IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.2396/Bang/2019		
Assessment Year : 2004-05		
M/s. Tata Power Solar Systems Limited, No.78, Hosur Road, Electronic City, Bengaluru – 560 100. **PAN : AAACT 4660 J**	Vs.	ACIT, Circle – 7(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Vikram Udupa, Advocate
Revenue by	:	Shri. Sunil Kumar Singh, CIT-2(DR)(ITAT), Bengaluru
Date of hearing	:	08.05.2023
Date of Pronouncement	:	17.05.2023

O R D E R

Per George George K, Judicial Member :

This appeal at the instance of the assessee is directed against the CIT(A)'s order dated 20.09.2019, passed under section 250 of the Income Tax Act, 1961 (hereinafter called 'the Act'). The relevant Assessment Year is 2004-05.

2. The brief facts of the case are as follows:

During the year under consideration, the assessee entered into various international transactions with its Associated Enterprises (AEs) which *inter alia* included payment towards technical know-how amounting to Rs.9,07,39,440. The said payment is pursuant to a license agreement entered into by the assessee with its AE (i.e., BP Solar International LLC) dated 01.04.2003. The said payment towards technical know-how was capitalized in the books of the assessee and depreciation on the same was claimed. The assessee aggregated all the international transactions on grounds of being inextricably and closely linked to each other, for the purposes of computation of Arm's Length Price (ALP) and benchmarked them at entity level. The assessee considered Transaction Net Margin Method (TNMM) as the most appropriate method with Operating Profit (`OP')/Operating Cost ('OC') as the profit level indicator. The assessee had earned a net margin (OP/OC) of 12.34% which was higher than the net margin of comparable companies of 9.23% as determined by it in its TP study. The computation of assessee's margin of 12.34% included depreciation as part of its operating cost.

3. During the course of assessment, the TPO upon considering the benchmarking analysis of the assessee, accepted the same for all international transactions except for the payment of technical know-how. The TPO thereafter concluded that the technical know-how fees should not have been paid by the assessee to its AE. Thus, by treating the ALP of such payment at NIL, the TPO made an adjustment of Rs. 9,07,39,440 in his order under section 92CA(3) passed on 15.12.2006. Subsequently, the assessment order under section 143(3) dated 28.12.2006 was passed by the AO incorporating the aforesaid transfer pricing adjustment.

4. On appeal, the CIT(A) vide order dated 20.09.2019 upheld the adjustment made by the TPO and incorporated in the assessment order by the AO. Further, the CIT(A) alternatively held that as the payment of technical

know-how was made without deduction of tax at source, the same is disallowable under section 40(a)(i) of the Act.

5. Aggrieved by the order of the CIT(A), assessee has filed the present appeal. The grounds raised read as follows:

1. *That on the facts and circumstances of the case, the order passed by the Learned Commissioner of Income-tax (Appeals) -7, Bengaluru, ["CIT(A)"1, to the extent prejudicial to the Appellant is bad in law and liable to be quashed.*
2. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in making an adjustment of INR 9ƒ9,7po,000 in respect of the international transactions of the Appellant.*
3. *On the facts and circumstances of the case, the learned CIT(A) erred in upholding the action of the Transfer Pricing Officer to determine the arm's length price in respect of technical know-how acquired from its Associated Enterprise ("AE") at NIL.*
4. *On the facts and circumstances of the case, the learned CIT(A) erred in not appreciating the fact that the Appellant had provided evidence to demonstrate the actual receipt of the technical know-how from its AE and the benefits derived from acquiring the said technical know-how.*
5. *On the facts and circumstances of the case, the Appellant being a joint venture, the learned CIT(A) ignored the evidence provided to demonstrate that the amount paid as technical know-how fee was not arbitrary, but was based on identified costs, was further negotiated between the joint venture partners and approved by the Board of Directors of the Appellant.*
6. *On the facts and circumstance of the case, the learned CIT(A) failed to appreciate the fact that the payment for technical know-how is a lumpsum one-time payment for the specific technology received and not recurring in nature.*
7. *With prejudice, that the learned CIT(A) erred in questioning the benefits derived by the Appellant, from payment of technical know-how fee.*
8. *On the facts and circumstances of the case, the learned CIT(A) failed to appreciate that the payment made towards technical know-how is approved by the FIPB and within the limits prescribed under the exchange control regulations.*
9. *On the facts and circumstances of the case, the learned CIT(A) failed to appreciate the fact that the technical know-how fee has been capitalized and the adjustment, if any shall be limited to the depreciation claimed.*
10. *On the facts and circumstances of the case, the learned CIT(A) erred in concluding that taxes at sources have not been deducted on royalty payments and erred in not considering the declaration/affidavit submitted by the Appellant.*

11. That the learned AO erred in levying interest under section 234B of the Act, the same being consequential in nature.

6. The assessee has also raised additional grounds vide its application dated 24.03.2023. The additional grounds raised read as follows:

12. On the facts and in the circumstances of the case and in law, the assessment order dated 28 December 2006, passed by the Addl. Commissioner of Income-tax, Range-7(3), Mumbai (Addl. Commissioner') under section 143(3) of the Income-tax Act, 1961 (Ace), is illegal, bad in law and without jurisdiction, as the Addl. Commissioner did not have the power to perform the functions of an 'Assessing Officer', in absence of an order issued to him under section 120(4)(b) of the Act conferring him with valid jurisdiction.

The Appellant prays that the said assessment order passed without valid jurisdiction ought to be quashed.

13. On the facts in the circumstances of the case and in law, the assessment order 28 December 2006, passed by the Addl. Commissioner, is illegal, bad in law and without jurisdiction, as the Addl. Commissioner did not have the valid jurisdiction to pass the said order, in absence of an order transferring him jurisdiction in accordance with section 127 of the Act.

The Appellant prays that the said assessment order passed without valid jurisdiction ought to be quashed.

7. The learned AR submitted that once the net profit margin is accepted to be at arm's length by the TPO, it presupposes that the various components of income and expenditure are also at arm's length. In support of its argument that no separate benchmarking of a transaction is warranted when TNMM is accepted at entity level, the reliance was on the decision in the case of Toyota Kirloskar Motor (P.) Ltd. v AC (2023) 147 taxmann.com 558. Alternatively, it was contended that since the payment towards technical know-how is capitalized in its books, the difference between transacted value and ALP cannot be added since there is no effect to the total income. To support this contention, reliance was placed on the decision in Ciena India Pvt. Ltd. v ITO [ITA No. 1453/Del/2014], order dated 24.04.2015. It was thus submitted that the transfer pricing adjustment made by TPO

should be deleted. On the alternate disallowance under section 40(a)(i) proposed by the CIT(A), the learned AR submitted that only such amounts can be disallowed under section40(a)(i), which have been claimed as a deduction in computing business income. It was submitted that the aforesaid section does not govern depreciation claimed on payments which had been capitalized. To support this contention, reliance was placed on the decisions in PCIT Vs. Tally Solutions (P) Ltd. (2021) 430 ITR 527 (Kar); CIT Vs. Mark Auto Industries Ltd in ITA No. 57 of 2009 (P&H HC)]; ITO Vs. Kawasaki Microelectronics Inc. [IT(IT)A No.1221/13/2014]; Sartorius Stedim India (P) Ltd Vs. ACIT (2023) 146 taxmann.com 343 (Bang-Trib).

8. On the other hand, the learned DR relied on the order of the CIT(A) and of the TPO to support his contentions.

9. We have heard the rival submissions and perused the material on record. The technical know-how is integral and inseparable to business segment of the assessee. All the documents explaining the need and benefit for payment of technical know-how was submitted by assessee to the TPO and is on record. On facts of the present case, it would be impractical and also inappropriate to evaluate payment of technical know-how fee on an individual or on a stand-alone basis (dehors the segment to which a benefit from such services accrues). For the year under consideration, the net profit margin of the assessee is 12.34% which is higher than the net profit margin of the comparable companies arrived at 9.23%. It is undisputed that the TPO had accepted the benchmarking analysis of the assessee for all transactions except for the payment of technical know-how fee to AE. This in our view would mean that the TPO has accepted the entity level margins earned by the assessee but proceeded to make TP adjustment on payment towards technical know-how. The Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India (P.) Ltd. Vs. CIT [2015] 374

ITR 118 held that once the revenue accepts the entity level margins as per the most appropriate method, it would be inappropriate to treat a particular expenditure as a separate international transaction. It was held that such an exercise would lead to unusual and absurd results. The relevant observations from the above judgment in this context are as under:-

"101. However, once the Assessing Officer/TPO accepts and adopts TNM Method, but then chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/ segregation, it would as noticed above lead to unusual and incongruous results as AMP expenses is the cost or expense and is not diverse. It is factored in the net profit of the inter-linked transaction. This would be also in consonance with Rule 10B(J)(e), which mandates only arriving at the net profit margin by comparing the profits and loss account of the tested party with the comparable. The TNM Method proceeds on the assumption that functions, assets and risk being broadly similar and once suitable adjustments have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the com parables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible"

10. Following the aforesaid judgment of the Delhi High Court, the co-ordinate bench of Bangalore ITAT, in the case of Lenovo (India) (P.) Ltd. Vs. ITO [IT(TP)A No. 195/Bang/2022 dated 31.01.2023] held that if margins of assessee with respect to its trading segment were accepted to be at arm's length by TPO, then no separate adjustment of AMP expenses could be made by treating it as an international transaction. The relevant extract of the decision is as follows:

"22. We also see merit in the submission of the Id AR that the ratio laid down by the decisions of the coordinate bench of the Tribunal in assessee's own case for AY 2012-13 to 2015-16 is that that if the net profit margin meets the Arm's length price, then no separate addition needs to be made. Considering the fact that no adverse inference is drawn by the TPO in respect of the Trading segment which means that the TPO has accepted the overall margins of the said segment and respectfully following decision of the Hon'ble Delhi Court in the case of Sony Ericsson (supra) and the ratio laid down by the

coordinate bench in assessee's own case, we direct the TPO to delete the adjustment made towards the trading segment."

11. Further, Bangalore Bench of ITAT in the case of Toyota Kirloskar Motors (P) Ltd., Vs. ACIT [2023] 147 taxmann.com 558 (Bang. – Tribunal) on similar set of facts has adjudicated the issue in favour of assessee. The relevant findings of the ITAT reads as follows:

"13. Ground Nos. 8 to 15 Relating to royalty adjustments:

In addition to the written synopsis the ld.AR submitted the assessee adopted TNMM at the entity level, in which process the royalty has been considered as a closely linked transaction as a part of operating cost. Therefore a separate adjustment for royalty is not required. The AR of the assessee relied on the judgments of assessee's own case Toyota Kirloskar Motors (P.) Ltd. v. Addl. C1T [2022] 138 taxmann.com 107 (Bang. - Trib.), in para nos.5 to 13, wherein held as under:-

> *"Ground Nos. 10-12: 5. The Ld.AR submitted that assessee selected TNMM as the most appropriate method and operating margin at entity level after including royalty was compared with comparable companies. The operating margin of the assessee are at arm's length as concluded by the Ld.TPO.*

6. The assessee submits that once the operating margin at segment or entity level is at arm's length, separate analysis of Royalty is not required. This is for the following reasons: Section 92C(1) provides that the arm's length price shall be computed applying the most appropriate method out of the methods listed in section 92C(I). Rule IOC lays down the guidelines for selection of the most appropriate method. The most appropriate method is to be selected having regard to nature of transaction or class of transaction or class of associated persons, functions performed, assets employed and risks assumed etc.

7. The assessee selected TNMM as the "most appropriate method" is not disputed by the revenue. The Ld.AR submitted that the TNMM considers the net profit margin earned by an organization. Adjustments are made to the net profits to factor in the differences at the transaction level or the enterprise level. It is submitted that the adjustments are also made for difference in the accounting methodology. TNMM makes a comparison at the entity/global/segment level and not at the transactional level. He assailed that the merit of this method is that, it is resilient to minor functional

differences. As a result of this characteristic. examination is not made at the individual component level of income or expenditure that us been reckoned in arriving at the net profit but at the entity level. The Ld.AR emphasized that when comparison is made at the macro (global) level, where multiple intertwined transactions exist, it is not possible to identify or pinpoint the contribution of each facet or transaction to the earning of net profit.

8. He submitted that in the process of adopting the TNMM, the assessee adopted the Net Profit as the starting point. and in arriving at its net profit, the assessee considered and factored the royalty payments_ The Ld.AR submitted that, royalty is integral to and inseparable to its dealings in the business segments. It is submitted that being a relevant aspect of dealings, it would be impractical and also inappropriate ***to*** *evaluate such payments on an individual and stand-alone basis, de hors the segment to which a benefit from such services accrues. He reiterated that the Ld.TPO in the TP Order held the profits so determined to be satisfying the arm's length test. This aspect has not been disputed. He thus submitted that once the net profit margin is demonstrated to be at arm's length, it pre-supposes that the various components of income and expenditure, including the international transactions that have been considered in the process of arriving at the Net Profit are also at arm's length, and under such circumstances, it is impermissible to select another method to examine an individual transaction of a segment already considered and evaluated.*

9. In support of this contention the Ld.AR relied on the judgment of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India (P.) Ltd. v CIT reported in [2015] 55 taxmann.com 240 (Delhi) which explains the terms "closely linked transaction" and under what circumstances a "bundled approach" can be adopted. The judgment also overrules ITAT Special Bench decision in the case of L.G. Electronics India Pvt. Ltd v. ACIT reported in [2013] 29 taxmann.com 300 (Delhi - Trib.) (SP) that rejected 'bundled approach'.

10. The Ld.AR thus submitted that its manufacturing activity and payment of royalty are closely inter-linked, interdependent and flow from a common source. He at the cost of repetition reiterated that once the net profit margin is determined to be at arm's length, it pre-supposes that the various components of income and expenditure considered in the process of arriving at the net profit are also at arm's length is to be upheld. On the contrary, the Ld.DR relied on the orders passed by the authorities below.

We have perused the submissions advanced by both sides in the light of records placed before us. It is the contention of the Ld.AR that assessee has paid royalty to TMC in accordance with the technical service agreement being an integral part of the manufacturing activity. Admittedly, the Ld.TPO upon segregating the manufacturing and trading activity found the margin

determined under the separate segments to be at arm's length. It has been submitted by Ld.AR that for:

A.Y. 2008-09 in IT(TP)A No. 1595/Bang/2012,
A.Y. 2010-11 in IT(TP)A No. 16/Bang/2015 and A.Y. 2013-14 in ITA Nos. 2016 & 1972/Bang/2018

the Coordinate Bench of this Tribunal in assessee's own case-has analysed that the royalty payment has been made by assessee towards the license to manufacture items on exclusive basis. It is also been submitted that in the sister concern's case being Toyota Kirloskar Auto Parts for A.Y. 2007-08 in IT(TP)A No. 1356/Bang/2011, this Tribunal has taken similar view. We note that for A.Y. 2007-08, this Tribunal in assessee's own case for A.Y. 2007-08 reported in [2014] 48 taxmann.com 380 has considered the issue of separately bench marking the royalty as under.

> *"48. On the issue whether the TPO can come to a conclusion that the ALP of an international transaction is nil because no services were rendered or that the assessee did not derive any benefit from the AE for which payments were made, we have considered the submissions of the learned counsel for the assessee. This issue is purely academic because we have already held that the conclusions of the TPO/DRP that the trading and manufacturing segment of the Assessee are distinct and not inter related warranting combined transaction approach is not correct and that a IT(TP)A No. 1315/Bang/2011 combined transaction approach has to be adopted and that on the basis of combined transaction approach the price paid for the international transaction is at Arm's Length. We may also that legally the TPO should adopt the ALP as nil. On similar approach by TPO adopting ALP at Nil the ITAT, Bangalore Bench, in the case of M/s.Festo Controls Pvt. Ltd. v. DCIT in ITA No. 969/Bang/2011 (AY: 2007-08) dated 4-1-2013, the Tribunal examined the question as to whether the TPO can determine the ALP at nil on the ground that no services Page 15 of 23 IT(TP)A Nos. 350/Bang/20 I 4 & 836/Bang/2014 were rendered. The Tribunal. on the above issue followed the decision of the Mumbai Bench of the ITAT in the case of Castrol India Ltd. v. ACIT in ITA No. 3938/MUM/2010 dated 149-2012 wherein it was held that it was incumbent upon the TPO to work out the ALP of the relevant transactions by following some authorized method and the entire cost borne by the assessee cannot be disallowed by taking the ALP at Nil. The Tribunal also referred to the decision of the Hon'ble Delhi High Court in the case of CIT v. EKL Appliances Ltd.. ITA No. 1068/2011 dated 29-3-2012. In the aforesaid decision. the assessee entered into an agreement pursuant to which it paid brand fee/royalty to an associated enterprise. The TPO disallowed the payment on the ground that as the assessee was regularly incurring huge losses, the knowhow/brand had not benefited the assessee and so the payment was not justified. This was reversed by*

the CIT (A) & Tribunal on the ground that as the payment was genuine, the TPO could not question commercial expediency. On appeal by the department, the Hon'ble Delhi High Court held that the "transfer pricing guidelines" laid down by the OECD make it clear that barring exceptional cases, the tax administration cannot disregard the actual transaction or substitute other transactions for them and the examination of IT(TP)A No. 1315/Bang/2011 a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. The guidelines discourage restructuring of legitimate business transactions except where (i) the economic substance of a transaction differs from its form and (ii) the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner. The OECD guidelines should be taken as a valid input in judging the action of the TPO because, in a different form, they have been recognized in India's tax jurisprudence. The Hon'ble Court held that it is well settled that the revenue cannot dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur (Eastern Investment Ltd 20 ITR 1 (SC), Walchand & Co 65 ITR 381 (SC) followed). Even Rule 10B(1)(a) does not authorise disallowance of expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same. In light of the aforesaid decisions, we are of the view that the stand taken by the assessee in this regard deserves to be accepted. It is clear from the decisions referred to above that the TPO has to work out the ALP of the international transaction by applying the methods recognized under the Act. He is not competent to hold that the expenditure in question has not been incurred by the assessee or that the assessee has not derived any benefits for the payment made by the assessee and therefore he cannot consider the ALP as NIL. We hold accordingly."

11. We note that post ITAT order, the department filed MP for Assessment Year 2007-08 before the Hon'ble Tribunal seeking clarification as to whether the TPO can compute ALP of the royalty payment. In M.P. No. 7/Bang/2015 [TS-70-ITAT2015(Bang)], the Tribunal further clarified that when margins at entity level were accepted, the matter of dwelling into ALP at transaction level was irrelevant. "21. In this M.P., the Revenue after referring to paras 50, 51 and 48 has submitted as follows:-

"5. The above para reads to mean that the TPO is to recomputed the ALP in accordance with the methods laid down in the Act and also sates that the Assessee's stand is accepted opening it to a reading that the appeal has been allowed in favour of the Assessee as well as that of it being set aside for the TPO to do it in accordance with the methods recognized under the Act. 6. The Tribunal was also pleased to set aside the matter to

the file of the TPO for AY 2008-09 when read with para 51 leads to a belief that the TPO is to recomputed the ALP. 7. Therefore, it is requested that the Hon'ble ITAT may clarify and adjudicate the above issue."

22. The Id DR reiterated the stand of Revenue as contained in the petition. We have considered the contentions in the petition and are of the view that the same are devoid of any merit. The addition by way of adjustments to the ALP has been deleted by the Tribunal in para 47 of its order. The observations in para 48 to 51 has been very clearly mentioned MP No. 7/Bang/20 I 5 to be purely academic. Therefore, the confusion as is sought to be brought out in the petition is without any basis and is rather mischievous. All that the AO has to do while giving effect to the order of Tribunal is to delete the addition on account of adjustment to ALP. We may also add that the miscellaneous petition is thoroughly misconceived and has been filed without a proper reading of the order of the Tribunal. We hope that such miscellaneous petitions will not be filed by the revenue in future, when the orders in question clearly set out its conclusions. The miscellaneous petition is therefore dismissed."

12. It is also observed that the principle of aggregation has been upheld by various High Courts as well as decision of this Tribunal. Admittedly. the assessee has treated royalty to be closely interrintaimitiar transactions. which was rejected by the revenue authorities.
Reliance has been placed on following decisions in respect of above proposition.

(a) CIT v. Air Liquide Engineering India P ***Ltd.*** *reported in [2014] 43 taxmann.com 299 (Hyderabad Tribunal)*
(b) Dell International Services India Pvt. Ltd. v. JCIT in IT(TP)A No. 130/Bang/2014 & ITtTPIA 121/Bang/2014 dated 22-12-2021 (c) McCann Erikson India Pvt Ltd v. ACIT — ITA No. 5871/De1/2011 (d) M/s. Thyssen Krupp Industries India Pvt Ltd v. ACIT — ITA No. 7032/Mum/2011
(e) Lumax Industries Ltd v. ACTT TS-152-I TAT-2013 (DEL)-TP.
(f) Hindustan Unilever Limited v. Ad CIT ITA No. 7868/Mum/2010 (g) DCIT v CMA CGM Global India (P) Ltd ITA No. 5979/Mum/2010 (h) Yokogawa India Limited v. ACIT ITA No. 1329/Bang/2011.

13. We note that assessee's margins have been computed including royalty payment which is higher than the margin of the comparables. It is also not disputed by the revenue that the comparables in case of the comparables, the royalty, margins are computed after including royalty and research and development expenses. The view taken by the Coordinate Bench of this Tribunal in assessee's own case for A.Y. 2007- 08 has been reproduced hereinabove wherein all these aspects have been considered. This Tribunal for A.Y. 2007-08 has deleted the adjustment made by the Ld.TPO in respect

of royalty by separately bench marking the transactions. This has been fortified by the clarification given in a Miscellaneous Petition filed by the department which is also reproduced hereinabove. This view is also supported by various decisions of Coordinate Benches of this Tribunal as well as various High courts, Cojoint reading of these orders, we direct the Ld.AO/TPO to delete the adjustment proposed for royalty as a separate international transaction. Respectfully following the above view, we direct the Ld.AO/TPO to delete the adjustment proposed towards royalty as a separate international transaction. Accordingly, ground nos. 10 to 12 raised by assessee stands allowed."

13.1 The ld.DR relied on the order of the lower authorities and he submitted that since the assessee has adopted TNMM and the TPO has also accepted the methods for calculation ALP, the TPO has not made separate adjustment in regard to payment of royalty, therefore, this issue should not be raised by the assessee.

13.2 After hearing both the sides, we observe from the order of the TPO, he has calculated the ALP in regard to royalty payment determined under TNMM of Rs. 154.54 crores however, no separate adjustment of royalty has been proposed by the TPO since the TNMM was adopted at NTT level which includes royalty also. The ld.DRP also expressed his opinion that the TPO has not proposed any adjustment towards royalty payment. Considering the above observations and arguments, we uphold the order of the DRP and no separate adjustment is required for the payment of royalty if the TNMM approach has been adopted at entity level as decided by the coordinate bench of the Tribunal in the assessee's own case noted supra, therefore ground Nos.8 to 15 become academic in nature, accordingly, we allow ground nos.8 to 15."

12. In view of the aforesaid reasoning and judicial pronouncements, the adjustment made by the TPO towards technical know-how fees despite accepting the entity level margins, is hereby deleted.

13. We now shall address the alternative ground canvassed by the CIT(A) for upholding the impugned adjustment by invoking the provisions of section 40(a)(i) of the Act. At the outset, we note that the assessee could not establish whether or not the tax had been deducted at source on the impugned payment due to absence of historical records. Irrespective of such fact, in our view, the action of the CIT(A) to invoke section 40(a)(i) of the Act is misplaced. As noted above, the payment towards technical know-

how was capitalized in the books of the assessee and depreciation on the same was claimed. We note that the Hon'ble Supreme Court in Nector Beverages (P.) Ltd. v DCIT (2009) 314 ITR 314 (SC), in the context of section 41, held that depreciation, by its very nature, is neither a loss, nor an expenditure, nor a trading liability. On this count, invoking section 40(a)(i) of the Act which prohibits claim of revenue expenditure, is incorrect. This view is also fortified by the decisions relied on by the assessee as noted above. It is sufficient to note the observations of the Hon'ble Karnataka High Court in the case of PCIT Vs. Tally Solutions (P) Ltd (supra), extracted as under:

"10. Thus, from close scrutiny of Section 40(a)(i) of the Act, it is axiomatic that an amount payable towards interest, royalty, fee for technical services or other sums chargeable under this Act shall not be deducted while computing the income under the head profit and gain of business or profession on which tax is deductible at source; but such tax has not been deducted. The expression 'amount payable' which is otherwise an allowable deduction refers to the expenditure incurred for the purpose of business of the assessee and therefore, the said expenditure is a deductible claim. Thus, Section 40 refers to the outgoing amount chargeable under this At and subject to TDS under Chapter XVII-B. The deduction under Section 32 is not in respect of the amount paid or payable which is subjected to TDS; but is a statutory deduction on an asset which is otherwise eligible for deduction of depreciation. Section 40(a)(i) and (ia) of the Act provides for disallowance only in respect of expenditure, which is revenue in nature, therefore, the provision does not apply to a case of the assessee whose claim is for depreciation, which is not in the nature of expenditure but an allowance. The depreciation is not an outgoing expenditure and therefore, provisions of Section 40(a)(i) and (ia) of the Act are not applicable. In the absence of any requirement of law for making deduction of tax out of expenditure, which has been capitalized and no amount was claimed as revenue expenditure, no disallowance under Section 40(a)(i) and (ia) of the Act would be made. It is also pertinent to note that depreciation is a statutory deduction available to the assessee on a asset, which is wholly or partly owned by the assessee and used for business or profession. The depreciation is an allowance and not an expenditure, loss or trading liability. The Commissioner of Income Tax (Appeals) has held that the payment has been made by the assessee for an outright purchase of Intellectual Property Rights and not towards royalty and therefore, the provision of Section 40(a)(ia) of the Act is not attracted in respect of a claim for depreciation. The aforesaid finding has rightly been

affirmed by the tribunal. The findings recorded by the Commissioner of Income Tax
(Appeals) as well as the tribunal cannot be termed as perverse."

14. In view of the above, the alternative proposal to disallow the impugned expense under section 40(a)(i) of the Act made by the CIT(A), is not sustainable. Since we allowed the grounds on merits, the additional ground regarding jurisdiction of AO is not adjudicated and is left open. It is ordered accordingly.

15. In the result, the appeal of the assessee stands allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(GEORGE GEORGE K)**
Accountant Member	**Judicial Member**

Bangalore.
Dated: 17.05.2023. /NS/*

Copy to:

1.	Appellants	2.	Respondent
3.	CIT	4.	CIT(A)
5.	DR, ITAT, Bangalore.		Guard file
6.			

By order

Assistant Registrar,
ITAT, Bangalore.