

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
'D' BENCH, CHENNAI**

श्री वी दुर्गा राव, न्यायिक सदस्य एवं श्री मंजुनाथ. जी, लेखा सदस्य के समक्ष  
**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND  
SHRI MANJUNATHA. G, HON'BLE ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.: **2093 & 2094/Chny/2014**  
निर्धारण वर्ष / Assessment Year: 2009-10

Alstom T&D India Limited,  
(Previously Areva T&D India Limited)  
19/1, I.O.C, GST Road,  
Pallavaram,  
Chennai – 600 062.  
**[PAN: AAACG-2115-R]**

The DCIT / ITO (TDS),  
LTU,  
Chennai.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA Nos.: **2081 & 2082/Chny/2014**  
निर्धारण वर्ष / Assessment Year: 2009-10

The ACIT /ITO (TDS),  
LTU,  
Chennai.

M/s. Areva T&D India Limited,  
(Now Alstom T&D India Limited)  
19/1, I.O.C, GST Road,  
Pallavaram,  
Chennai – 600 101.  
**[PAN: AAACG-2115-R]**

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

Assessee by : Shri. Tushar Jarwal, Advocate &  
Shri. Rahul Sateeraja, Advocate  
Department by : Shri. P. Divahar, CIT

सुनवाई की तारीख/Date of Hearing : 21.08.2023  
घोषणा की तारीख/Date of Pronouncement : 20.11.2023

**आदेश /ORDER**

**PER: MANJUNATHA. G, ACCOUNTANT MEMBER:**

This bunch of four cross appeals, two each by the assessee and two each by the revenue are directed against orders of the Commissioner of Income Tax (Appeals), Large Taxpayers Unit, Chennai, all dated 29.05.2014 and pertains to assessment year 2009-10. Since, facts are identical and issues are common, for the sake of convenience, the appeals filed by the assessee and the revenue are being heard together and disposed off, by this consolidated order.

**ITA Nos: 2082 & 2093/Chny/2014, AY 2009-10:**

2. The brief facts of the case are that the assessee is a limited company, engaged in the business of manufacture of transmission and distribution equipment comprising of protection and control consisting relays and control panels, high voltage and medium voltage switch gears, transformers and electrical distribution system. It was also engaged in the business of execution of turnkey projects involved in transmission and distribution of power. The assessee has filed its return of income for the assessment year 2009-10 on 29.09.2009, declaring a total income of Rs. 379,33,12,852/-.

The case was selected for scrutiny and the assessment has been completed u/s. 143(3) of the Income tax Act, 1961 (hereinafter referred to as "the Act") on 30.01.2013 and determined total income of Rs. 499,20,38,015/-. The assessee carried the matter in appeal before the first appellate authority and the Id. CIT(A) for the reasons stated in their appellate order dated 29.05.2014, partly allowed appeal filed by the assessee. Aggrieved by the CIT(A) order, the assessee and as well as, the revenue are in appeal before the Tribunal.

3. The first issue that came up for our consideration from ground no. 1 of assessee's appeal is addition towards disallowance of provision for warranty amounting to Rs. 6,61,04,000/-. The Id. Counsel for the assessee submitted that the assessee company is manufacturing heavy electrical equipments and sells those equipments with a warranty period of two years for any manufacturing defects. The appellant company provides provision for warranty expenses based on past experience and on scientific basis considering historical warranty claims settled for earlier period. The appellant follows a policy of scientifically recognizing the warranty provision and also reviews the same at the end of the warranty period and

reverse excess provision created thereby maintaining the adequate provision required for warranty. The Assessing Officer without understanding the nature of business of the assessee disallowed provision for warranty expenses, even though the assessee has explained the method of providing for warranty expenses. In this regard, he relied upon the decision of Hon'ble Supreme Court in the case of M/s. Rotork Controls India Pvt Ltd vs CIT, 314 ITR 62 (SC).

3.1 The Id. DR, Shri. P. Divahar, CIT, supporting the order of the Id. CIT(A) submitted that, if you go through the provision created and utilized by the assessee for last five years, it is abundantly clear that the appellant is not creating provision for warranty in line with the ratio laid down by the Hon'ble Supreme Court in the case of M/s. Rotork Controls India Pvt Ltd vs CIT (Supra). The Assessing Officer has brought out clear facts to the effect that the assessee simply making a provision at the end of the year and releasing said provision without actual utilization of said provision. Therefore, the Id. CIT(A) after considering relevant facts has rightly sustained additions made by the Assessing Officer and their order should be upheld.

3.2 We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. The facts borne out from record indicates that the appellant is creating a provision for warranty expenses at the end of the year, but not utilizing said provision in total, which is evident from the historical provision created by the appellant and subsequent release after the warranty period. Further, the outstanding credit in provision for warranty account is much higher than the amount of provision utilized by the assessee. During the year, the appellant created provision of Rs. 6.61 crores and released Rs. 4.07 crores and closing balance as on 31.03.2009 was at Rs. 23.44 crores. From the above, it is abundantly clear that provision created by the assessee for warranty expenses is not scientifically recognized considering past trend and future liability required to settle warranty claims. Therefore, we are of the considered view that provision created by the assessee for warranty expenses is not in line with the ratio laid down by the Supreme Court in the case of M/s. Rotork Control India Pvt Ltd vs CIT (supra) and thus, in our considered view, there is no error in the reasons given by the Id. CIT(A) to sustain

additions made towards disallowance of provision for warranty expenses. Thus, we are inclined to uphold the findings of the Id. CIT(A) and reject grounds taken by the assessee.

3.3 In so far as alternative arguments of the Id. Counsel for the assessee that, at least the Assessing Officer may be directed to allow actual expenditure incurred towards warranty amounting to Rs. 4,71,12,000/-, we find that the appellant could not give any detail as to whether actual expenditure incurred during the year is out of provision created for the impugned year or out of opening balance brought forward from earlier financial year. In absence of specific details with regard to utilization of warranty expenses, the claim of the assessee cannot be accepted. Thus, we reject the alternative arguments of the Id. Counsel for the assessee.

4. The next issue that came up for our consideration from ground no.2 of assessee's appeal is not allowing deduction towards release/utilization for provision for warranty created during earlier years. The Id. Counsel for the assessee submitted that the Id. CIT(A) allowed relief on this issue and thus, the appellant does not want to press the ground

challenging the issue. Hence, ground no.2 of assessee's appeal is dismissed as not pressed.

5. The next issue that came up for our consideration from ground nos. 3 & 4 of assessee's appeal is disallowance of provision made for contract contingencies amounting to Rs. 4,93,06,000/-. The assessee company has claimed deduction towards provision for contract losses of Rs. 8,12,35,000/-. The Assessing Officer, disallowed sum of Rs. 4,93,06,000/- being difference between reversal of provision of Rs. 5,59,29,000/- minus opening balance of Rs. 2,40,00,000/- on the ground that the liability is contingent in nature and appellant could not provide basis for estimation of contract losses.

5.1 The Id. Counsel for the assessee submitted that, although the issue has been decided against the assessee by the Tribunal in assessee's own case for earlier assessment years 2003-04 & 2004-05, but actual expenditure being difference between provision and release only to be added, however the Assessing Officer has made additions towards closing balance without appreciating fact that the assessee has already

credited reversal of provision to the P&L account and offered to tax.

5.2 The Id. DR, on the other hand submitted that, the issue may be set aside to the file of the Assessing Officer to verify the claim of the assessee and make additions towards difference between provision and reversal of contract losses.

5.3 We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. This issue is covered against the assessee by the decision of ITAT, Chennai Benches for the assessment years 2003-04 & 2004-05 in ITA Nos. 799 & 800/Chny/2010, dated 21.06.2011, where it has been clearly held that provision for contract losses is unascertained liability and contingent in nature, cannot be allowed as deduction. In fact, the Id. Counsel for the assessee fairly agreed that this issue is covered against the assessee. But, his only argument is that the Assessing Officer has made addition of Rs. 4,93,06,000/- being difference between amount released and opening balance instead of provision created minus amount released during the year. We find merit in arguments of the Id. Counsel

for the assessee that addition can only be made towards net of provision minus amount released during the year because opening balance brought forward from earlier years cannot be added during the year. Therefore, we set aside the issue to the file of the Assessing Officer and direct the Assessing Officer to re-compute addition in accordance with our direction given herein above.

6. The next issue that came up for our consideration from ground no. 5 of assessee's appeal is disallowance of payment made towards use of trademark to the parent company. The appellant has debited an amount of Rs. 21,62,36,000/- towards payment made to parent company for use of trademark. The Assessing Officer disallowed trademark paid to parent company on the ground that the assessee could not establish nexus between trademark and business advantage derived by the appellant company in India. The Assessing Officer, further observed that the assessee could not file any details with regard to the registration of trademark under any international or domestic law.

6.1 The Id. Counsel for the assessee submitted that the assessee company is a part of Areva group and the trademark signifies the business symbol of an organization. The group allows the company to use trademark and charge a fee of 1% on sales. The assessee has derived business advantage by using Areva trademark. The trade mark is registered in India. Therefore, the Assessing Officer is incorrect in disallowing trademark fees paid to parent company, even though the assessee has filed necessary details. He further submitted that, the case was subjected to TP proceedings u/s. 92CA of the Act and TPO has not made any adjustment towards trademark fees paid by the assessee to the parent company. Since, there is no adjustment by the TPO, as per the provisions of section 92CA(4) of the Act, the Assessing Officer should pass an order in conformity with ALP determined by the TPO. Since, the Assessing Officer has made additions contrary to provision of section 92CA(4) of the Act, the additions made by the Assessing Officer cannot be sustained. In this regard, he relied upon the decision of Hon'ble Supreme Court in the case of *Sassoon J David and Company Pvt Ltd vs CIT, Bombay* [1979] 118 ITR 261.

6.2 The Id. DR, on the other hand supporting order of the Ld. CIT(A) submitted that the TPO can only verify the price charged by an entity in comparison with a third party transactions under uncontrolled transactions. The commercial expediency has to be verified by the Assessing Officer. Just because the TPO has not made any adjustment u/s. 92CA of the Act, the powers of Assessing Officer cannot be curtailed. Since, the appellant could not justify payment of trademark fee with necessary evidences, the Assessing Officer has rightly disallowed the amount paid to parent company and their order should be upheld.

6.3 We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. We have also carefully considered reasons given by the Assessing Officer to disallow trademark fees paid to parent company. The Assessing Officer has disallowed trademark fees on two grounds; the first reason given by the Assessing Officer is that the appellant could not furnish any evidences to prove registration of trademark under any international or domestic law. The second reason given by the Assessing Officer is that the assessee could not establish

nexus between payment of trademark fee and business advantage. As regards first objection of the Assessing Officer, the Id. Counsel for the assessee filed necessary documents evidencing registration of trademark under Indian Law. The appellant has also explained how trademark helped the appellant company to generate business in India. Since, the Assessing Officer has disallowed trademark fee, on the ground that no documents has been filed to substantiate the payment, contrary to evidences on record, in our considered view, the issue needs to go back to the file of the Assessing Officer for further verification. Thus, we set aside the orders of the lower authorities on this issue and restore the issue back to the file of the Assessing Officer and direct the Assessing Officer to reexamine the issue in light of various evidences that may be filed by the assessee to justify payment of trademark fees to parent company.

7. The next issue that came up for our consideration from ground no. 6 of assessee's appeal & ground nos. 1 to 2.4 of revenue appeal is disallowance of payment made to non-residents u/s. 40(a)(i) of the Act, for non-deduction of tax at source u/s. 195 of the Act. The Assessing Officer has

disallowed certain payments made to non-residents u/s. 40(a)(i) of the Act, for non-deduction of TDS u/s. 195 of the Act, on the ground that said payments are in the nature of fees for technical services covered under the provisions of section 9(1)(vii) of the Act and Explanation to section 9(2) of the Act. The Assessing Officer has considered payment towards warranty expenses to Areva T&D Switzerland, reimbursement of expenses to Areva T&D SA, France, remittance towards installation and commissioning charges paid to Heinrich George GMBH, Germany and remittance towards consultancy charges paid to M/s. International Access Consultants Ltd and M/s. Ensys Company Ltd. It was the arguments of the assessee before the Assessing Officer that payments made to non-residents are in the nature of reimbursement of expenses and business profits which cannot be taxed in India, in absence of PE. The assessee further submitted that payment to Kema Netherlands towards testing fee is covered by the decision of ITAT, Chennai Benches in assessee's own case for assessment year 2007-08, where it has been clearly held that it is not fees for technical services. In so far payment to Henrich George GMBH, the services were rendered outside India and the non-resident is not having PE

in India. In absence of PE, business profits cannot be taxed in India. Since, income of non-residents is not taxable in India, the question of deduction of TDS u/s. 195 of the Act, does not arise and consequently, payments made to said non-residents cannot be disallowed u/s 40(a)(i) of the Act.

7.1 We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. Insofar as payment to Kema Netherlands towards testing fee, the issue is covered by the decision of ITAT, Chennai Benches in assessee's own case for assessment year 2007-08 in ITA No. 2090/Chny/2014, where the Tribunal held that in absence of make available technical knowledge, experience, skill, knowhow or process etc., any payment towards services rendered by non-residents cannot be considered as fees for technical services as per section 9(1)(vii) of the Act. Therefore, we are of the considered view that the Assessing Officer is erred in disallowing payment made to Kema Netherlands u/s. 40(a)(i) of the Act. Thus, we direct the Assessing Officer to delete additions made towards payment made to Kema Netherlands. Insofar as payment made to Henrich George GMBH towards installation and

commissioning charges, the services are made available to appellant in India while providing installation and commissioning services. Therefore, in our considered view payment made to Henrich George GMBH is fees for technical services as defined u/s. 9(1)(vii) of the Act. But, fact remains that the definition for fees for technical service has been amended by insertion of Explanation 2 to section 9(2) by Finance Act, 2010 with retrospective effect from 01.04.1976. Although, said payments are brought within the ambit of FTS as per section 9(1)(vii) of the Act by way of an amendment, but when said payment was made, there was no clarity in respect of certain payments made to non-residents. Therefore, it is impossible for the assessee to perform which is impossible to perform and deduct TDS on payment made to non-residents by considering subsequent amendment by way of Explanation 2 to 9(2) by Finance Act, 2010 with retrospective effect from 01.04.1976. Since, the payments are made prior to the amendment, it is impossible for the assessee to perform impossible things and deduct TDS. Therefore, we are of the considered view that payment made to Henrich George GMBH cannot be disallowed u/s 40(a)(i) of the Act, for non-deduction of TDS u/s. 195 of the Act. Thus,

we direct the Assessing Officer to delete addition made towards payment to Henrich George GMBH, Germany.

7.2 Insofar as deletion of additions made by the Assessing Officer towards payment made to non-residents u/s. 40(a)(i) of the Act, for non-deduction of TDS u/s. 195 of the Act, we find that the Id. CIT(A) has recorded a categorical finding that payments made to Areva T&D, Switzerland towards warranty related repairs executed by them on behalf of the assessee are reimbursement of expenses, without any markup. Similarly, payments made to Areva T&D SA, France for training charges and remittance towards testing charging to Dalia Insulators and testing charges to TBEA, China and also inspection charges to SGS Ltd, Thailand are reimbursement of expenditure without any markup and cannot be treated as fees for technical services. The Id. CIT(A) had also recorded a categorical finding that remittance towards consultancy charges towards international Access Consultants Ltd, Hongkong and site engineer expenses paid to Ensys Company Ltd, Thailand are reimbursement of expenses. It is an admitted fact that payment towards reimbursement of expenses to non-residents without any markup cannot be

considered as fees for technical services. Further, even assuming for a moment, said payment are in the nature of business profits, those payments cannot be taxed in India in the hands of non-residents unless said non-residents have had permanent establishment in India. Since, payment made to above non-residents are neither fee for technical services which can be taxed u/s. 9(1)(vii) of the Act, nor business profits which can be taxed in India, in our considered view, the assessee need not to deduct TDS u/s. 195 of the Act on said payments. Since, the assessee need not to deduct TDS on payments made to non-residents, the Assessing Officer is erred in disallowing said payments u/s. 40(a)(i) of the Act. The Id. CIT(A) after considering relevant facts has rightly deleted additions made by the Assessing Officer and thus, we are inclined to uphold the findings of the Id. CIT(A) and dismiss the grounds taken by the revenue.

8. The next issue that came up for our consideration from ground no. 7 of assessee's appeal is disallowance of depreciation on goodwill. The assessee has claimed depreciation on goodwill for the first time before the CIT(A). The Id. CIT(A) rejected additional ground filed by the assessee

on the ground that a similar issue has been considered for assessment year 2007-08 and rejected the claim of depreciation on goodwill. The Id. Counsel for the assessee, submitted that this issue is covered in favour of the assessee by the decision of ITAT, Chennai Benches in assessee's own case for assessment year 2007-08, in ITA No. 2090/Chny/2014, where the Tribunal decided the issue in favour of the assessee.

8.1 The Id. DR, on the other hand supporting order of the Id. CIT(A) submitted that, deprecation on goodwill is not allowable, because goodwill is not an intangible asset to be eligible for depreciation u/s. 32 of the Act.

8.2 We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. We find that an identical issue has been considered by the Tribunal in assessee's own case for assessment year 2007-08, in ITA No. 2090/Chny/2014, wherein under identical facts, decided the issue in favour of the assessee. The relevant findings of the Tribunal are as under:

*"11. We heard the Ld.counsel for the assessee and the Ld. Departmental Representative. The Ld. D.R. submitted that he is placing reliance on the observation made by the Assessing Officer as well as on the grounds of appeal. As rightly submitted by the Ld.counsel for the assessee, this Tribunal by placing reliance on the judgment of Delhi High Court in the assessee's own case for assessment year 2005-06, allowed depreciation on the goodwill. Since facts are identical, this Tribunal is of the considered opinion that the decision of co-ordinate Bench of this Tribunal for the assessment year 2006-07 is equally applicable for the year under consideration. Therefore, by following the decision of this Tribunal for assessment year 2006-07 and for the reasons stated therein, the orders of both the authorities below are set aside and the Assessing Officer is directed to allow depreciation on goodwill."*

8.3 In this view of the matter and consistent with view taken by the co-ordinate bench in assessee's own case, we direct the Assessing Officer to allow depreciation on goodwill as claimed by the assessee.

9. The next issue that came up for our consideration from ground no. 8 of assessee's appeal is disallowance of depreciation on non-compete fee. The Id. Counsel for the assessee, submitted that this issue is covered in favour of the assessee by the decision of Hon'ble High Court of Madras in assessee's own case for assessment year 2006-07 in TCA No. 194/2021, wherein the Hon'ble High Court held that the assessee is eligible for depreciation on non-compete fee. The Id. DR, on the other hand fairly agreed that the issue is

covered by the decision of Jurisdictional High Court of Madras and thus, may be decided in accordance with law.

9.1 We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. We find that the Jurisdictional High Court of Madras in TCA No. 194/2021, dated 25.03.2021, in assessee's own case held that the assessee is entitled for depreciation for non-compete fee. The relevant findings of the Hon'ble High Court are as under:

*"5. The next issue related to disallowance of depreciation claimed under Section 32(1) of the Act in respect of 'non compete fee'. The assessee contended that the depreciation on 'non compete fee' related to one M/s.Areva T & D Instrument Transformer India Private Limited amounting to Rs.52,43,007/- and that they claimed the same as deduction. The Assessing Officer rejected the claim on the ground that 'non compete fee' could not be classified as any of the businesses or commercial right as spelt out in Appendix I of the Income Tax Rules 1962 and therefore, not allowable.*

*6. The other issue was with regard to amalgamation of three companies with the assessee company and on amalgamation, the assets stood transferred to the assessee company with effect from 01.1.2006. The net excess value of the assets over the liability of the amalgamating company amounted to Rs.54,26,56,000/- and had been adjusted against the general reserve of the assessee company. The assessee was called upon to explain as to why the said excess asset, which was taken over as liability during the current year, should not be taxed under Section 28(iv) of the Act. The explanation offered by the assessee was not accepted and the Assessing Officer held that the said amount had to be charged to income tax*

under the head 'profit and gain of business' under Section 28(iv) of the Act.

7. Aggrieved by the above findings, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), Large Taxpayer Unit, Chennai [for short, the CIT(A)]. By order dated 31.1.2011, the appeal was partly allowed and the assessee got relief in respect of depreciation on the property at Lucknow and depreciation on non compete fee and in respect the amount credited to reserve and surplus. As against that, the Revenue filed an appeal before the Tribunal and it was dismissed by the impugned order.

8. The first question of law is as to whether the depreciation is allowable in respect of the property acquired in exchange of relinquishment of tenancy right in another property.

9. This issue was considered by the Hon'ble Division Bench of this Court in the assessee's own case in the decision reported in (2012) 26 Taxmann.com 266, the relevant portions of which read thus:

"6. We have perused the order passed by this Court dated 30.03.2012 in the Tax Cases filed by the Revenue in T.C.(A) Nos. 1390 of 2005, 2436 of 2006 and 250 to 252 of 2008 Alsthom Ltd. case ( supra) wherein, this Court pointed out that since there was a payment of consideration in exchange of the property, it could not be held that the assessee would be entitled to the depreciation of the property obtained. Thus this Court reversed the order of the Tribunal.

7. As far as the present case is concerned, we must point out to the agreement with the landlord, which showed the payment of consideration for the surrender of tenancy rights. The Revenue does not dispute the existence of such an agreement. It is also not disputed by the Revenue that the purchase of the premises by the assessee was from M/s. Harsaran Singh Constructions Pvt. Ltd., which had nothing to do with the landlord. Given the fact that tenancy right is a capital asset, as held by the Apex Court in the decision reported in CIT v. D.P. Sandu Bros. Chembur (P.) Ltd. [2005] 273 ITR 1 / 142 Taxman 713 (SC) that the surrender of tenancy rights amounted to transfer and hence, being a capital receipt, on the facts thus placed before this Court that

*the amount paid on account of surrender of tenancy rights being given by the assessee to the builder, there is no exchange of one property for the other. Hence, we have no hesitation in accepting the plea of the assessee, thereby rejecting the Revenue's contention raised in all these Tax Cases. Consequently, we hold that the assessee is entitled to depreciation."*

10. *In the light of the said decision of the Hon'ble Division Bench of this Court in the assessee's own case reported in (2012) 26 Taxmann.com 266, substantial question of law No.1 is answered against the Revenue.*

11. *The second question is as to whether the non compete fee is an asset in the nature of patents, copyrights, trademark, licence, franchises or any other business or commercial right of similar nature and as to whether the assessee is eligible to claim depreciation under Section 32 of the Act.*

12. *The Tribunal took note of the decision of the High Court of Delhi in the assessee's own case for the assessment year 2005-06 in ITA.No.315 of 2010 dated 30.3.2012 and allowed the appeal filed by the assessee thereby reversing the findings of the CIT(A).*

13. *Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the appellant/Revenue has placed reliance on the decision of the Delhi High Court in the case of Sharp Business System Vs. CIT-III [reported in (2012) 27 Taxmann.com 50] in support of her contention that the amount paid as non compete fee did not qualify for depreciation under Section 32(1)(ii) of the Act.*

14. *In the decision in the case of Asianet Communications Ltd. Vs. CIT, Chennai [reported in (2018) 257 Taxman 473], a Division Bench of this Court, to which, one of us (TSSJ) was a party, had considered the same issue as to, where the non compete fee paid by the assessee was for the purpose of its business and it did not entail an enduring benefit to the assessee in its business, whether the payment of such fee was to be allowed as revenue expenditure. In this decision, the Court took note of the decision of the Delhi High Court in the case of Sharp Business System and it has been held as follows :*

"36. So far as the decision in *Sharp Business System (supra)* is concerned, as pointed out earlier, in paragraph 5 of the judgment, it has referred to the decision of this Court in *G.D.Naidu*. The discussion is in paragraph 9 and the conclusion is in paragraph 10.

37. In paragraph 9 of the judgment, the Court has not discussed the decision of *G.D.Naidu*, though it has referred to it in paragraph 5 of the judgment. This is pointed out because, the Court has discussed the decision in *Blaze & Central (P.) Ltd. (supra)*, which was distinguished in *G.D.Naidu*. We find that in paragraph 9 of the judgment, the Court after referring to *Empire Jute Co. Ltd. (supra)* and *Alembic Chemical Works Co. Ltd. (supra)*, has pointed out that the single test, that is, whether the payment results in an enduring benefit cannot be conclusive in a decision as to whether an expenditure qualifies as one falling or in the capital field and that the decisions have emphasized the need to shift from a narrower field to a broader one, to ascertain the real nature of the advantage, which the taxpayer would derive.

38. Thus, the test to be applied following *Empire Jute Co. Ltd. (supra)* is to see as to whether it added to the capital of the assessee, whether a new asset was created and whether there was an addition or expansion of the profit making apparatus of the assessee and whether the assessee acquired source of profit or income when such investment was made. However, the Court in our respectful view, applied the test, which does not flow from the test laid down in *Empire Jute Co. Ltd. (supra)* by observing that the test is one of ascertaining whether from commercial angle and the advantage results in a capital field or it is the expenditure falls legitimately within the revenue field. Ultimately, the Court held that the arrangement for a period of 7 years is an enduring benefit. This in our respectful view, does not fulfil the test laid down by *Empire Jute Co. Ltd. (supra)* and in fact, the Court itself had pointed out that is not the conclusive test to determine whether expenditure is in capital field or revenue. Thus, for the above reasons, we are not in respectful agreement with the reasoning given by the Hon'ble Division Bench in *Sharp Business System (supra)*.

39. It would be relevant to note that, in the case of Sharp Business System (supra), the Joint-venture company was incorporated in the assessment year 2001-02 and in the first year of business, with a view to warding off competition, it entered into agreement by paying a non-compete fee of Rs.73 Crores to L & T Ltd., of setting-up or undertaking or assisting in the setting-up or undertaking any business in India, of selling, marketing and trade of electronic office products for seven years and this amount was treated as deferred revenue expenditure in the assessee's books of accounts and written-off over corresponding period of seven years.

40. There is a marked difference in the factual position in Sharp Business System (supra) and the factual position in the case on hand where the assessee's business continues to remain the same, and this is also one more reason to hold that the decision in Sharp Business System (supra) is not applicable to the facts of the case apart from the reservation expressed by us above."

15. In the decision of this Court in the case of Asianet Communications Ltd., the Court distinguished the decision of the Delhi High Court in the case of Sharp Business System. We would hasten to add that the facts in the case of Sharp Business System were couched differently in the sense that a sum of Rs.73 Crores was paid to M/s.L & T Ltd., as consideration for the latter in setting-up or undertaking or assisting in the setting-up or undertaking any business in India, of selling, marketing and trade of electronic office products for seven years. The facts of the case of the assessee before us are entirely different. This aspect had been noted by the Tribunal in paragraph 11 of the impugned order. The Tribunal also took note of the fact that in the assessee's own case, the High Court of Delhi decided the issue in favour of the assessee.

16. Before us, a chart has been filed showing the issue relating to depreciation on non compete fee. From the chart, we find that for the assessment year 2001-02, the Assessing Officer himself allowed it, which was confirmed by the CIT(A) and the decision of the CIT(A) was accepted by the Department. For the assessment year 2002-03, no scrutiny assessment had

*been carried out. For the assessment year 2003-04, the CIT(A) allowed it and the Assessing Officer gave effect to the order passed by the CIT(A). For the assessment year 2004-05, no scrutiny assessment was carried out and for the assessment year 2005-06, the claim was allowed by the CIT(A) and it was given effect to by the Assessing Officer. Thus, the Assessing Officer was bound to be consistent with the earlier decisions.*

*17. Therefore, we find that the Tribunal rightly granted relief to the assessee. Accordingly, substantial question of law No.2 is answered against the Revenue."*

9.2 In this view of the matter and by respectfully following the decision of Jurisdictional High Court of Madras in assessee's own case, we direct the Assessing Officer to allow depreciation on non-compete fee.

10. The next issue that came up for our consideration from ground no. 9 of assessee's appeal is rejection of additional depreciation in respect of additions made to plant and machinery in the second half of assessment year 2008-09. The Id. Counsel for the assessee, submitted that the assessee has made additions to plant and machinery in the second half of financial year 2007-08 relevant to assessment year 2008-09 and claimed 50% of actual depreciation. The balance amount of remaining 50% of additional depreciation was claimed in subsequent financial year. The Assessing Officer and CIT(A) denied deduction for remaining 50% of additional depreciation

on the ground that additional depreciation can be claimed only in the year of addition to plant and machinery.

10.1 The Id. Counsel for the assessee, submitted that this issue is also covered in favour of the assessee by the decision of ITAT Chennai Benches, in assessee's own case for assessment year 2007-08 in ITA No. 2090/Chny/2014, where the Tribunal held that the assessee is entitled for remaining 50% of additional depreciation in the subsequent year. However, set aside the issue to the file of the Assessing Officer for verification and thereafter to decide the issue.

10.2 The Id. DR, fairly agreed that this issue is covered in favour of the assessee by the decision of ITAT, in assessee's own case for assessment year 2007-08 and thus, the issue may be decided in accordance with law.

10.3 We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. We find that, a similar issue has been considered by the Tribunal in assessee's own case for assessment year 2007-08 and by considering relevant facts

held that the assessee is eligible for deduction towards remaining 50% of additional depreciation, if the assessee establishes the fact that conditions prescribed for claiming additional depreciation was satisfied in the preceding assessment year. The relevant findings of the Tribunal are as under:

*"23. The Ld.counsel for the assessee purchased the machinery during the assessment year 2006-07 and claimed depreciation. The Assessing Officer allowed 50% of the additional depreciation and the balance additional depreciation was claimed during the year under consideration. On a query from the Bench, the Ld.counsel submitted that the copy of assessment order for assessment year 2006-07 is not readily available even with the assessee. This Tribunal is of the considered opinion that for claiming additional depreciation, the assessee has to establish that the machinery was purchased and installed. If the depreciation could be allowed in the earlier assessment year, the balance depreciation can be claimed in the subsequent year. This Tribunal is of the considered opinion that the matter needs to be re-examined by the Assessing Officer. Accordingly, orders of both the authorities below are set aside and the issue of additional depreciation is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the matter and find out whether the assessee, in fact, purchased and installed the machinery in the assessment year 2006-07 and whether the additional depreciation was claimed and allowed at the rate of 10% and thereafter decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee."*

10.4 In this view of the matter and by following the decision of co-ordinate bench of ITAT Chennai Benches in assessee's own case, we set aside the issue to the file of the Assessing Officer

and direct the Assessing Officer to verify the claim of the assessee and thereafter decide the issue in accordance with the findings of the Tribunal given for the assessment year 2007-08.

11. In the result, appeal filed by the assessee is partly allowed for statistical purposes and appeal filed by the revenue is dismissed.

**ITA Nos: 2081 & 2094/Chny/2014 AY 2009-10:**

12. These cross appeals filed by the assessee and as well as the revenue pertains to order passed by the CIT(A), LTU, against the order passed by the Assessing Officer u/s. 201(1) & 201(1A) of the Act holding the assessee in default for not deducting TDS u/s. 195 of the Act towards certain payments made to non-residents amounting to Rs. 5,08,27,882/- and demanding tax u/s. 201(1) of the Act & interest thereon u/s. 201(1A) of the Act. The Assessing Officer has computed short deduction of TDS u/s. 201(1) of the Act for Rs. 51,19,281/- and interest thereon at Rs. 27,05,252/- u/s. 201(1A) of the Act, in respect of payment made to non-residents. The CIT(A), partly allowed appeal filed by the assessee and

directed the Assessing Officer to restrict the demand only to the extent of interest charged u/s. 201(1A) of the Act in respect of payment made to M/s. Kema Netherlands towards testing charges and Henrich George GMBH, Germany towards installation and commissioning charges, on the ground that sum paid by the appellant to non-residents in respect of above two parties were disallowed u/s. 40(a)(i) of the Act by the Assessing Officer and confirmed by the CIT(A). Aggrieved by the CIT(A) order, the assessee as well as the revenue are in appeal before us.

12.1 The Id. Counsel for the assessee, submitted that payment made to non-residents have been disallowed u/s. 40(a)(i) of the Act in assessment order passed u/s. 143(3) of the Act dated 29.05.2014. The assessee has challenged disallowances of payment made to non-residents u/s. 40(a)(i) of the Act and argued that said payments are not liable for TDS u/s. 195 of the Act and consequently cannot be disallowed u/s. 40(a)(i) of the Act. In case, the assessee succeeds and gets relief, this appeal filed by the assessee becomes infructuous.

12.2 The Id. DR, on the other hand submitted that the Id. CIT(A) erred in directing the Assessing Officer to restrict demand only to the extent of interest charged u/s. 201(1A) of the Act in respect of two payments wherever he has confirmed additions u/s. 40(a)(i) of the Act and deleted total demand wherever he has deleted disallowances u/s. 40(a)(i) of the Act, without appreciating fact that order u/s. 201(1) & 201(1A) of the Act holding the assessee as an assessee in default and disallowance u/s. 40(a)(i) of the Act, in the order u/s. 143(3) of the Act stands on different coatings. He further submitted the Id. CIT(A) ought to have relied on the decision of Hon'ble Madras High Court in the case of Tube Investments of India Ltd vs ACIT 325 ITR 610, wherein, it was held that provisions of Chapter XVIIB are forms of recovery of tax by way of TDS at the point where the payment is made or credited to a third party in the event of failure to deduct tax at source, section 201 automatically comes into play. The Id. DR, further submitted that the Id. CIT(A) erred in deleting the demand without appreciating fact that said payments are in the nature of fees for technical services u/s. 9(1)(vii) of the Act.

12.3 We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. The Assessing Officer has computed short deduction of TDS and interest thereon u/s. 201(1) & 201(1A) of the Act in respect of payments made to non-residents without deduction of tax at source u/s. 195 of the Act. The Assessing Officer had also disallowed said payments made to non-residents u/s. 40(a)(i) of the Act and added back to total income of the assessee. The assessee had challenged both orders passed by the Assessing Officer u/s. 143(3) of the Act and u/s. 201(1) & 201(1A) of the Act. The CIT(A), directed the Assessing Officer to restrict the demand only to the extent of interest charged u/s. 201(1A) of the Act in respect of payments made to Kema Netherlands towards certification/testing charges and Henrich George GMBH, Germany towards installation and commissioning, because above two payments have been confirmed by the CIT(A). Insofar as remaining payments made to non-residents, the Id. CIT(A) deleted said payments, on the ground that those payments are in the nature of reimbursement of expenses and not liable for TDS and consequently provisions of section 40(a)(i) of the Act cannot be invoked. The assessee as well as

the revenue challenged the findings of the CIT(A) by filing appeal before the Tribunal. The Tribunal in ITA No.2093/Chny/2014 & 2082/Chny/2014 has considered the issue of disallowances of payments made to non-residents u/s. 40(a)(i) of the Act for non-deduction of TDS u/s. 195 of the Act, and held that payments made to non-residents as considered by the Assessing Officer in the order passed u/s. 143(3) of the Act and 201(1) & 201(1A) of the Act are not liable for TDS u/s. 195 of the Act and consequently, disallowances cannot be made u/s. 40(a)(i) of the Act. Since, those payments have already been considered and held that said payments are not liable for TDS u/s. 195 of the Act, in our considered view, the demand raised by the Assessing Officer u/s. 201(1) and 201(1A) of the Act, in respect of short deduction of TDS and interest thereon cannot survive under the law. Therefore, we direct the Assessing Officer to delete demand raised towards short deduction of TDS u/s. 201(1) of the Act & interest thereon u/s. 201(1A) of the Act in respect of payments made to non-residents.

13. In the result, appeal filed by the assessee is allowed and appeal filed by the revenue is dismissed.

14. As a result, the appeals filed by the assessee in ITA No.2093/CHNY/2014 is partly-allowed for statistical purposes, ITA No.2094/CHNY/2014 is allowed and the appeals filed by the Revenue in ITA Nos.2081 & 2082/CHNY/2014 are dismissed.

Order pronounced in the court on 20<sup>th</sup> November, 2023 at Chennai.

Sd-  
(वी दुर्गा राव)  
**(V. DURGA RAO)**  
न्यायिकसदस्य/**Judicial Member**

Sd-  
(मंजुनाथ. जी)  
**(MANJUNATHA. G)**  
लेखासदस्य/**Accountant Member**

चेन्नई/Chennai,

दिनांक/Dated: 20th November, 2023

**JPV**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

- |                        |                          |                              |
|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT     | 5. विभागीय प्रतिनिधि/DR  | 6. गार्ड फाईल/GF             |