

IN THE INCOME TAX APPELLATE TRIBUNAL

"H" BENCH, MUMBAI

BEFORE SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.2458/MUM/2015
(Assessment Year : 2010-11)

Thermo Fisher Scientific India Pvt. Ltd.,

403 – 404, 'B' Wing, Delphi,

Hiranandani Business Park,

Mumbai - 400076

PAN : AABCT3207A

..... Appellant

v/s

DCIT - 15(3)(1),

Room No.451, Aayakar Bhavan,

New Marine Lines,

Mumbai - 400020

..... Respondent

Assessee by : Shri Dhanesh Bafna, Shri Amol Mahajan,
Ms. Chandani Shah, Ms. Hinal Shah

Revenue by : Shri Ajay Chandra, CIT-DR
Shri Pravin Salunkhe, Sr.DR

Date of Hearing – 03/06/2025

Date of Order - 16/07/2025

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The assessee has filed the present appeal challenging the impugned final assessment order dated 24/02/2015, passed under section 143(3) read with section 144C (13) of the Income Tax Act, 1961 ("*the Act*"), pursuant to the directions dated 29/12/2014 passed by the learned Dispute Resolution Panel ("*learned DRP*") under section 144C(5) of the Act, for the assessment year 2010-11.

2. In this appeal, the assessee has raised the following grounds: –

"1. Ground 1 – General

On the facts and in the circumstances of the case and in law, the directions of the Hon'ble Dispute Resolution Panel- II (DRP') and the final assessment order passed by the learned Deputy Commissioner of Income-tax - 15(3)(1), Mumbai ("DCIT") are bad in law and merit to be set aside.

2. Ground 2 - Depreciation on contracts - Acquisition from Glaxosmithkline Pharmaceuticals Ltd ('GSK') in AY 2008-09

2.1 On the facts and in the circumstances of the case and in law, the learned DCIT and the Hon'ble DRP erred in not granting depreciation of Rs. 10,05,95,058 on the written down value of business or commercial rights being the manufacturing contracts as on 1 April 2009 under section 32(1) r.w.s 2(11) of the IT Act.

2.2 On the facts and in the circumstances of the case and in law, the learned DCIT and the Hon'ble DRP erred in not granting depreciation of Rs. 2,42,65,076 on the written down value of business or commercial rights being the supply contracts as on 1 April 2009 under section 32(1) r.w.s 2(11) of the IT Act.

2.3 On the facts and in the circumstances of the case and in law, the learned DCIT and the Hon'ble DRP erred in not granting depreciation on the written down value of manufacturing and supply contracts based on the following observations which are incorrect on facts:

- Claim for depreciation on contracts was not made in the return of income for AY 2010-11*
- Issue for depreciation on contracts was considered by the Hon'ble DRP in the earlier years*
- Manufacturing and supply contracts are not self-generated by GSK and have not been transferred to the Appellant*
- Manufacturing and supply contracts are not an intangible asset as per Accounting Standard ('AS')-26 issued by the Institute of Chartered Accountants of India*

2.4 Without prejudice to para 2.1 and 2.3 above, the learned DCIT and Hon'ble DRP erred in not considering the value of manufacturing contracts as goodwill acquired from GSK, which is an intangible asset eligible for depreciation under section 32(1) r.w.s 2(11) of the IT Act.

2.5 Without prejudice to para 2.2 and 2.3 above the above, the learned DCIT and Hon'ble DRP erred in not considering the value of supply contracts as goodwill acquired from GSK, which is an intangible asset eligible for depreciation under section 32(1) r.w.s 2(11) of the IT Act.

3. Ground 3 - Depreciation on contracts - Acquisition from Chemito Technologies Private Limited ('CTPL) in AY 2009-10

3.1 On the facts and in the circumstances of the case and in law, the learned DCIT and the Hon'ble DRP erred in not granting depreciation of Rs. 48,82,491 on the written down value of business or commercial rights being the maintenance contracts as on 1 April 2009 under section 32(1) r.w.s 2(11) of the IT Act.

3.2 On the facts and in the circumstances of the case and in law, the learned DCIT and the Hon'ble DRP erred in not granting depreciation on the written down value of maintenance contracts based on the following observations which are incorrect on facts:

- Claim for depreciation on contracts was not made in the return of income
- Issue for depreciation on contracts was considered by the Hon'ble DRP in the earlier years
- Maintenance contracts are not self-generated by CTPL and have not been transferred to the Appellant
- Maintenance contracts are not an intangible asset as per AS-26 issued by the Institute of Chartered Accountants of India

3.3 Without prejudice to the above, the learned DCIT and Hon'ble DRP erred in not considering the value of maintenance contracts as goodwill acquired from CTPL, which is an intangible asset eligible for depreciation under section 32(1) r.w.s 2(11) of the IT Act.

4. Ground 4 - Depreciation on purchased goodwill - Acquisition from GSK in AY 2008-09

4.1 On the facts and in the circumstances of the case and in law, the learned DCIT and the Hon'ble DRP erred in not granting depreciation of Rs. 10,53,85,945 on the written down value of purchased goodwill as on 1 April 2009 acquired from GSK which is an intangible asset eligible for depreciation under section 32(1) r.w.s. 2(11) of the IT Act.

4.2 On the facts and in the circumstances of the case and in law, the learned DCIT and the Hon'ble DRP erred in not granting depreciation on the written down value of purchased goodwill as on 1 April 2009 although depreciation is a mandatory allowance under section 32(1) read with Explanation 5 thereto of the IT Act.

4.3 Without prejudice to the above, the learned DCIT and the Hon'ble DRP erred in concluding that the claim for depreciation made by the Appellant during the assessment proceedings is an additional claim which cannot be accepted.

Ground 5 - Depreciation on purchased goodwill - Acquisition from CTPL in AY 2009-10

5.1 On the facts and in the circumstances of the case and in law, the learned DCIT and the Hon'ble DRP erred in not granting depreciation of Rs. 5,42,34,074 on the written down value of purchased goodwill as on 1 April

2009 acquired from CTPL which is an intangible asset eligible for depreciation under section 32(1) r.w.s 2(11) of the IT Act.

5.2 On the facts and in the circumstances of the case and in law, the learned DCIT and the Hon'ble DRP erred in not granting depreciation on the written down value of the purchased goodwill as on 1 April 2009 although depreciation is a mandatory allowance under section 32(1) read with Explanation 5 thereto of the IT Act.

5.3 Without prejudice to the above, the learned DCIT and the Hon'ble DRP erred in concluding that the claim for depreciation made by the Appellant during the assessment proceedings is an additional claim which cannot be accepted.

6. Ground 6 - Deduction for non-compete fee payment

6.1 On the facts and in the circumstances of the case and in law, the Hon'ble DRP and the learned DCIT ought to have allowed full deduction of Rs. 7,00,00,000 as per the second proviso to section 40(a)(ia) of the IT Act and not just a proportion of the said amount as deductible revenue expenditure since the payees have discharged their tax liability on the non-compete fee paid by the Appellant by furnishing their return of income during the subject year.

7. Ground 7 - Allowance of brought forward unabsorbed depreciation of AY 2008-09

7.1 On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in not allowing the unabsorbed depreciation of Rs. 23,42,60,932 carried forward and brought forward as per the original return of income of AY 2008-09 and AY 2010-11 respectively.

7.2 On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in not holding that the provisions of sections 72 r.w.s. 80 and 139(3) of the IT Act apply only to business loss and do not cover the amount of unabsorbed depreciation which is treated as depreciation of current year as per section 32(2) of the IT Act and consequently they ought to have held that unabsorbed depreciation of AY 2008-09 is allowable as a deduction against current year's income.

7.3 On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in not allowing brought forward and consequent set off of the unabsorbed depreciation of AY 2008-09 of Rs. 18,73,52,790 on goodwill purchased from GSK.

7.4 On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in not allowing depreciation of Rs. 262,345 relating to depreciation on software expenses treated as capital expenditure in AY 2007-08.

8. Ground 8 - Allowance of brought forward unabsorbed depreciation pertaining to AY 2009-10

8.1 On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in not allowing the unabsorbed depreciation of Rs. 17,82,24,085 carried forward and brought forward as per the original return of income of AY 2009-10 and AY 2010-11 respectively.

8.2 On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in not allowing brought forward and consequent set off of the unabsorbed depreciation of AY 2009-10 of Rs. 14,05,14,593 on the written down value of goodwill purchased from GSK as on 1 April 2008.

8.3 On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in not allowing brought forward and consequent set off of the unabsorbed depreciation of AY 2009-10 of Rs. 7,23,12,099 on goodwill purchased from CTPL.

8.4 On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in not allowing depreciation of Rs. 104,938 relating to depreciation on software expenses treated as capital expenditure in AY 2007-08.

9. Ground 9 - Transfer pricing ('TP') adjustment of Rs. 19,18,64,661 relating to alleged excessive advertisement, marketing and promotional ('AMP') expenditure

9.1 On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in confirming the upward adjustment of Rs. 19,18,64,661 to the income of the Appellant under the presumption that the Associated Enterprises ('AEs') have benefitted from the AMP expenses incurred by the Appellant.

9.2 Without prejudice to the above, on facts and circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in confirming learned TPO's action of alleging that there exists an arrangement between the Appellant and AEs and thereby erred in contending that AEs needs to compensate the Appellant towards AMP expenses;

9.3 Without prejudice to the above, on facts and circumstances of the case and in law, learned DCIT and Hon'ble DRP erred in confirming the actions of learned TPO of disregarding the economic characterization of the Appellant as a normal risk bearing distributor and failing to appreciate that no separate compensation is required for the alleged AMP expenditure, when the Appellant has achieved more than arm's length return for the distribution activity;

9.4 Without prejudice to the above, on facts and circumstances of the case and in law, learned DCIT and Hon'ble DRP erred in confirming the actions of learned TPO of disregarding that a substantial portion of AMP expenditure pertained to the Appellant's locally acquired chemical manufacture division; and that the Appellant is the legal and economic owner of all the marketing intangibles (trademarks, copyrights, etc.) relating to this business; thus, failing to appreciate that the issue of alleged provision of brand promotion services by way of incurring excessive AMP expenditure does not arise in the Appellant's case;

9.5 Without prejudice to the above, on the facts and in the circumstances of the case and in law, while arriving at the arm's length AMP expenditure, learned DCIT and Hon'ble DRP erred in confirming learned TPO's actions of –

a. applying bright line test for determining compensation towards AMP expenditure incurred by the Appellant and failing to appreciate that no such method has been prescribed under the IT Act and Income-tax Rules, 1962;

b. including the expenditure in the nature of cost of discounted sales pertaining to the locally acquired chemical manufacture division (referred to in para 9.4 above) within the ambit of AMP for the purpose of computing AMP/Sales ratio;

c. disregarding the fact that total advertisement and marketing expenditure included substantial expenses towards cost of goods sold that were in the nature of discount;

d. failing to appreciate that the alleged AMP expenditure incurred by Appellant was towards promoting its products and not towards promoting the brand;

e. erroneously holding that the Appellant should have earned a mark-up on the AMP expenses incurred for providing the purported brand promotion services to AEs and applying aforementioned mark-up; and

f. considering inappropriate comparables for computation of the aforementioned mark-up

The Appellant therefore prays that the addition made by the learned DCIT of Rs. 19,18,64,661 under Section 143(3) read with Section 144(C) of the Act on the basis of the order passed by the learned TPO under Section 92CA(3) of the Act be deleted.

10. Ground 10 - TP adjustment relating to import of finished goods (Rs. 6,42,81,181)

On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in confirming the upward adjustment of Rs. 6,42,81,181 to the income of the Appellant in relation to the international transaction of purchase of finished goods; and in doing so the learned DCIT and Hon'ble DRP grossly erred in agreeing with the learned TPO's action of -

a. rejecting the TP documentation maintained by the Appellant; and

b. rejecting (i) Sataytej Commercial Company Ltd. and (ii) Siemens Ltd. - Healthcare and Other services segment from the economic analysis, which are comparable to the Appellant's distribution activity in terms of functions, asset base and risk profile.

The Appellant therefore prays that the addition made by the learned DCIT of Rs. 6,42,81,181 under Section 143(3) read with Section 144(C) of the Act on the basis of the order passed by the learned TPO under Section 92CA(3) of the Act be deleted.

Ground 11 - TP adjustment relating to receipt of indenting commission (Rs. 4.41,90,721)

On the facts and in the circumstances of the case and in law, the learned DCIT and Hon'ble DRP erred in confirming the upward adjustment of Rs. 4,41,90,721 to the income of the Appellant in relation to the international transaction of receipt of indenting commission; and in doing so the learned DCIT and Hon'ble DRP grossly erred in agreeing with the learned TPO's action of –

- a. rejecting the TP documentation maintained by the Appellant; and*
- b. rejecting commission agreements (i) Smith & Nephew Ine S&N and Harry Kraus; (ii) VipMed and Fulfilment Services Inc; and (iii) Cincinnati Sub-Zero Products, Inc. and Dimension Distributing Inc. from the economic analysis, which are comparable to the Appellant's indenting activity in terms of functions, asset base and risk profile.*

The Appellant therefore prays that the addition made by the learned DCIT of Rs. 4,41,90,721 under Section 143(3) read with Section 144(C) of the Act on the basis of the order passed by the learned TPO under Section 92CA(3) of the Act be deleted.

12. Ground 12 - TP adjustment of Rs. 5,98,88,781 relating to reimbursement expenses

On the facts and in the circumstances of the case and in law, the Hon'ble DRP and learned DCIT erred in confirming the learned TPO's action of determining the arm's length price of the appellant's international transaction of reimbursement of expenses (in the nature of SAP development cost, inter-connectivity charges, professional expenses and administrative expenses) as Nil and in doing so the Hon'ble DRP failed to take cognizance of the fact that these expenses are essential to the business of the Appellant.

13. Ground 13 - Short credit of tax deducted at source (TDS')

On the facts and circumstances of the case and in law, the learned DCIT erred in granting credit for TDS of Rs. 33,83,093 as against Rs. 43,83,437 (as per Form 26AS) claimed by the Appellant, thereby there is a short tax credit of TDS of Rs. 10,00,344.

14. Ground 14A - Penalty proceedings

On the facts and in the circumstances of the case and in law, the learned DCIT erred in initiating penalty proceedings under section 271(1)(c) of the IT Act without appreciating that the Appellant has neither concealed particulars of its income nor furnished any inaccurate particulars of income.

15. Ground 14B - Penalty proceedings

On the facts and in the circumstances of the case and in law, the learned DCIT erred in initiating penalty proceedings under section 271B of the IT Act.”

3. Apart from the aforesaid grounds, the assessee, vide its application dated 23/01/2025, sought admission of the following grounds of appeal: –

"Ground No.15:

Without prejudice to Ground no. 2 and 3, on the facts and in the circumstances of the case and in law, the Ld. AO/Ld. DRP erred in denying the claim of depreciation on written down value of certain intangible assets in the form of contracts being manufacturing contracts, supply contracts (in relation to acquisition from Glaxosmithkline Pharmaceuticals Ltd. (GSK)) and maintenance contracts (in relation to acquisition from Chemito Technologies Put. Ltd. (CTPL)), without appreciating the fact that the said intangible assets were already forming a part of the opening block of assets and depreciation thereupon stood allowed/accepted in the prior years.

The Appellant humbly prays that the entire claim of depreciation on contracts be allowed under section 32 of the Act.

Ground No. 16:

On the facts and circumstances of the case and in law, the Ld. TPO/Ld. DRP/Ld. AO erred in not excluding certain companies which are not functionally comparable to the Appellant's international transaction of provision of indenting services from the final set of comparables.

The Appellant prays that the comparables which are not functionally comparable be excluded from the list of comparables."

4. Since the issues raised by way of additional grounds can be decided on the basis of the material available on record, the same are admitted for adjudication.

5. Ground no.1 is general in nature. Therefore, the same needs no specific adjudication.

6. Grounds no.2-5, raised in assessee's appeal, pertain to the claim of depreciation on manufacturing, supply and maintenance contracts and goodwill pursuant to the acquisition of two undertakings in a slump sale arrangement in earlier years.

7. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is engaged in the manufacturing, installation and sale (including trading) of scientific/medical laboratory equipment and chemicals. For the year under consideration, the assessee filed its return of income on 30/03/2011, declaring a total loss of INR 21,55,61,952. During the assessment proceedings, upon perusal of the details of depreciation claimed by the assessee, it was observed that the assessee has claimed depreciation on manufacturing contracts and supply/maintenance contracts based on acquisition of undertakings from GSK Pharma Ltd and Chemito Technologies Pvt. Ltd. Accordingly, the assessee was asked to justify the allowability of claim of depreciation on manufacturing contracts and supply/maintenance contracts. In its response, the assessee placed reliance upon the Business Transfer Agreements, Valuation Report, and some judicial rulings. The Assessing Officer ("AO"), vide draft assessment order dated 24/03/2014 passed under section 143(3) read with section 144C of the Act, disagreed with the submissions of the assessee on the following basis: –

- (a) No such intangible assets, such as manufacturing contracts, and supply/maintenance contracts have been transferred to the assessee company in a slump sale.
- (b) No evidence of these intangible assets being self-generated, and the same were transferred to the assessee in a slump sale.
- (c) Manufacturing contract, and supply/maintenance contracts are not akin to the assets identified under the provision of section 32(1)(ii) of the Act.

- (d) From the valuation report, "*future economic benefits*" and "*cost measurement*" cannot be measured reliably.
- (e) Regarding the supply contracts purchased from GSK Pharma Ltd, it is seen from the valuation report that the agreements are valid only for one year; thus, such contracts cannot be said to be enforceable in a court of law. Hence, these contracts are not going to create defined future economic benefits, and thus, fail to qualify the definition of intangible assets as per Accounting Standard-26.
- (f) Regarding the maintenance contracts purchased from Chemito Technologies Pvt. Ltd., from the valuation report, it is evident that the "*future economic benefits*" cannot be measured reliably. Thus, the "*maintenance contracts*" do not satisfy the definition of an asset to be recognised as an intangible asset as per Accounting Standard-26.

8. Accordingly, the AO, vide draft assessment order, disallowed the claim of depreciation made by the assessee in respect of manufacturing contracts and supply/maintenance contracts and added the same to the total income of the assessee.

9. The learned DRP, vide its directions issued under section 144C(5) of the Act, rejected the objections filed by the assessee on this issue on the basis that the assessee has not explained why such a claim was not made by filing a revised return. Accordingly, the action of the AO in not entertaining the claim of the assessee was upheld. In conformity, the AO passed the impugned final

assessment order on this issue. Being aggrieved, the assessee is in appeal before us.

10. We have considered the submissions of both sides and perused the material available on record. During the assessment year 2008-09, the assessee acquired by way of slump sale on a going concern basis the Qualigens Fine Chemicals Division from GSK Pharma Ltd. Further, during the assessment year 2009-10, the assessee acquired on a slump sale basis the Analytical Technologies and Environmental Instrumentation Division from Chemito Technologies Pvt. Ltd. As per the assessee, amongst various other assets acquired as part of the above-mentioned slump sale acquisitions, the assessee, inter-alia, acquired certain business/commercial rights in the form of certain manufacturing contracts, supply contracts and maintenance contracts, which were recognised by the assessee as intangible assets in the financial statements of the concerned year in accordance with the asset recognition criteria as stipulated under Accounting Standard-26. Further, the assessee treated the difference between the purchase consideration paid and the value of all assets (tangible and intangible assets) acquired in the slump sale as goodwill in its financial statements. In support of the submission that the impugned contracts qualify as intangible assets as per the Accounting Standard-26 and were accordingly recorded in the assessee's books of accounts as separate intangible assets, the assessee placed reliance upon the valuation reports from Bansi S. Mehta and Company, Chartered Accountants for acquisition of undertakings from GSK Pharma Ltd and Chemito Technologies Pvt. Ltd. During the hearing, reliance was also placed on the

response to comments of the AO by Bansi S. Mehta and Company and additional opinion on the valuation report from M/s Anmol Sekhri Consultants Private Limited. Without prejudice to the aforesaid submission, the learned AR, inter-alia, submitted that even assuming without accepting that the consideration paid for these contracts does not constitute a separate intangible asset, the same would be liable to be considered as goodwill, i.e. the difference between the purchase consideration and the net assets value, and the depreciation is allowable on goodwill being an intangible asset.

11. On the contrary, the learned Departmental Representative ("*learned DR*") submitted that as per the provisions of the Accounting Standard-26, manufacturing contracts, supply contracts and maintenance contracts acquired by the assessee pursuant to the above-mentioned slump sale acquisitions cannot be recognised as intangible assets. The learned DR further submitted that the Accounting Standard-26 specifically requires the capacity of an enterprise to control future economic benefits from an intangible asset. However, in the present case, the assessee has not been able to demonstrate its capacity to control future economic benefits from the contracts, which are only for the duration of 1 year, 2 years or 5 years. It was further submitted that the cost of these contracts cannot be measured reliably. Thus, the learned DR submitted that these contracts cannot be recognised as intangible assets in view of the provisions of the Accounting Standard-26.

12. In his rebuttal, the learned Authorised Representative ("*learned AR*") submitted that the manufacturing contracts related to toll manufacturing sites are engaged in exclusive manufacturing of Qualigens chemicals based on

specifications provided by the assessee and the said toll manufacturers were identified in 1997 by GSK Pharma Ltd and have been associated with them for the past 10 years and have developed significant manufacturing efficiencies and better capacity utilisation leading to considerable cost advantages. Thus, the learned AR submitted that the same is likely to continue in the future. As regards the supply contracts, the learned AR submitted that the Qualigens business enjoys a leadership position with about 30% market share in the speciality chemicals market, and thus, even though supply contracts entered into on an annual basis, majority of these relationships with customers/distributors date back to 30 to 40 years and thus expected to be renewed and continued on year-on-year basis. Further, as regards the maintenance contracts, the learned AR submitted that these contracts were entered into with customers for annual maintenance of the products sold by Chemito Technologies Pvt. Ltd. business and were entered on the expiry of the warranty period of the products, normally for a period of 5 years. Thus, it was submitted that the maintenance contracts that were unexpired on the date of transfer of business were transferred to the assessee and have been valued on the basis of the discounted net contribution arising from the maintenance contracts. Further, the learned AR by referring to the sample copy of these contracts submitted that these contracts continued between the parties and the assessee beyond the period mentioned in the Business Transfer Agreements, which clearly demonstrates that the future economic benefits have flowed to the assessee from the impugned contracts.

13. From the perusal of the details of manufacturing contracts, supply contracts and maintenance contracts acquired by the assessee pursuant to the above-mentioned slump sale acquisitions, forming part of the paper book from pages 73-83 and pages 214-220, we find that only few of these contracts continued in the year under consideration. Further, the maintenance contracts were all entered into on a yearly basis. However, as noted above, as per the assessee, the relationship with the manufacturer/customers/distributors has continued for many years, and these contracts are likely to continue in future. Further, as noted above, it is the plea of the assessee that these are speciality chemicals that enjoy a leadership position and due to continuing long-standing relationships, the assessee continued to enjoy future economic benefits.

14. In any case, it is pertinent to note that in the present case, the total consideration paid by the assessee for the afore-mentioned slump sale acquisitions from GSK Pharma Ltd and Chemito Technologies Pvt. Ltd. includes consideration paid for manufacturing contracts, supply contracts and maintenance contracts acquired by the assessee. Thus, even if it is assumed that these contracts are not separate intangible assets under section 32(1)(ii) of the Act, it cannot be disputed that the consideration paid also covered the consideration for these contracts, and the said consideration was over and above the net asset value of other recognised tangible and intangible assets. We find that the coordinate bench of the Tribunal in assessee's own case in Thermo Fisher Scientific India Pvt. Ltd. v/s DCIT, in ITA No. 769/Mum/2023, for the assessment year 2009-10, vide order dated 31/07/2023 held that the consideration paid over and above the fair value of the assets and liabilities

acquired by way of slump sale from GSK Pharma Ltd and Chemito Technologies Pvt. Ltd. is attributable to goodwill. The relevant findings of the coordinate bench, in the aforesaid decision, are reproduced as follows: -

"5.18 We have heard rival submission of parties. The issue in dispute is claim of depreciation on Goodwill recognised by the assessee in two transaction of acquisition of two units. The assessee claimed that those acquisitions are for purchase of unit for lumpsum consideration, as going concerns in the nature of slump sale, which is subject to capital gain tax us 50B in the hand of seller. Whereas the according the Assessing officer the acquisitions are in the nature of amalgamation. Before us, the learned counsel has referred to various clauses of business transfer agreement (BTA) in respect of units acquired from GSK and CTPL respectively. On perusal of relevant clauses referred, we find that transaction in both the cases are of slump sale and not, amalgamation as stated by the Assessing Officer.

5.19 The learned Assessing Officer has further relied on the Explanation 7 to section 43(1) of the Act, to hold that assessee is not entitled for depreciation on the Goodwill recognised. For ready reference, the relevant explanation is reproduced as under:

"Explanation 7.—Where, in a scheme of amalgamation, any capital asset is transferred by the amalgamating company to the amalgamated company and the amalgamated company is an Indian company, the actual cost of the transferred capital asset to the amalgamated company shall be taken to be the same as it would have been if the amalgamating company had continued to hold the capital asset for the purposes of its own business.

Explanation 7A.—Where, in a demerger, any capital asset is transferred by the demerged company to the resulting company and the resulting company is an indian company, the actual cost of the transferred capital asset to the resulting company shall be taken to be the same as it would have been if the demerged company had continued to hold the capital asset for the purpose of its own business :

Provided that such actual cost shall not exceed the written down value of such capital asset in the hands of the demerged company."

5.20 On perusal of the above Explanation, we find that same is in relation to transactions of amalgamation and not related to slump sale transactions, which is the case of the assessee.

5.21 The learned Assessing Officer has further relied Explanation-2 to section 43(6) of the Act, which reads as under:

"Explanation 2.—Where in any previous year, any block of assets is transferred,—

(a) by a holding company to its subsidiary company or by a subsidiary company to its holding company and the conditions of clause (iv) or, as the case may be, of clause (v) of section 47 are satisfied; or

(b) by the amalgamating company to the amalgamated company in a scheme of amalgamation, and the amalgamated company is an Indian company, then, notwithstanding anything contained in clause (1), the actual cost of the block

of assets in the case of the transferee-company or amalgamated company, as the case may be, shall be the written down value of the block of assets as in the case of the transferor-company or the amalgamating company for the immediately preceding previous year as reduced by the amount of depreciation actually allowed in relation to the said preceding previous year.

5.22 On perusal of above Explanation, we find that it is in relation to acquisition of a subsidiary company by its holding company or vice versa and in relation to transactions of amalgamation and not in respect of slump sale.

5.23 The learned Assessing Officer has further relied on fifth proviso (now sixth proviso) to section 32(1)(ii) of the Act, which is reproduced for ready reference:

"Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii), clause (xiiib) and clause (xiv) of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them."

5.24 On plain reading of the above proviso, it is clear that same is in relation to allocation of the depreciation on the asset between predecessor and successor entities, whereas in the instant case goodwill was not in existence as intangible asset in the case of predecessor companies from whom the assessee has acquired corresponding units under slump sale. Therefore, the said provision is also not applicable of the facts of the instant case.

5.25 The ratio is in the case of United Breweries (supra) is also not applicable over the facts of case as in the said case there was amalgamation of the three wholly owned subsidiaries whereas in the instant case there is a acquisition of units of third parties by way of slump sale.

5.26 The learned DR before us submitted that allocation of values to the fixed asset acquired has been on lower side for creating goodwill as intangible asset. But in our opinion, if the quantum of goodwill is reduced, the valuation of the fixed asset will increase, which are also eligible for depreciation and thus in the exercise of reallocation of values among the goodwill and other fixed asset, will be a revenue neutral exercise.

5.27 In view of the above discussion, we concur with the arguments of the learned counsel of the assessee that goodwill arising from transactions of acquisition of units of GSK and CTPL, is eligible for depreciation under the provisions of the Act. As far as claim of the assessee for allowing depreciation on said goodwill corresponding to assessment year 2008-09, we are of the opinion that claim with respect to depreciation for assessment years 2008-09,

cannot be allowed in the appeal for assessment year 2009-10. It is for the assessee to explore necessary remedy under the provisions of the Act or any other legal remedy as advised. The ground No.2 (two) of the appeal of the assessee is accordingly allowed."

15. Therefore, we are of the considered view that the entire exercise of determining the nature of manufacturing contracts, supply contracts and maintenance contracts acquired by the assessee from the afore-mentioned slump sale acquisitions is merely academic, as even if these contracts are not considered as separate intangible assets as per the provisions of Accounting Standard-26, even then the excess consideration paid over and above the fair value of the recognised assets and liabilities acquired by way of slump sale transactions has been held to be goodwill in nature and the assessee was allowed depreciation on the same under the provisions of the Act by the coordinate bench of the Tribunal. Accordingly, accepting the alternative plea of the assessee and respectfully following the decision of the coordinate bench of the Tribunal rendered in assessee's own case, we direct the AO to treat the excess of consideration paid over and above the fair value of the assets and liabilities as goodwill and allow the depreciation on same to the assessee under the provisions of the Act. On similar lines, the depreciation on goodwill amounting to INR 15,96,20,019 claimed by the assessee in the year under consideration is also allowed. As a result, grounds no.2-5, raised in assessee's appeal, are allowed. In view of our aforesaid findings, additional ground no.15 needs no separate adjudication.

16. Ground no.6, raised in assessee's appeal, was not pressed during the hearing. Accordingly, the same is dismissed as not pressed.

17. Grounds no.7.1 and 7.2, raised in assessee's appeal, pertain to the set off of brought forward unabsorbed depreciation of preceding years.

18. The brief facts of the case pertaining to this issue, as emanating from the record, are: Vide draft assessment order dated 24/03/2014, the AO denied the set off of brought forward losses as well as unabsorbed depreciation pertaining to the assessment year 2008-09 on the basis that for the assessment year 2008-09 the assessee filed its return of income under section 139(4) of the Act and as per the provisions of section 139(3) of the Act, for carry forward of losses, the return should have been filed as per the provisions of section 139(1) of the Act. Further, the AO also referred to the provisions of section 80 of the Act. The learned DRP rejected the objections filed by the assessee and upheld the addition proposed by the AO vide draft assessment order. In conformity, the AO passed the impugned final assessment order disallowing the claim of set off of brought forward losses and unabsorbed depreciation pertaining to the assessment year 2008-09. Being aggrieved, the assessee is in appeal before us.

19. We have considered the submissions of both sides and perused the material available on record. It is the plea of the assessee that the entire claim of INR 23.42 crores, which was carried forward and set off during the year under consideration, is in relation to the unabsorbed depreciation and not business loss. During the hearing, the learned AR submitted that section 80 of the Act mandates timely filing of the return of income within the due date to claim set off of business losses and there is no such requirement for

claiming set off of brought forward unabsorbed depreciation as the provisions of depreciation are governed only by section 32 of the Act and are in no way linked to the timely filing of the return of income. In support of the aforesaid submission, the learned AR placed reliance upon the decision of the Hon'ble Delhi High Court in CIT v/s Govind Nagar Sugar Ltd, reported in [2011] 334 ITR 13 (Delhi). From the perusal of the aforesaid decision, we find that the following substantial questions of law came up for consideration before the Hon'ble Delhi High Court: –

"(a) Whether ITAT was correct in law in holding that for carried forward of unabsorbed depreciation, it was not necessary that the return should have been filed within the time allowed under section 139(1) read with section 139(3) of the Income-tax Act?

(b) Whether ITAT was correct in law in holding that the provisions of section 80 of the Income-tax Act do not apply to unabsorbed depreciation covered by section 32(2) of the Act?"

20. While answering the aforesaid questions in favour of the assessee, the Hon'ble Delhi High Court observed as follows: –

"9. The question that follows for consideration is as to whether the loss referred under section 80 of the Act also includes unabsorbed depreciation and investment allowances. For this we may examine the provisions of losses referred to under section 80 of the Act. Section 72 provides for provisions with regard to carry forward and set off of business losses. According to this section, where for any assessment year, the net result of computation under the head 'profits and gains of business or profession' is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of section 71, then so much of the loss shall be carried forward to the next assessment year. Similarly, section 73 deals with losses in speculation business. Sub-section (2) of section 73 provides that for any assessment year any loss computed in respect of speculation business has not been wholly set off under sub-section (1), so much of the loss as is not set off or the whole loss where the assessee had no income from any other speculation business, shall be carried forward on certain conditions. section 74 deals with losses under the head 'capital gains', which is not relevant for the present case. On examining the aforesaid provisions, as referred in section 80

of the Act, *prima facie*, these sections do not cover or deal with procedure of setting off of unabsorbed depreciation and investment allowance.

10. Section 32 of the Act deals with different types of depreciations. From a plain reading of provisions of sections 72 and 32 it is manifestly clear that section 72 deals with carry forward of unabsorbed business losses other than losses on account of depreciation and that is so because the carry forward depreciation has been provided under section 32(2) of the Act. The manner of carry forward in the two provisions is entirely different. In this manner of interpretation of the provisions of losses as noted above, we may see that sections 80 and 139(3) of the Act apply to business losses and not to unabsorbed depreciation which is exclusively governed by the provisions of section 32(2) of the Act. That being so, the period of limitation for filing loss return as provided under section 139(1) shall not be applicable for carrying forward of unabsorbed depreciation and investment allowances. There is a catena of judgments in support of this proposition of law. In *Sri Hari Mills Ltd.'s case (supra)* and *Sathappa Textiles (P.) Ltd.'s case (supra)* it was held that the section 80 refers to the loss and not for unabsorbed depreciation and, therefore, in respect of carry forward of depreciation, there is no obligation to file return within the time prescribed for the return under section 139(1). This view was reiterated by Madras High Court in *Sathappa Textiles (P.) Ltd.'s case (supra)*. In *Brahmaver Chemicals (P.) Ltd.'s case (supra)* it was held as under:-

"The above provision contemplates determination of loss in pursuance of the return filed under section 139(3) of the Income-tax Act which are to be carried forward to be set off under section 72, 73, 74 or 74A. Section 139(3) also refers to the same provision contemplating for filing of the return within the time allowed under section 139(1) and thus the determination of the loss is permissible when the return is filed within the stipulated time under section 139(1). There is no reference to the provision for carry forward of depreciation or investment allowance in section 80."

11. In the case of *CIT v. Virmani Industries (P.) Ltd. [1995] 216 ITR 607 / 83 Taxman 343 (SC)*, it was held as under:-

"The assessee was engaged in the manufacture of soap and oil during the previous year relevant to the assessment year 1956-57. The assessee had stopped the business in that year and had let out the factory on hire. Ten years later, i.e., in the previous year relevant to the assessment year 1965-66, the assessee started the business of manufacture of steep pipes and that business used part of the old machinery which was being used for soap and oil. It was during the assessment proceedings relating to the assessment year 1965-66, the assessee claimed that the unabsorbed depreciation should be brought forward and set off against the profits of the new business in respect of it pertained to the old machinery utilized in the new business. The Apex Court ruled that a depreciation allowance which remained unabsorbed could be set off against the income of the accounting period for relevant to the assessment year 1965-66. "

12. In the case of *Haryana Hotels Ltd. (supra)*, the question for consideration was same as is before us in the present case. Referring to various decisions of different Courts it was held as under:-

"Under section 32(2) of the Act the unabsorbed depreciation of earlier previous years forms part of the current year's depreciation and thereafter allowance for depreciation is given from the current year's income. There is no such provision in section 72 of the Act by virtue of which business losses of earlier years shall form part of the current year's business losses and be allowed to be set off from current year's income. However, only the business losses of earlier years which are notified by the Assessing Officer are allowed to be carried forward and set off from the current year's income. Similarly, there is no provision under the Act which makes it mandatory for the assessee to file return for carry forward and set off of unabsorbed depreciation which is to be notified by the Assessing Officer as in the case of unabsorbed business loss. Thus, from a reading of the provisions of the Act, the distinction between unabsorbed depreciation and unabsorbed business loss for the purposes of set off and carry forward is clear. "

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"A reading of section 32(2) of the Act makes it clear that a carried forward unabsorbed depreciation allowance is deemed to be part of and stands on the same footing as current depreciation, i.e., in the assessment of the assessee, if full effect cannot be given to any allowance in any previous year owing to there being no profits or gains chargeable for that previous year, the allowance or part of the allowance to which effect has not been given, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of the said allowance. There is no time-limit provided under section 32(2) of the Act for carry forward of unabsorbed depreciation to any subsequent year. The Apex Court in CIT v. Jaipuria China Clay Mines (P.) Ltd. [1966]59ITR555(SC) has held that unabsorbed depreciation of past years had to be added to depreciation of the current year and the aggregate unabsorbed and current year's depreciation had to be deducted from the total income of the assessment year."

13. In the case of CIT v. J. Patel & Co. [1984] 149 ITR 682/ 18 Taxman 204, the Division Bench of our High Court endorsed with approval the case of Madras High Court titled as CIT v. Nagapatnam Import & Export Corpn. [1975] 119 ITR 444/[1980] 3 Taxman 150 wherein it was held as under :-

"The point to be considered is whether the allowance for depreciation is to be equated with the loss that had been contemplated for apportionment among the partners. For some purposes of the Act, depreciation forms part of the loss. The income of the firm or the loss in the hands of the firm cannot be computed without making allowance for depreciation in case the assessee is eligible for, and has made such a claim by complying with the relevant provisions of the Act. If there is any other loss apart from the depreciation, then that loss will get added to the amount of depreciation allowable to the assessed under section 32 read with the rules. It is the total of this amount which will be allocated among the partners under the provisions of section 75. However, the Act thus makes a distinction between the unabsorbed allowance of depreciation and other losses. It has already been seen that section 72(2) of the Act provides that where any allowance or part thereof is, under sub-section (2) of section 32 or sub-section (4) of section 35, to be carried forward; effect shall first be given to the provisions of section 72. In other words, section 72(2) contemplates the loss other than the unabsorbed depreciation being given a priority in the matter of set-off, as there is a time-limit within which such loss can be adjusted. Under section 72(3) the loss other than from depreciation is eligible for being carried forward and set-off only for a period of eight assessment year immediately succeeding the assessment year for which the loss was first computed; in the case of unabsorbed depreciation allowance, there is no such time-limit. The Legislature has, therefore, made a specific

provision for priority in setting off the loss other than unabsorbed depreciation allowance so that the unabsorbed depreciation allowance can be carried forward if necessary without any time-limit and set off in the appropriate succeeding years. It is thus clear that there is a separate identity maintained under the statute with reference to the unabsorbed depreciation allowance though at the time of computation it forms part of 'loss'. It may be that at the time of allocation among the partners, the unabsorbed depreciation is taken along with any other loss that may have been sustained by the registered firm; but this identity of unabsorbed depreciation is required to be maintained in order to enable it to be set off against the future income separately and independently of the other losses. If we approach the construction of section 32(2) in the light of the above background, there appears to be no difficulty in construing the reference."

14. In the same case reliance was also placed on the judgment of Gauhati High Court in *CIT v. Singh Transport Co.* [1980] 123 ITR 698/ 4 Taxman 86, which held as under:-

"In the result, we have no hesitation in arriving at the conclusion that section 32(2) of the Act governs exclusively as to the manner of carry forward and set off in respect of depreciation allowance. In this view of the matter, the rigour of limitation as to the time up to which unabsorbed depreciation allowance can be set off is not applicable in case of such depreciation allowance. Further, section 32(2) being the provision providing the manner of carry forward and set off of such allowances, the provisions of section 75 are inapplicable section 75 which provides that the partners of a registered firm are exclusively entitled to carry forward and set off losses are only applicable in respect of business losses or losses in speculation business and cannot be applicable to carry forward and set off of depreciation allowance."

15. Learned counsel appearing for the Revenue relied upon the case of *Garden Silk Weaving Factory v. CIT* [1991] 189 ITR 512/56 Taxman 4K (SC) in support of his submission that unabsorbed depreciation is indeed a part of loss and if the same was not claimed within the due time under section 139, it could not be allowed to be carried forward. In view of what has been discussed above the learned counsel is not right in interpreting the provisions of law and also the aforementioned judgment of Supreme Court. In this case, the Supreme Court held that though 'depreciation' is component element of the genus described as 'loss', there is nothing anomalous or absurd in the statute providing for a dissection of the amount of loss for the purpose of carrying forward and providing for a special or different treatment to unabsorbed depreciation.

16. We have already noted above that section 32 deals with the different types of depreciation whereas section 80 deals with carry forward of unabsorbed losses other than losses on account of depreciation. If that was not so, there was no need for Legislature to provide specific provision for carrying forward of depreciation under section 32 of the Act. It has already been noted that in case of *Nagapatinam Import & Export Corpn.* (*supra*), which was relied by our High Court in the case of *J. Patel & Co.* (*supra*) whereby, it was held that section 72 contemplates loss other than unabsorbed depreciation and there was a time-limit within which loss can be adjusted, whereas in the case of unabsorbed depreciation there is no time-limit and further that under the statute there is a separate identity with respect to unabsorbed depreciation though at the time of computation, it becomes a part of loss.

17. From the above, it comes out that the effect of section 32(2) is that unabsorbed depreciation of a year becomes part of depreciation of subsequent year by legal fiction and when it becomes part of current year depreciation it is liable to be set off against any other income, irrespective of the fact that the earlier years return was filed in time or not.

18. In view of our aforesaid discussions, both, questions (a) and (b) are answered in affirmative in favour of the assessee and against the Revenue."

21. Therefore, respectfully following the aforesaid decision of the Hon'ble Delhi High Court in Govind Nagar Sugar Ltd (supra), we direct the AO to allow the brought forward and set off of unabsorbed depreciation pertaining to the assessment year 2008-09 in the year under consideration. As a result, ground no.7.1 and 7.2, raised in assessee's appeal, are allowed.

22. Grounds no.7.3 and 7.4 were not pressed during the hearing. Accordingly, the same are dismissed as not pressed.

23. As regards ground No. 8.1, raised in assessee's appeal, it is the plea of the assessee that the AO even though allowed set off of brought forward losses and unabsorbed depreciation pertaining to the assessment year 2009-10 in the current year, however, considered the incorrect figure of INR 14.93 crores instead of INR 17.82 crores as reflected in the return of income on account. Since this issue only requires factual verification, therefore, we restore this issue to the file of the jurisdictional AO with a direction to consider the correct figure of brought forward losses and unabsorbed depreciation pertaining to the assessment year 2009-10 for carry forward and set off in the year under consideration. As a result, ground no.8.1, raised in assessee's appeal, is allowed for statistical purposes.

24. Grounds no.8.2-8.4 were not pressed during the hearing. Accordingly, the same are dismissed as not pressed.

25. The issue arising in ground no.9, raised in assessee's appeal, pertains to Transfer Pricing Adjustment on account of advertisement, marketing and sale promotion ("*AMP*") expenses incurred by the assessee.

26. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the Transfer Pricing Assessment proceedings, pursuant to the reference by the AO under section 92CA(1) of the Act to the Transfer Pricing Officer ("*TPO*") for the determination of the arm's length price of the international transactions entered into by the assessee, it was observed that the assessee had incurred an expenditure of INR 26,03,52,241 on advertisement and sales promotion as per the profit and loss account of the assessee. Accordingly, the assessee was asked to show cause as to why the said expenditure should not be considered as creating a valuable brand for its Associated Enterprises. In the absence of any response from the assessee, the TPO proceeded to conclude the Transfer Pricing Assessment on the basis of the material available on record. Vide order dated 29/01/2014 passed under section 92CA(3) of the Act, the TPO held that the assessee is creating a valuable brand by incurring huge expenses on AMP in India. It was further held that in the present case, there is an arrangement in which the ownership in the Thermo Fisher brands is not transferred to the assessee, but the assessee is incurring substantial AMP expenses, which improves the brand value of the Associated Enterprises in India. Thus, it was held that this arrangement is an international transaction which requires compensation at

arm's length as the assessee is jointly contributing to the increase in the value of brands owned by the Associated Enterprises. The TPO, by following the decision of the Special Bench of the Tribunal in M/s L.G. Electronics India Private Limited adopted the Bright Line Test (i.e., by considering the AMP/Sales ratio of the comparable companies), and concluded that the assessee is not being suitably compensated for the development of marketing intangible as the AMP/Sales ratio of the assessee is 14.01% as compared to the average AMP/Sales margin of 4.63% of the comparable companies. The TPO further added the markup of 10.07% (being the arithmetic mean of OP/OC of the companies which are exclusively engaged in advertising and marketing services), and computed the ALP of the international transaction relating to AMP expenses at INR 19,18,64,660.

27. The learned DRP, vide its directions, following the decision of the Special Bench of the Tribunal in M/s L.G. Electronics India Private Limited, inter-alia, rejected the objections of the assessee and held that by incurring significant AMP expenses, the assessee is not only promoting the brand, but also increasing the sale of this product. The DRP also rejected the contention of the assessee that the Associated Enterprises did not benefit from the AMP expenses. As regards the contention of the assessee that out of the total expenditure of INR 26.03 crore incurred by the assessee and shown under the head selling and distribution expenses in the profit and loss account, an amount of INR 24.39 crore pertain to the expenditure incurred by the assessee in the form of sale of goods which relate to assessee's chemical manufacturing business which was acquired in the earlier year within India,

the learned DRP directed the TPO to examine whether the sum of INR 24 crore forming part of the AMP expenses actually pertain to the chemical unit. The learned DRP further directed the TPO that if the said expenditure is not related to the transaction related to Associated Enterprises, then the adjustment on account of AMP expenditure may be suitably modified after excluding such expenditure. Pursuant to the DRP's directions, no changes were made to the Transfer Pricing Adjustment on account of AMP expenses incurred by the assessee. Being aggrieved, the assessee is in appeal before us.

28. Having considered the submissions of both sides and perused the material available on record, in the present case, it is evident that the TPO for making the impugned addition has adopted the Bright Line Test, which has been held to be not having any statutory mandate by the Hon'ble Delhi High Court in Sony Ericson Mobile Communications (India) Pvt. Ltd. vs. CIT, reported in (2015) 374 ITR 118 (Del). Further, we find that no material has been brought on record by the Revenue to prove the existence of any arrangement, understanding or action in concert between the assessee and its Associated Enterprises for incurring the AMP expenses on behalf of the Associated Enterprises. Thus, on this basis alone, we do not find any merits in the impugned Transfer Pricing Adjustment made on account of AMP expenses incurred by the assessee. As a result, ground no.9 raised in assessee's appeal is allowed.

29. The issue arising in ground no.10, raised in assessee's appeal, pertains to the Transfer Pricing Adjustment in respect of the international transaction of import of finished goods.

30. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee, inter-alia, was engaged in the import of laboratory documents and related products from the Associated Enterprises and selling the same to the Indian customers. For benchmarking the said international transaction of import of finished goods, the assessee adopted the Resale Price Method ("*RPM*") as the most appropriate method. By considering itself the tested party, the assessee identified four comparable companies with an arithmetic mean gross margin, i.e., Gross Profit/Sales, of 31.50%. As the assessee earned a gross profit margin of 34.15% on sales during the year, accordingly, the assessee claimed that the international transaction of import of finished goods undertaken by it with the Associated Enterprises is at arm's length in accordance with the Transfer Pricing Regulations. The TPO, vide order passed under section 92CA(3) of the Act, rejected 2 companies, i.e. Satyatej Commercial Co. Ltd. and Siemens Ltd., considered as comparable by the assessee and arrived at a set of following 2 comparable companies for benchmarking the international transaction of import of finished goods: –

<i>S. No.</i>	<i>Name of the Company</i>	<i>GP/Sales%</i>
<i>1</i>	<i>Hicks Thermometers (India) Ltd.</i>	<i>43.63</i>
<i>2</i>	<i>3M India Ltd. – Healthcare Market Segment</i>	<i>45.47</i>
	<i>Mean</i>	<i>44.55</i>
	<i>Assessee's margin (audited segmental accounts)</i>	<i>33.38</i>

31. Since the arithmetic mean of gross profit margin of the companies considered as comparable by the TPO was 44.55%, by considering the same as arm's length margin, the TPO computed the transfer pricing adjustment of

INR 6,42,81,180.86 in respect of the international transaction of import of finished goods.

32. The learned DRP, vide its directions, rejected the contentions of the assessee and upheld the rejection of 2 companies, i.e. Satyatej Commercial Co. Ltd. and Siemens Ltd., by the TPO. In conformity, the AO passed the impugned final assessment order, incorporating the transfer pricing adjustment on account of the international transaction of import of finished goods. Being aggrieved, the assessee is in appeal before us.

33. During the hearing, the learned AR submitted that if only one company, i.e. Satyatej Commercial Co. Ltd., which is in a similar line of business, is directed to be included as a comparable, then the assessee would fall within the arm's length margin range. By referring to the relevant extract of the Annual Report of Satyatej Commercial Co. Ltd., the learned AR submitted that this company is engaged in the trading of surgical and medical instruments, which is similar to the trading of laboratory equipment undertaken by the assessee. Thus, it was submitted that this company is comparable to the assessee for benchmarking the international transaction entered into by adopting RPM as the most appropriate method.

34. On the other hand, the learned DR vehemently relied upon the order passed by the lower authorities and submitted that as per the annual report of this company, it has inventory in the nature of "*surgical, medical goods and disposables*", therefore, it is necessary to examine the percentage of revenue from trading in disposables.

35. We have considered the submissions of both sides and perused the material available on record. In the present case, there is no dispute regarding the profile of the assessee, that it was engaged in importing laboratory equipment and related products from its Associated Enterprises and selling the same to the Indian customers. Further, the transfer pricing benchmarking analysis undertaken by the assessee by adopting RPM as the most appropriate method has also not been disputed by the lower authorities. In the present case, the only dispute is regarding the selection of comparable companies for benchmarking the international transaction of the import of finished goods. The TPO, vide its order passed under section 92CA(3) of the Act, excluded 2 companies out of 4 companies considered as comparable by the assessee. During the hearing before us, the assessee has contended for the inclusion of only one company, i.e. Satyatej Commercial Co. Ltd., which was excluded by the TPO.

36. From the perusal of the record, we find that the TPO excluded Satyatej Commercial Co. Ltd. on the basis that this company is also into the trading of disposables and from the Annual Report, one cannot separate the figures of disposables and surgical goods. The TPO further noted that out of total purchases of INR 3.53 crore made by this company, only INR 51 lakh was purchased in foreign currency, whereas the assessee's total purchase in foreign currency is more than INR 51 crore. The TPO also noted that for working margin, this company has taken freight and forwarding, customs duty as part of operating cost, while in the assessee's working, these items were not taken as part of operating cost. Accordingly, the TPO directed the

exclusion of Satyatej Commercial Co. Ltd. as the same is not comparable to the assessee. The learned DRP, vide its directions, upheld the exclusion of this company on the basis that the goods dealt with by this company are different from the goods traded by the assessee.

37. Therefore, from the record, it is evident that one of the factors for excluding this company as a comparable by the lower authorities is product dissimilarity, as Satyatej Commercial Co. Ltd. is dealing in surgical, medical goods and disposables. On the other hand, the assessee is importing laboratory equipment and related products from its Associated Enterprises. We find that while analysing the relevance of product similarity for benchmarking the international transactions by adopting the RPM as the most appropriate method, the coordinate bench of the Tribunal in its recent decision in Troy Chemicals India Pvt. Ltd. v/s CIT, in ITA No. 5933/Mum./2024, vide order dated 30/05/2025, observed as follows: -

"13. Therefore, in the present case, before proceeding further, it is pertinent to analyse the relevance of product similarity for benchmarking the international transactions by applying the RPM as the most appropriate method. The RPM has been prescribed as one of the methods under Rule 10B(1)(b) of the Income Tax Rules ("the Rules") for the determination of arm's length price under section 92C of the Act. Rule 10B(1)(b) of the Rules reads as follows: -

"Section 10B(1)(b) in Income Tax Rules, 1962

(b) resale price method, by which,-

(i) the price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise, is identified;

(ii) such resale price is reduced by the amount of a normal gross profit margin accruing to the enterprise or to an unrelated enterprise from the purchase and resale of the same or similar property or from obtaining and providing the same or similar services, in a comparable uncontrolled transaction, or a number of such transactions;

(iii) the price so arrived at is further reduced by the expenses incurred by the enterprise in connection with the purchase of property or obtaining of services;

(iv) the price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between the international transaction or the specified domestic transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of gross profit margin in the open market;

(v) the adjusted price arrived at under sub-clause (iv) is taken to be an arm's length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise;"

14. From a plain reading of the provisions of Rule 10B(1)(b) of the Rules, it is evident that in RPM the gross sale margin realised by an enterprise from a control transaction are compared with gross margins realised by the enterprise or an unrelated party from comparable uncontrolled transaction of purchase and resale of the "same or similar" property or from obtaining and providing the "same or similar" services. Thus, it is evident that Rule 10B(1)(b) of the Rules, which prescribes the RPM as one of the methods for the determination of arm's length price, also does not require strict product similarity for benchmarking the international transaction. We find that while analysing this aspect of the matter, i.e., the relevance of product similarity for benchmarking the international transaction by adopting the RPM as most appropriate method, the Co-ordinate Bench of the Tribunal in the case of *Mattel Toys (I) (P) Ltd. vs. DCIT*, reported in (2014) 30 ITR(T) 283 (Mumbai), observed as follows:-

"38. Thus, the RPM method identifies the price at which the product purchased from the A.E. is resold to a unrelated party. Such price is reduced by normal gross profit margin i.e., the gross profit margin accruing in a comparable controlled transaction on resale of same or similar property or services. The RPM is mostly applied in a situation in which the reseller purchases tangible property or obtain services from an A.E. and reseller does not physically alter the tangible goods and services or use any intangible assets to add substantial value to the property or services i.e., resale is made without any value addition having been made. Since in RPM only margins are seen with reference to items purchased and sold or earned by an independent enterprise in comparable uncontrolled transactions vis-a-vis the one in the controlled transactions, therefore, in such a situation, the nature of products has not much relevance though their closer comparable may produce a better result. The focus is more on same or similar nature of properties or services rather than similarity of products. In RPM other attributes of comparabilities than the product itself can produce a reliable measure of arm's length conditions. The main reason is that the product differentiation does not materially effect the gross profit margin as it represents gross compensation after the cost of sales for specific function performed. The functional attribute is more important while undertaking the comparability analysis under this method. Thus, in our opinion, under the RPM, products similarity is not a vital aspect for carrying out comparability analysis but operational comparability is to be seen. Since the gross profit margin is the main criteria while evaluating the transactions in the RPM wherein price is identified at which property or services are resold and normal gross profit margin is derived at by the enterprise which is deducted from the resale price of such property or service in comparable uncontrolled transactions. The gross profit margin earned by the independent enterprise in comparable uncontrolled

transactions is served as a guidance factor. This is also what happens in the case of a distributor wherein the property and service are purchased from the A.E. and are resold to other independent entities, without any value additions. The gross profit margin earned in such transactions becomes the determination factor to see the gross compensation after the cost of sales. In the instant case, the assessee is a distributor of Mattel toys and gets the finished goods from its A.E. and resells the same to independent parties without any value addition. In such a situation, RPM can be the best method to evaluate the transactions whether they are at ALP."

15. We find that similar findings have been rendered by the Co-ordinate Benches of the Tribunal in the following decisions:-

- *ACIT vs. Kobelco Construction Equipment India Ltd., (2017) 81 taxmann.com 31 (Delhi – Trib.)*
- *Pepperl & Fuchs (India) (P.) Ltd. vs. DCIT, (2019) 105 taxmann.com 29 (Bangalore – Trib.)*

16. Thus, we find that it has been consistently held by the Co-ordinate Benches of the Tribunal that under the RPM, the focus is more on same or similar nature of properties or services rather than the similarity of products, and therefore, the functional attribute is a primary factor while undertaking the comparability analysis under the RPM."

38. Thus, in the aforesaid decision, the coordinate bench arrived at the conclusion that for benchmarking under the RPM, functional attribute is a primary factor rather than the similarity of the products. Therefore, respectfully following the aforesaid decision, we do not find any merit in the findings of the lower authorities in excluding Satyatej Commercial Co. Ltd. as a comparable on the basis that it is dealing in different products.

39. As regards the finding of the TPO that this company has purchases in foreign currency only amounting to INR 51 lakh out of the total purchases of INR 3.53 crore, as compared to total purchases in foreign currency of the assessee amounting to INR 51 crore, we are of the considered view that purchase in foreign currency will not have any impact on the gross sales margin which are compared under RPM, and thus the fact that the major part

of the products were procured by this company locally is of no relevance. Further, as regards the freight and forwarding cost forming part of the operating cost, we find that before the learned DRP, the assessee agreed that the same could be excluded from the cost of goods sold for the purpose of benchmarking. Accordingly, in view of the aforesaid findings, we direct the TPO/AO to consider Satyatej Commercial Co. Ltd. as a comparable to the assessee and exclude freight and forwarding costs while computing the margin of this company. As regards the other company which was excluded by the TPO, we are not expressing any findings in light of the submission of the learned AR as noted above, and objections, if any, against the same are kept open for adjudication if it arises in the assessee's case in future. As a result, ground no.10 raised in assessee's appeal is allowed.

40. The issue arising in ground no.11 and additional ground no.16, raised by the assessee, pertains to the Transfer Pricing Adjustment in respect of the international transaction of receipt of indenting commission.

41. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee provided indenting services to its Associated Enterprises for its direct sales in India, which includes promoting and extending sales of the Associated Enterprises' products throughout the territory of India. For benchmarking the said international transaction of receipt of indenting commission, the assessee adopted the Comparable Uncontrolled Price ("CUP") method as the most appropriate method. By considering itself as the tested party, the assessee

selected the following comparable companies by conducting a search on the RoyaltyStat database: -

<i>Sr. No.</i>	<i>Contractors</i>	<i>Commission rate%</i>
1	<i>Hand Innovations. Inc</i>	<i>22.00</i>
2	<i>Smith & Nephew, Inc (S&N)</i>	<i>9.00</i>
3	<i>Vip Med</i>	<i>3.38</i>
4	<i>Mentor Medical Inc.</i>	<i>11.40</i>
5	<i>Cincinnati Sub-Zero Products, Inc</i>	<i>9.00</i>
6	<i>Servomex Company</i>	<i>13.25</i>
7	<i>RG Medical Diagnostics</i>	<i>17.50</i>
8	<i>J.T. Posey Co. Inc.</i>	<i>15.00</i>

42. As the mean of the commission rates of the said comparable companies was 12.57%, which was less than the commission rate charged by the assessee of 12.74% from its Associated Enterprises, the assessee claimed that the international transaction of receipt of indenting commission is at arm's length.

43. During the Transfer Pricing Assessment proceedings, it was observed that some of the companies selected by the assessee from the RoyaltyStat database were not comparable due to differences in the FAR. Accordingly, the TPO, vide order passed under section 92CA(3) of the Act, excluded the following companies for benchmarking the international transaction of receipt of indenting commission: -

<i>Contractor</i>	<i>Sales Agent</i>
<i>Smith & Nephew, Inc (S&N)</i>	<i>Harry Kraus</i>
<i>VipMed</i>	<i>Fulfillment Services, Inc</i>
<i>Cincinnati Sub-Zero Products, Inc.</i>	<i>Dimension Distributing Inc.</i>

44. As the mean of the commission rate of the remaining 5 comparable companies was 15.83%, the TPO made a Transfer Pricing Adjustment of INR

4,41,90,721 in respect of the international transaction of receipt of indenting commission.

45. The learned DRP, vide its directions, upheld the aforementioned companies by the TPO for benchmarking the international transaction of receipt of indenting commission. In conformity, the AO passed the impugned final assessment order. Being aggrieved, the assessee is in appeal before us.

46. During the hearing, the learned AR submitted that the TPO has adopted an inconsistent stand vis-à-vis the comparable companies selected. It was submitted that the TPO has excluded certain companies engaged in particular product profiles, even though other companies having similar product profiles have been accepted for benchmarking. The learned AR submitted that Smith & Nephew, Inc., excluded by the TPO, has a similar product profile to Hand Innovations Inc. Further, it was submitted that, similarly, Cincinnati Sub-Zero Products Inc., excluded by the TPO, has a similar product profile to RG Medical Diagnostics. Thus, the learned AR sought the exclusion of Hand Innovations Inc. and RG Medical Diagnostics for benchmarking the international transaction of receipt of the indenting commission.

47. On the other hand, the learned DR vehemently relied upon the order passed by the lower authorities.

48. Having considered the submissions of both sides and perused the material available on record, we are confining our findings only in respect of the exclusion of Hand Innovations Inc. and RG Medical Diagnostics as sought by the learned AR. Other objections, if any, against the TPO's findings on this

adjustment are kept open for adjudication if they arise in the assessee's case in future.

49. From the perusal of the TPO's order, we find that Smith & Nephew, Inc., selected by the assessee, was excluded by the TPO on the basis that the same is into bone healing therapy for Fresh Closed Distal Radius Fractures. Thus, the TPO held the company to be functionally not comparable to the assessee. From the perusal of the Sales Representative Agreement entered into between Hand Innovations Inc. and Harry Kraus, forming part of the paper book from pages 1068-1072, we find that the product was Distal Radius Fractures Plate, which is similar to the product profile of Smith & Nephew, Inc., excluded by the TPO. Further, it is also pertinent to note that both companies have similar Sales Representative Agent, i.e., Harry Kraus. Therefore, we concur with the submissions of the learned AR and direct the TPO to also exclude Hand Innovations Inc. for benchmarking the international transaction of receipt of the indenting commission.

50. As regards Cincinnati Sub-Zero Products Inc., we find that the TPO excluded this company on the basis that it is operating in New Hampshire, Maine, Vermont, Connecticut, Rhode Island operating in India. Thus, the TPO held that this company is operating in a very small territory as compared to the assessee, which is operating in India, having a large population. Accordingly, the TPO held that this company is not comparable to the assessee and directed the exclusion of the same. The learned DRP upheld the exclusion of this company as a comparable on the basis that the products dealt with are different from the medical laboratory equipment distributed by the assessee.

The learned DRP noted that most of the products dealt with are for the maintenance of room temperature, such as Hypo/Hypothermia Systems (Water), Convective Air Therapy System (Air) and Heater/Cooler System. Thus, the learned DRP held that this company is not comparable to the assessee as the products distributed are different. From the perusal of the Sales Representation Agreement entered into by RG Medical Diagnostics, forming part of the paper book from pages 1107-1110, we find that this company was also operating in Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island and New York. Further, we find that the products dealt with by this company are in temperature monitoring. Therefore, it is evident that not only this company is having similar product line as that of Cincinnati Sub-Zero Products Inc. but this company is also operating in the territory similar to Cincinnati Sub-Zero Products Inc. Therefore, we agree with the submissions of the learned AR and direct the TPO to also exclude RG Medical Diagnostics for benchmarking the international transaction of receipt of the indenting commission. As a result, ground no.11 and additional ground no.16 raised in assessee's appeal are allowed.

51. The issue arising in ground no.12, raised in assessee's appeal, pertains to the Transfer Pricing Adjustment relating to reimbursement of expenses.

52. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee reimbursed certain expenditure total amounting to INR 5,98,88,781 in the nature of SAP development expenses, Internet charges, professional expenses and

administrative expenses to its Associated Enterprises. Accordingly, during the Transfer Pricing Assessment proceedings, the assessee was asked to show cause why the arm's length price for the international transaction of reimbursement of expenditure should not be considered as Nil. The TPO, vide order passed under section 92CA(3) of the Act, held that the assessee has failed to establish the requirement of these services and also failed to file any evidence which will establish that the assessee received the services. Further, the TPO held that it is not clear that the expenses are incurred by the Associated Enterprises and reimbursed by the assessee at cost. The TPO held that the assessee has not established how the allocation of cost has been made. Accordingly, the TPO in the absence of supporting documents treated the arm's length price of the international transaction of reimbursement of expenses as INR Nil.

53. The learned DRP, vide its directions, granted partial relief to the assessee, agreeing with the submissions regarding reimbursement of employee expenses of INR 39,44,768, directed the TPO to accept the transaction at the transaction value. However, in respect of reimbursement of SAP development expenses, Internet charges, professional expenses and administrative expenses, the learned DRP, after considering the remand report of the TPO, held that the assessee has not produced sufficient evidence to show a nexus between the cost allocation and the assessee's business. It was further held that some of this evidence does not pertain to the year under consideration. Accordingly, the determination of the Nil arm's length price by the TPO. In conformity, the AO passed the impugned final assessment order.

54. We have considered the submissions of both sides and perused the material available on record. During the year under consideration, the assessee reimbursed expenditures in the nature of SAP development expenses, Internet charges, professional expenses and administrative expenses to its Associated Enterprises for the cost incurred on behalf of the assessee. Such reimbursement was made by the assessee without paying any markup on the cost. The TPO, as well as the learned DRP, treated the arm's length price of this transaction at NIL on the basis that the assessee has failed to justify/prove the rendition, necessity and benefit of this expenditure. We find that during the proceedings before the learned DRP, the assessee filed the details of reimbursement paid to the Associated Enterprises by way of additional evidence. As regards the SAP development expenses, the assessee furnished the invoice raised by Dell Perot Systems in respect of the India rollout project. As regards the Internet services received by the assessee, the assessee placed on record the invoices raised by AT&T relating to the assessment year 2011-12 on the basis that the invoices for the year under consideration are not available, as the data is very old. Further, as regards the reimbursement of professional expenses, the assessee placed on record the invoices raised by the legal consultant for various assignments in India. It is evident from the record that the TPO neither undertook any benchmarking analysis nor searched for any comparable transaction for considering the arm's length price at NIL. In this regard, it is relevant to note the following observations of the Hon'ble Delhi High Court in CIT v/s Cushman and Wakefield (India) Pvt. Ltd., reported in [2014] 367 ITR 730 (Del.): -

"35. The TPO's Report is, subsequent to the Finance Act, 2007, binding on the AO. Thus, it becomes all the more important to clarify the extent of the TPO's authority in this case, which is to determining the ALP for international transactions referred to him or her by the AO, rather than determining whether such services exist or benefits have accrued. That exercise - of factual verification is retained by the AO under Section 37 in this case. Indeed, this is not to say that the TPO cannot - after a consideration of the facts - state that the ALP is 'nil' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the TPO stating that the assessee did not benefit from these services, which amounts to disallowing expenditure."

55. As noted above, in the present case, no search was conducted to find out the independent entity in a comparable transaction, and the arm's length price of the international transaction was treated to be NIL. In the present case, no doubts about payments made by the assessee have been raised by the AO under section 37 of the Act. Further, accrual of benefit to the assessee or the commercial expediency of any expenditure incurred by the assessee cannot be the basis for disallowing the same, as held by the Hon'ble Delhi High Court in the case of CIT v/s EKL Appliances Ltd., reported in [2012] 345 ITR 241 (Del.).

56. We further find that the Hon'ble jurisdictional High Court in CIT v/s Lever India Exports Ltd., reported in [2017] 246 Taxmann 133 (Bombay), observed as follows: -

"7. We note that the Tribunal has recorded the fact that the respondent assessee has launched new products which involved huge advertisement expenditure. The sharing of such expenditure by the respondent assessee is a strategy to develop its business. This results in improving the brand image of the products, resulting in higher profit to the respondent assessee due to higher sales. Further, it must be emphasized that the TPO's jurisdiction was to only determine the ALP of an International Transaction. In the above view, the TPO has to examine whether or not the method adopted to determine the ALP is the most appropriate and also whether the comparables selected are appropriate or not. It is not part of the TPO's jurisdiction to consider whether or not the expenditure which has been incurred by the respondent assessee

passed the test of Section 37 of the Act and/or genuineness of the expenditure. This exercise has to be done, if at all, by the Assessing Officer in exercise of his jurisdiction to determine the income of the assessee in accordance with the Act. In the present case, the Assessing Officer has not disallowed the expenditure but only adopted the TPO's determination of ALP of the advertisement expenses. Therefore, the issue for examination in this appeal is only the issue of ALP as determined by the TPO in respect of advertisement expenses. The jurisdiction of the TPO is specific and limited i.e. to determine the ALP of an International Transaction in terms of Chapter X of the Act read with Rule 10A to 10E of the Income Tax Rules. The determination of the ALP by the respondent assessee of its advertisement expenses has not been disputed on the parameters set out in Chapter X of the Act and the relevant Rules. In fact, as found both by the CIT (A) as well as the Tribunal that neither the method selected as the most appropriate method to determine the ALP is challenged nor the comparables taken by the respondent assessee is challenged by the TPO. Therefore, the ad-hoc determination of ALP by the TPO dehors Section 92C of the Act cannot be sustained."

57. In view of the above, we are of the considered opinion that TPO, as well as learned DRP, were not justified in treating the value of the international transaction of reimbursement of expenses to be NIL, in the present case. Accordingly, ground no.12 raised in assessee's appeal is allowed.

58. The issue arising in ground no.13, raised in assessee's appeal, pertains to the short credit of the taxes deducted at source. Having considered the submissions of both sides, we deem it appropriate to restore this issue to the file of the AO with the direction to grant the credit of taxes deducted at source, in accordance with the law, after conducting the necessary verification. We order accordingly. As a result, ground no.13 raised in assessee's appeal is allowed for statistical purposes.

59. Grounds no.14A and 14B, raised in assessee's appeal, pertain to the initiation of penalty proceedings under section 271(1)(c) and section 271B of the Act, which are premature in nature. Therefore, the said grounds are dismissed.

60. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 16/07/2025

Sd/-
VIKRAM SINGH YADAV
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 16/07/2025

Prabhat

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

By Order

Assistant Registrar
ITAT, Mumbai