75,690/- as revenue expenditure.

41. Before us the solitary plea of the ld. Counsel for the assessee was that necessary directions be given for allowing depreciation on the foreign exchange loss so treated as capital expenditure.

42. In view of the above, since the ld. Counsel for the assessee has fairly conceded this ground, the disallowance of foreign exchange loss amounting to

Rs. 38,75,690/- relating to loss availed for capital work is upheld. The A.O. is directed to grant depreciation as per law on the same. Ground of appeal No. 5 of the Assessee is accordingly dismissed.

43. In effect, the appeal of the assessee is partly allowed for statistical purposes.

44. It was common ground that the issue in the remaining appeals of the assessee and the Revenue related to adjustment made on account of royalty payment made by the assessee to its AE as per the Transfer Pricing provisions of the Act. This issue has been adjudicated by us in the assessee's appeal for Asst.Year 2006-07 in ITA No.2948/Ahd/2010 above, wherein at para 30-32 of our order, we have deleted the adjustment so made by the Revenue. Since it was common ground that the issue and the facts in the remaining years are identical to that in Asst.Year 2006-07, decision rendered therein will apply *mutatis mutandis* to rest of the appeals also. Following the same, the assessee's appeals in ITA No.1314/Ahd/2014, 1147/Ahd/2015 and 181/Ahd/2016, Asst.Year 2008-09, 2009-10 and 2011-12 respectively are allowed; while appeal of the Revenue in ITA No.2168 and 2169/Ahd/2017 for Asst.Year 2012-13 and 2013-14 are dismissed.

45. Combined results in summary,

i) Assessee's appeal in ITA No.2948/Ahd/2010 for Asst.Year 2006-09 is partly allowed for statistical purpose;
ii) Remaining appeals of the assessee are allowed;
iii) Both appeals of the Revenue are dismissed.

Order pronounced in the Court on 13th July, 2022 at Ahmedabad.

Sd/-	**Sd/-**
(SIDDHARTHA NAUTIYAL)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad : Dated 13/07/2022