

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ, “ए ” चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, ‘A’, CHANDIGARH

श्री एन. के. सैनी, उपाध्यक्ष एवं श्री संजय गर्ग, न्यायिक सदस्य
BEFORE SHRI N.K. SAINI, VICE PRESIDENT &
SHRI SANJAY GARG, JUDICIAL MEMBER

आयकर अपील सं./ **ITA No.547/Chd/2017**

निर्धारण वर्ष / Assessment Year : 2013-14

आयकर अपील सं./ **ITA No.139/Chd/2019**

निर्धारण वर्ष / Assessment Year : 2012-13

आयकर अपील सं./ **ITA No.842/Chd/2018**

निर्धारण वर्ष / Assessment Year : 2014-15

आयकर अपील सं./ **ITA No.140/Chd/2019**

निर्धारण वर्ष / Assessment Year : 2015-16

M/s Fastway Transmission (P) Ltd., Plot No.17, Industrial Area, Phase-1, Chandigarh.	बनाम	The A.C.I.T., Central Circle-II, Chandigarh.
स्थायी लेखा सं./PAN NO: AABCF1854B		

निर्धारिती की ओर से/Assessee by : Shri Ashwani Kumar, CA

राजस्व की ओर से/ Revenue by : Shri Chandrajit Singh, CIT (DR)
on 4.12.2019
and Smt Chandrakanta CIT (DR)
on 18.03 2020

सुनवाई की तारीख/Dates of Hearing : 04.12.2019/18.03.2020

उद्घोषणा की तारीख/Date of Pronouncement: 06/05/2020

Per Sanjay Garg, Judicial Member:

आदेश/ORDER

These appeals relating to different assessment years have been preferred by the assessee against the corresponding separate orders passed by the Ld. Commissioner of Income Tax (Appeals)-3 Gurgaon, (hereinafter referred to as CIT(Appeals)) u/s 250(6) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). Since the facts as well the issues involved in all the captioned appeals are identical, hence, these have been heard together and are being disposed of with this common order:

2. ITA No 547/Chd/2017 for AY-2013-14 is taken as the lead case for the sake of convenience.

ITA No. 547/Chd/2017

3. The brief facts of the case, as extracted from the impugned orders of the lower authorities, are that the assessee is engaged in the business of Multi System Operators and Digital Cable Services (DCS). The DCS services are rendered to the customers through set top boxes. The assessee, thus, acts as an intermediate between local cable operators and broadcasters. The assessee for the assessment year under consideration declared a loss of Rs.30,21,64,573/- in the return of income. During the course of assessment

proceedings, the Assessing Officer (in short 'AO') noticed that the assessee had entered into a financial lease agreement with M/s CISCO Capital System India Pvt. Ltd. (hereinafter referred to as CISCO) for supply of Set Top Boxes (hereinafter referred to as STB) and Head Ends. The Assessing Officer further noted that CISCO was a Non-Banking Finance Company (NBFC) registered with Reserve Bank of India and was in the business of providing different types of loans on assets/equipments to its customers. The Assessing Officer found that the assessee had entered into the said agreement with CISCO through Master Lease Finance Agreement dated 7.12.2011 along with a number of schedules, wherein the lease term was 48 months for the supply of 7,91,924 number of STBs and Head ends for the amount detailed as under:

STB	=	Rs.11,82,70,066
Custom Duty	=	Rs.25,94,63,987
Head ends	=	<u>Rs.7,90,48,205</u>
Total	=	Rs.144,67,82,258

The AO further noted from the Notes to Accounts, forming part of the Balance Sheet that the assessee had treated the arrangement with CISCO as a Finance lease capitalizing the principal component (cost plus custom duty) of the agreed lease rent. The assessee debited only the interest in the Profit and Loss account and further treated the assets leased (set top boxes) as fixed assets. However, for the purpose of

computation of income as per the provisions of the Income Tax Act, the principal component of the lease rentals amounting to Rs.58,87,16,983/- was also claimed as deduction along with interest component.

On being asked to explain in this respect, the assessee explained that in the books of accounts, following mandatory accounting standard AS-19 for the companies prescribed by the Institute of Chartered Accountants of India, the assets were treated as fixed assets and the transaction with CISCO was treated as Finance Lease, whereas, for the purpose of Income Tax Act, the transaction was treated as operating lease and thereby claiming the lease rental paid to CISCO as deduction.

The AO, after analyzing the various clauses of the agreement entered into by the assessee with CISCO, held that the assessee had entered into a finance lease agreement with CISCO and was entitled to claim depreciation on the assets so leased. Accordingly, the Assessing Officer disallowed the claim of deduction of the Principal component of the lease rentals amounting to Rs.58,87,16,983/- made by the assessee and allowed depreciation @ 15% amounting to Rs.16,18,14,843/- on the leased assets, thus resulting in an addition of Rs.42,69,02,140/-. He rejected the alternate contention of the assessee that the STB would fall within the

definition and scope of computers, hence, depreciation on the same should be granted @ 60% as provided under I.T. Rules, 1962. The AO also found that the assessee had claimed double deduction on account of interest paid to CISCO amounting to Rs.6,38,170/- and added the same to the income of the assessee. The Assessing Officer further made disallowance on account of excess deduction claimed u/s 35D of the Act by the assessee amounting to Rs.2.40 crores and Rs.3,41,870/-. Further disallowance of interest, amounting to Rs.28,68,096/- was also made, u/s 36(1)(iii) of the Act, on account of payments made on behalf of one M/s G.S. Majestic Developers Pvt. Ltd. treating the same to be in the nature of loan for non business purpose. Thus, after making above disallowances/additions, the Assessing Officer assessed the income of the assessee at Rs.21,19,85,703 as against loss of Rs.30,21,64,573/- returned by the assessee.

4. The assessee appealed against the aforesaid order of the Assessing Officer before the CIT(Appeals) but could not succeed on any of the issues raised.

5. Aggrieved by the order of the CIT(A), the assessee has come up in appeal before us raising the following Grounds:

- "1. That the Worthy Commissioner of Income Tax (Appeals)-5, Gurgaon has grossly erred in dismissing all the grounds of appeal as taken before him by the appellant without appreciating the detailed*

submissions and various contentions as raised by the assessee during the course of number of hearings and has passed the order in a summary manner and has just confirmed the additions, which are totally uncalled for and against the facts and circumstances of the case.

2. *That the Worthy CIT(A) has erred in confirming the addition of Rs.6,00,38,170/-, which had been claimed in the computation of income u/s 37 as interest paid to the M/s Cisco System Capital India Pvt. Ltd., towards the payment of interest on account of Set top Boxes taken on lease from the above said company.*
3. *That the Worthy CIT (A) has erred in holding that the transactions between the appellant company and M/s Cisco System Capital India Pvt. Ltd., are on account of financial lease and which finding is against the material on record.*
4. *That the Worthy CIT (A) has erred in confirming the action of the Assessing Officer with regard to the addition of Rs.42,69,02,407/- as lease rental charges and allowing the depreciation u/s 32 as per AO order, which is against the decided law on the subject and the various judgments, which we had cited before him the claim by the appellate of lease rent to the tune of Rs.58,87,16,983/- has been denied in summary manner on certain irrelevant facts.*
5. *That the Worthy CIT (A) has erred in holding in para 5.4.13 about treating the lease rental as capital expenditure and not allowing the deduction u/s 37 of the Income Tax Act is against the facts and circumstances of the case.*
6. *That the Worthy CIT (A) has erred in confirming the action of the Assessing Officer in disallowing the deduction u/s 35D amounting to Rs.2.40 crores.*
7. *That the Worthy CIT (A) has erred in confirming the addition of Rs.3,41,870/- on account of alleged unexplained expenditure.*
8. *That the Worthy CIT(A) has erred in confirming the action of the Assessing Officer in disallowing the interest amounting to Rs.28,68,096/- u/s 36 (1)(iii) and holding that the amount of Rs. 3.20 crores as*

advanced by the company was not for the business purposes.

9. *That the Appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off."*

6. Apart from the above grounds of appeal, the assessee has taken the following additional ground of appeal:

"Without prejudice, the assessing officer erred in not allowing depreciation on Set top boxes at the eligible rate of 60% "

7. **Ground No.1** raised by the assessee is general in nature, hence needs no adjudication.

8. **Grounds No.2 :** The assessee vide ground No. 2 has agitated the action of the CIT(A) in confirming the addition of Rs.6,00,38,170/- made on account of interest paid to M/s CISCO Capital System holding the same to have been claimed twice by the assessee.

9. The Ld. Counsel for the assessee in this respect has submitted that during the relevant year 2013-14 for 'STBs & head ends, there were two components of the lease payments made by the assessee to M/s CISCO

Principal Component	- Rs. 58,87,16,983/-
Interest Component	- Rs. 6,00,38,178/-
Total	Rs. 64,87,55,153/-

The Ld. Counsel has further submitted that as per the accounting standards AS-19 prescribed by the Institute of Chartered Accountants of India (ICAI), the assessee capitalized the aforesaid total amount of Rs. 64,87,55,153/- in the books of account and claimed depreciation on it. The assessee did not debit the interest competent of Rs. 6,00,38,178/- in the profit and loss account, though inadvertently mentioned so in 'Note 2J' of the Audited Accounts that interest component has been debited. However, actually it was not done so. The Ld. Counsel in this respect has submitted that it is not the case of the Assessing Officer that the interest component was not allowable as deduction to the assessee but the limited issue that whether the assessee has claimed double deduction of the same which can be well verified from the accounts of the assessee by the Assessing Officer. The Ld. counsel for the assessee in this respect has further submitted that Assessing Officer mistook the figure of Rs. 5.35 crores as claim of deduction on account of interest expenditure, rather, the said figure was in respect of interest on service tax which was part of the total figure of Rs. 9.48 crores debited under the head 'Finance Cost' and not a part of the figure of Rs. 64.87 cores relating to the lease payment charges. The Ld. counsel in this respect has further submitted that the payment of Rs. 5.35 cores, notice of which has been taken by the Assessing Officer was towards interest on service tax which was apparent from

the fact that the said amount was deposited under the code "00440218 - Cable Operator". The Ld. Counsel has further relied upon the copy of the challans placed at pages 59 to 61 of the paper book to show that the interest / penalty / overheads as service tax, whereas, the code 00440217 relates to service tax. The sum and substance of the whole arguments of the Ld. counsel, was that the interest component of the total lease rental paid by the assessee was required to be debited into the profit and loss account even as per AS-19, however, the assessee inadvertently capitalized the entire amount of lease rental of Rs. 64.87 crores. However, in the income tax return, the entire lease rental of Rs. 64.87 cores has been claimed as deduction of expenditure u/s 37 of the Income Tax Act. That there was no deduction of the interest component of Rs. 6,00,38,178/- which is otherwise allowable to the assessee under both the conditions i.e. whether the transaction is taken as that of lease or as that of loan. The assessee was entitled to claim deduction u/s 37 of the interest expenditure incurred / paid for the procurements of the assets which were used solely for the business of the assessee.

10. The Ld. DR, on the other hand, has relied on the findings of the lower authorities and has further submitted that the issue whether double deduction has been claimed by the assessee of the interest expenditure should be restored to the

Assessing Officer for verification. Considering the above submissions of the Ld. representatives of the parties, this issue is restored to the file of the Assessing Officer for limited purpose of verification that whether the assessee has claimed double deduction of the amount of Rs. 6,00,38,178/- claimed as interest component of the total lease rental claim of Rs. 64,87,55,153/-. However, the issue as to the allowability of deduction of principal component of Rs. 58,87,16,983/- has been contested vide ground Nos. 3 to 5 which has been discussed in the subsequent paras of this order.

In view of this, the issue raised vide ground No.2 of the appeal is accordingly restored to the file of the Assessing Officer in the terms as indicated above.

11. **Grounds No 3, 4 & 5 :** Ground Nos.3, 4 and 5 raised by the assessee are against the action of the Ld. CIT (Appeals) in upholding the order of the Assessing Officer treating the lease agreement entered into by the assessee with CISCO as a finance lease agreement as against operating lease claimed by the assessee. Since the issues raised vide above grounds are interlinked, hence the same are taken together for adjudication.

12. We have heard the rival contentions of the Ld. Representatives of both the parties and have also gone through the record. The detailed submissions of the Ld. Counsel for the assessee on the issue are summed up point wise as under: -

- A) That there were both types of transactions done by the assessee with CISCO i.e. some equipment were leased out by the CISCO and the other were purchased directly by the assessee. In case of direct purchase, the assets were capitalized and depreciation claimed on those. However, in case of leased assets, though, in view of the mandatory requirement for the companies as per Companies Act to follow the Accounting Standard AS-19 prescribed by Institute of Chartered Accountants of India, the lease transaction with CISCO was booked as Finance Lease, however, in fact, the same was an operating lease. Hence, though, as per the accounting standard ES-19, STPs were capitalized and depreciation computed, however, in the income tax return the depreciation so computed was written back and instead the lease rent (both principal component and interest component) was claimed as deductible expenditure u/s 37 of the Act.
- B) That as per the provisions of the Income Tax Act (in short 'the Act'), depreciation is admissible under section 32 of the Act only to the owner of the asset. That the lease charges paid for the use of the asset to the owner of the asset are allowable as revenue expenditure under section 37 of the I.T. Act to the payer.
- C) That at page 80 in paragraph 5.4.4 of the impugned order, the Ld. CIT(A) himself has mentioned, "there is no doubt about the genuineness of the lease agreement". The Ld. Counsel in this respect has submitted that when the CIT(A) did not have any doubt about the genuineness of the lease agreement, then

there was no question of making any disallowance holding the lease agreement as non-genuine.

- D) That the Income Tax Act does not recognize the difference between the finance lease and operating lease. Reliance in this respect has been placed upon the CBDT circular No. 2 of 2001.
- E) That in the purchase bills CISCO has been mentioned as buyer.
- F) That CISCO had claimed the lease rentals as its income and TDS has been deducted by the assessee on the lease rentals, which had been affirmed also by CISCO in its reply to query raised to it by the AO by issuing notice u/s 133(6) of the Act
- G) That CISCO has claimed depreciation on the assets/equipment as owner, which has been allowed to it @ 60% from A.Y 08-09-A.Y 10-11 and that even AO had accepted depreciation claimed on STB @60% in A.Y 13-14, which was confirmed by the DRP also.
- H) That the entries in the books of account are not determinative of the nature of the transaction. The income for the purpose of levy of income tax is to be determined as per the provisions of the Income Tax Act, 1961, and the Accounting Standards are not relevant for the same. Reliance in this regard was placed on the decision of the apex court in Kedarnath Jute Manufacturing Co. ltd. vs CIT (1971) 83 ITR 363; Sutej Cotton Mills Ltd. Vs CIT 116 ITR 1 and further upon the CBDT Circular No.2 of 2001 dated 9.2.2001 stating that the Accounting Standards on leases will have no implication on the allowance of depreciation on asset under the provisions of Income Tax Act. Reliance was further placed on notification issued by the CBDT dated 9.1.2015 and further dated 29.9.2016 pointing out therefrom that the Accounting Standards-19 relating to accounting for leases has not been notified for the purpose of applicability under the Income Tax Act.

- I) That in finance lease there is outright sales and the seller tries to secure itself with collateral security as virtually ownership is transferred to lessee, which is absent in the present case where CISCO has no security rather ownership and control over the asset and there is no charge registered with the ROC also by CISCO which is mandatory if there is ownership of lessee.
- J) The Ld. Counsel for the assessee has further submitted that so far the argument that the assessee had claimed CENVAT credit on leasehold goods, he explained from page 38 to 41 of the written submissions that for claiming CENVET credit, it is not essential that assessee must be owner of the goods.
- K) The Ld. Counsel for the assessee has further invited our attention to the following clauses of the lease agreement and submitted that it was apparent that the assessee was not the owner of the equipment and that CISCO was the owner of the equipment:
- i) That in the Master Lease and Finance Agreement Financing and leasing are separate transactions. The finance agreement is applicable to software license, maintenance, services whereas lease agreement are applicable to equipment.
 - ii) That monthly rent was paid for usage and no lump sum payment was paid showing that the asset had been leased to the assessee for usage only.
 - iii) That the risks and rewards of ownership were equally distributed between the lessor and the lessee.
 - iv) As para 1.2 of the deed, the lessor shall all times retain title to the equipment. Without permission of the lessor the lessee shall not dispose of any of the equipment. The record of maintenance etc. will be produced before the lessor.
 - v) As per clauses 5.1 and 5.2, the lessee was entitled to use the asset in its business only.

- vi) As per Clauses 11.1 and 11.2 of the deed, in default of payment by the assessee, the consequences entailed returning the asset to the lessor.
- vii) As per Clause 9.1, on end of the lease, the equipment was to be returned to the lessor.

Various judgements have been relied upon by Ld. Counsel for the assessee to stress the point that when the ownership had not transferred to the lessee then the arrangement can not be said to be of a loan or finance. The judgements referred to are as under:

1. CIT vs Shaan Finance (P) Ltd. 231 ITR 308 (SC)
2. CIT vs. Maharashtra Apex Corporation 254 ITR 98(SC)
3. ICDS Ltd. Vs. CIT 350 ITR 527(SC)
4. Rajshree Roadways vs. Union of India [2003] 129taxman 663(Raj.)
5. PKF Finance Ltd. Vs CIT (Pb. & Hry)
6. CIT Vs Cosmo Films Ltd. (2011) 338ITR 226
7. CIT vs Punjab State Electricity Board (2010) 320 ITR 469 (PB & Hry.)
8. Bombay Dyeing & Mfg. Co. Ltd. Vs. DCIT ITA 4599/Mum./2002 (Mumbai Tribunal).
9. Minda Corporation limited vs DCIT ITA No. 1962/Del/2012 (ITAT Delhi).

The Ld. Counsel concluding his arguments, has submitted that in any case it would be a revenue neutral exercise. Either the assessee would be entitled to lease charges or to depreciation. He in this respect has relied upon

the decision of the Delhi High Court in the case of “CIT v. Triveni Engineering and Industries Ltd.” [2011] 336 ITR 374 (Delhi).

13. The Department has also filed various documents and written submissions in support of its contention. The main thrust of the Ld. DR has been that the impugned agreement was a loan/finance agreement, with the assessee being the owner of the asset for all practical purposes and CISCO being the financier. The arguments of the Ld. DR are summed up as under:-

- A. That the assessee as per its own will and as per the actual nature of the transaction has followed AS-19, which does not mandate or require an assessee to claim a transaction as a financial lease. AS-19 simply prescribes as to what is the operating lease and finance lease. Assessee having itself categorized it as financial lease in the books was estopped from taking a different stand for the purpose of taxation.
- B. The assessee for the purpose of deferment of tax has given the different treatment to the aforesaid transaction of loan.
- C. As per the lease agreement, the lease term was non-cancellable and the obligation was absolute (Clause 1.3).
- D. That the life span of set top box was 3 to 4 years. The term of the lease deed was so devised to cover both the principal and interest components of the financed amount within the lease period.(Lease Schedule & Clause 11). The lessee had, on the

termination of lease, the option to transfer the asset at Rs.1 per set top box.

- E. The CISCO has no ownership control over the equipment. In case of breach of contract, the set top boxes cannot be taken away from the millions of consumers by the CISCO. That the other option of returning the asset after uninstallation from customers premises and shipping back to the lessor, being far more expensive, the said option was merely a camouflage, with the real intention being to sell the asset to the lessee at very low price on the termination/expiry of the agreement.
- F. The assessee had availed credit of custom duty paid on the import of the set top boxes against service tax liability. The assessee had also availed CENVAT credit on STBs claiming them to be capital goods.
- G. That the regulations framed by Telecom Regulatory Authority of India (TRAI) stipulate that the customer can keep the box after expiry of 3 years of installation. The assessee could not have complied with above condition if it were not the owner of the asset.
- H. That the TDS had been deducted only on the interest component of the payments made by the lessee and not on the principal components.
- I. That the purchase bills of these assets revealed that the asset has been billed to Fastway Transmission (P) Ltd. recognizing the assessee as primary buyer and user.
- J. That the lessor has also treated the agreement as finance lease in its Books.
- K. That the sworn statements of Shri Rajesh Mehru, CFO of the company, Shri Sushil Thakur, Assistant Manager (Accounts) in the company, Shri Chaman Lal Katiyal, Accounts Head in the company, recorded during the course of survey u/s 133A or under section 131 of the Act, reaffirmed that the transaction was that of a loan.

L. That the assessee through letter dated 24.2.2014 addressed to DDIT(Investigation) had stated that it had shown the lease finance as unsecured loan in its books.

M. That CISCO is a Non Banking Finance Company (NBFC) and its main activity is of financing and not leasing.

N. That all the risks and rewards associated with ownership lay with the assessee, the lessee. The risks agreed to be borne by the lessee as per the terms of the MLFA are as under:

- a) As per clause 1.2 of the agreement the risks and responsibility associated with the procurement of the asset lay solely upon the assessee.
- b) The lessee was solely responsible for delivery, installation, maintenance and repayment of the equipment, warranties, indemnities and insurance. All fees, taxes and charges levied by the Government were the responsibility of the lessee. (Clause 5.1-5.3)
- c) The risks associated with loss, theft, damage, destruction of asset lay with the lessee. (Clause 5.4)
- d) The lessee was required to obtain and maintain the risk insurance coverage with respect to the equipment insured, against any casualty to the equipment, any commercial liability etc., with the insurance policy naming the lessee as the insured. (Clause 5.5)
- e) The lessee was required to indemnify the lessor against all claims such as demands, actions, debts, settlements, etc. arising on account of leasing documents, equipment, ownership of equipment, infringement of patent, copyright, etc. It was pointed out that by virtue of the indemnity clause the lessee had been burdened with extraordinary responsibility and risks while the lessor was exonerated from the same and the element of bailment was completely missing. (Clause 6)

- f) While the lessee had the right to terminate the lease by prepaying the rent, the lessor had no such option except in the case of default by the lessee. (Clause 10.2)
- g) The lessee was granted all rights of possession and user of the equipment and of manufacturer warrantee rights relating to the asset. (Clause 8)
- h) The lessee had been given right of sublease the equipment to its customers and put permanent marking on the equipment. (Clause 12 of lease schedule)
- i) Foreign Exchange fluctuation loss or gain on imports of asset was to be borne by the lessee.

Reliance has been placed on the decision of the Special Bench of I.T.A.T. in the case of “Indusind Bank Ltd. Vs. CIT” 135 ITD 165, “Asea Brown Boveri Ltd. Vs. Industrial Finance Corporation of India”, 154 Taxman 512, “Association of Leasing and Financial Service Companies Vs. Union of India” (2011) 2 SCC 352. Reliance was also placed on CBDT Instruction No.1978 dated 31.12.1999 laying down certain features to determine the ownership of leased asset for the purpose of allowing depreciation u/s 32 of the Act.

14. We have considered the rival contentions. The first and foremost argument of the Ld. Counsel for the assessee is that since the Income Tax Act, 1961 does not recognize the difference between the finance lease and operating lease, hence whatever type of lease it may be, the assessee can not be denied the benefit of deduction u/s 37 of the Act of revenue

expenditure incurred by the assessee in the shape of lease rental solely for the business purpose of the assessee. That the distinction between an operating lease or finance lease is prescribed in the Accounting Standard (AS-19) by the ICAI which is mandatorily required to be followed by the Companies for making accounting entries, however, the said standard has no relevance so far as the computation of the income under the provisions of Income Tax Act was concerned. The Ld. counsel in this respect has relied upon the decision of the Apex Court in the case of 'Kedarnath Jute Manufacturing Co. Ltd. vs CIT' (supra) and CBDT Circular No. 2 of 2001 dated 9.2.2001.

15. On the other hand, the Ld. DR in his submissions as noted above and further relying upon the decision of the Special Bench of the Tribunal in the case of 'IndusInd Bank Ltd. vs ACIT' (supra) as well as of Hon'ble Supreme Court in the case of 'Association of Leasing and Financing Services Co. Ltd v Union of India' [2011] 2 SCC 352 has submitted that the assessee himself had treated the aforesaid lease as 'Finance Lease' as per AS-19 and further that as per AS-19, the assessee is entitled to only depreciation on the equipment as per the rules; That after analyzing the contents of the agreement in question, the Assessing Officer rightly held that the transaction in question was a Finance Lease and hence,

the Assessing Officer rightly denied the deduction of alleged lease rental paid to CISCO as the same was not a revenue expenditure.

16. At this stage, it is appropriate, in our view, to firstly discuss the relevant provisions of the Act relating to allowability of claim of deduction as depreciation on capital assets and also relating to the allowability of revenue expenditure.

17. Section 32 of the Income Tax Act prescribes for allowance of deduction on account of depreciation on Capital Assets and reads as under:

Section 32 of the Income Tax Act.

“Depreciation.

Section - 32

32. (1) In respect of depreciation of—

- (i) buildings, machinery, plant or furniture, being tangible assets;*
- (ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,*

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—

- (i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;*
- (ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed:*

[Provided.....”

18. Section 37 of the Income Tax Act deals with the allowability of the expenditure solely incurred for the business purposes, the relevant part of the section is reproduced as under:-

“General

Section - 37

37. Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

Explanation”

19. A perusal of the above provisions reveals that for the claim of depreciation, asset must be owned wholly or partially by the assessee and is used for the purpose of business or profession of the assessee. Whereas any expenditure, not being in the nature of the capital expenditure or personal expenditure of the assessee, laid out or expended wholly and exclusively for the purpose of business of the assessee is allowable as a deduction of expenditure u/s 37 of the Act.

20. The question before us is as to whether the principal component of lease rental claimed by the assessee is a Revenue expenditure falling u/s 37 of the Act or a capital expenditure incurred for the purpose of capital assets upon

which the assessee can be allowed depreciation as per the provisions of section 32 of the Income Tax Act.

21. The assessee in this case has pleaded that the assets / equipment in question was the property of CISCO which was taken by the assessee on lease from CISCO against payment of lease charges; Whereas, the sum and substance of the arguments of the Ld. DR has been that the transaction in fact, was a finance lease as defined by the ICAI in its AS-19.

The AS-19 prescribed by the ICAI reads as under:-

“3.1 A lease is an agreement whereby the lessor conveys to the lessee in return for a payment or series of payments the right to use an asset for an agreed period of time.

3.2 A finance lease is a lease that transfers substantially all the risks and rewards incident to ownership of an asset.

3.3 An operating lease is a lease other than a finance lease.”

22. After considering the rival submissions, we find force in the contention of the Ld. Counsel for the assessee that the Income Tax Act does not recognize or differentiate between different types of lease transactions. As per the provisions of the Income Tax Act, any expenditure incurred on capital assets cannot be allowed as deduction of expenditure, however, an assessee can claim depreciation as prescribed by the rules on the value of such an asset. However, if such an asset, as claimed in this case by the assessee, is not owned by the assessee, rather, the same

has been procured on lease or hire basis to be used solely for business purpose of the assessee, the hire charges / lease rental paid for such an asset will be admissible as revenue expenditure u/s 37 of the Act. In this case, the Revenue has tried to draw distinction between two types of leases classifying them as operating lease and finance lease as per guidelines issued by the ICAI vide AS-19. We find that AS-19 has been prescribed by the ICAI to be followed for maintaining the account books by the companies. However, so far as the Income Tax Act is concerned, the same has no relevance. There is no provision under the Income Tax Act differentiating between Operating Lease and Finance Lease. Further the CBDT Circular No. 2 of 2001 dated 9.2.2001 reads as under:-

“CIRCULAR NO. 2 of 2001

Finance Lease Agreements—Effect of publication of Accounting Standards on allowability of depreciation— Reg.

9/02/20

01

DEPRECIATION
SECTION 32

Under the Income-tax Act, in all leasing transactions, the owner of the asset is entitled to the depreciation if the same is used in the business, under section 32 of the Income-tax Act. The ownership of the asset is determined by the terms of contract between the lessor and the lessee.

1. The Central Board of Direct Taxes vide Instruction No. 1978, dated 31st December, 1999

(F.No. 225/190/98/ITA.II) has laid down the line of investigation in such cases. In cases where assets are factually nonexistent, having been created by hawala transaction, the question of allowance of depreciation does not arise. In cases of sale and lease-back of assets without any alternation in the situation of assets and its working, the denial of depreciation claimed has to be considered keeping in view the principle laid down by the Supreme Court in the case of McDowell & Co. Ltd. (1985) 47 CTR (SC) 126 : (1985) 154 ITR 148 (SC).

2. It has come to the notice of the Board that the new Accounting Standard on 'Leases' issued by the Institute of Chartered Accountants of India require capitalization of the asset by the lessees in financial lease transaction. By itself, the accounting standard will have no implication on the allowance of depreciation on assets under the provisions of the Income-tax Act.

3. The contents of this Circular may be brought to the notice of all concerned.

[F.No. 225/86/2000/ITA-II—From Central Board of Direct Taxes]

SOURCE : (2001) 165 CTR (St) 25

23. Moreover, a perusal of the said AS-19 reveals that the same in fact talks of a loan agreement described as a lease. In our view, more confusion will be created if the reliance is placed on AS-19 prescribed by ICAI for deciding the claim of deduction under the Income Tax Act. When the Income Tax Act does not distinguish between various type of leases, we find no justifiable reason to firstly describe and categorise a particular type of transaction/agreement as a form of lease named "finance lease" and then to say that the provisions of section 37 of the Income Tax Act for claim of expenditure on lease rental will not be applicable on such type of lease; this, in our view, will be against the provisions of the Income Tax

Act. On the one hand, terming and placing a transaction / agreement under the genre of 'Lease' and then to say that such particular species of that genre will not be entitled to the deductions as prescribed for the lease transactions under the Income Tax Act, in our view, serves no purpose other than confusion and conflict of opinion giving rise to the dispute and litigation on the issue. As per the provisions of the Income Tax Act what is to be determined as to whether the agreement / transactions in question is of a lease or a loan or of a hire / purchase.

The Hon'ble Supreme Court in the case of "Tuticorin Alkali Chemicals and Fertilizers Ltd. Vs CIT" 227 ITR 172: [1997] 93 Taxman 502 (SC) has held that normally, the Accounting Standards is accepted but it cannot override the provisions of the Income Tax Act. The relevant part of the observation made by the by the hon'ble Supreme Court is reproduced as under:

***"28.** It is true that this Court has very often referred to accounting practice for ascertainment of profit made by a company or value of the assets of a company. But when the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law and not in accordance with accountancy practice. Accounting practice cannot override section 56 or any other provision of the Act. As was pointed out by Lord Russell in the case of B.S.C. Footwear Ltd. (supra), the Income-tax Law does not march step by step in the footprints of the accountancy profession."*

Further, it has been held by the Hon'ble Supreme Court in the case of 'Kedarnath Jute Manufacturing Co. Ltd. vs CIT' (Supra) that whether the assessee was fully entitled to a particular deduction or not, would depend upon the provisions of the Income Tax Act and not on the entries of his books of account. The Hon'ble Supreme Court in the case of 'Sutlej Cotton Mills vs CIT' 116 ITR 1 has held that the entries in the books of account were not determinative of the taxable income of the assessee

24. Now, in this case the moot question before us is that whether the assessee is the owner of the equipment or the same is hired on rent by the assessee from CISCO or to say in other words whether the agreement with CISCO is of a "lease" as claimed by the assessee or the same is mere loan / finance agreement. Though the contention of the Ld. AR has been that since the AO himself termed the transaction as Finance Lease which admittedly is a form of lease hence, the assessee is entitled to deduction of lease rental paid as revenue expenditure. However, we are not convinced with the above contention of the Ld. Counsel for the assessee. Hon'ble Supreme in the case of "Sundaram Finance Ltd vs State Of Kerala And Another" 1966 AIR 1178, 1966 SCR (2) 828 (by the majority view) has held that the true effect of a transaction may be determined from the terms of the agreement

considered in the light of the surrounding circumstances. In each case the Court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the document. Though both the Ld. Representatives of the parties have relied upon various case laws in support of their contentions, however, without separately discussing the facts of each of the case law relied upon, it may be well observed that it is nowhere held in any of the case laws that the nomenclature given to a transaction by the parties is sacrosanct or is determinative of the nature of the transaction. It is only after considering the relevant facts and circumstances and the various clauses of the agreement that the real intention of the parties behind the agreement is gathered which is determinative of the nature of such transaction/agreement. A perusal of the case laws cited reveals that the judges of the Hon'ble Apex Court as well of the Hon'ble High Courts are unanimous to hold that the true legal relation arising from a transaction determines the taxability of the receipt arising from the transaction under the Income Tax Act. In a case, where the terms of the transaction are embodied in a document, the true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. For the purpose of deciding whether a particular transaction is a lease or not, the question

of intentions of the parties is to be determined and the intention has to be inferred from the circumstances of each case. As per the facts of the present case, the transaction in question may be either of a Lease or of a loan or a Hire-Purchase agreement. Now we will discuss separately about the respective salient features of Lease, loan and Hire-Purchase agreements.

25. No definition has been given of 'Lease' under the Income Tax Act. However, the term 'lease' has been defined under Section 105 of the Transfer of Property Act, 1882, but the same is in context to lease of immovable property. The said definition is reproduced as under:—

"a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms"

The said definition when applied in case of lease of moveable properties would mean that the lease is the transfer of right to enjoy the property in question. Such a transfer of right can be made for a fixed time or for indefinite time and in lieu of getting the right to possess and enjoy the property, the lessee has to pay certain considerations either in cash or in kind to the lessor. Hence, the lease is an arrangement whereby lessor conveys

user rights in an asset to the lessee. The asset is owned for all practical purposes by the lessor, having all rights and bearing all risks associated with ownership, and the lessee is given only the user rights in the asset. The dominant control over the asset remains with the lessor.

However, in a loan transaction, the asset is owned and possessed by the loanee/debtor. The loanee/debtor bears all the risk relating to the asset. The creditor is entitled to the return of the principal amount along with interest etc. as per agreement between the creditor and debtor. The creditor, however, for the security of the money advanced may get a lien over the asset purchased with the loan amount until his dues are paid back by the debtor.

However, the confusion arises in case of certain transaction which, though, apparently appears to be of lease of asset *viz.* asset/s purchased by lessor and further leased out to the lessee; but in actual this type of transaction is an arrangement of financing the purchase of the asset for the so called lessee (debtor) and such an lessee in fact is the owner of the asset and is liable to bear all type of risks associated with such asset. In this form of arrangement, the so-called lessor's role is confined to only financing the purchase and he has no other interest or is not liable for any risk associated with the asset. It is the so called lessee who, for all practical

purposes, is the owner of the asset exercising all rights of ownership and bearing all risks associated with the asset, paying back the entire cost of the asset to the lessor over the term of the lease which generally is the economic life of the asset and acquiring ownership of the asset on termination of the lease at very low price.

The third type of such like transactions is a hire-purchase agreement which in fact is lease cum purchase agreement. In Hire -purchase agreement, the hirer has option to terminate the agreement by returning the goods to the owner, but, in financial lease, the terms are so devised that the goods are passed on to the lessee without any option to the lessee to terminate the agreement at his own will by returning the goods. In hire-purchase agreement, the seller remains the owner of the goods till the last instalment of the agreed price is paid by the hirer or the hirer chooses to buy the goods before the expiry of the term of agreement. An interesting question as to whether the transaction was a hire-purchase agreement or a mere loan/finance transaction came into consideration before the Hon'ble Supreme in the case of "Sundaram Finance Ltd vs State Of Kerala And Another" 1966 AIR 1178, 1966 SCR (2) 828 after analyzing the various terms and clauses of the agreement observed that an owner of goods who purports to convey absolutely or acknowledges to have

conveyed goods and subsequently purports to hire them under a hire-purchase agreement is not estopped from proving that the real bargain was intended to be a loan on the security of the goods. It was held that in a hire-purchase agreement the hirer being under no legal obligation to buy, has an option either to return the goods or to become its owner by payment in full of the stipulated hire charges and the price for exercising the option. This class of hire purchase agreements must be distinguished from transactions in which the customer is the owner of the goods and with a view to finance his purchase, he enters into an arrangement which is in the form of a hire-purchase agreement with the financier, but in substance evidences a loan transaction subject to a hiring agreement under which the lender is given the license to seize the goods.

26. Now, after analysis of the various clauses of the lease deed in question, it is to be noted:

- a) That as per clauses 1.2 and 8.1 of the agreement, the lessee has to select the equipment to be procured and inform the lessor accordingly. The obligation of the lessor is restricted only to the payment of the price of the equipment to the vendor. So much so that as per the said clauses, if the lease does not consummate, the lessee shall be liable to pay to the vendor in accordance with the applicable

purchase order or shall have to indemnify the lessor and hold the lessor harmless from any liability arising in connection with any supply contract or lessor right, title, interest in the equipment.

- b) Further as per clause 10.2 of the agreement, the lessee in any case has to pay the full rental agreed upon and even the related items of financing transaction, even if it prematurely terminates the contract thus ensuring the repayment to the lessor of the amount financed by it.

The relevant clause is as under:

“10.2 Prepayment. *Lessee may terminate a Lease or Financing Transaction by prepaying its remaining Rent. Lessee shall provide Lessor with at least one (1) month prior written notice of the intended prepayment date, Lessor may, depending on market Conditions at the time, reduce the remaining Rent to reflect such pre payment and shall advise Lessee of the balance to be paid. If a lease is terminated, Lessee shall at the same time prepay any related line items of Financing transaction.”*

- c) As per clause 1.3 of deed, the lease is a non-cancelable lease and lessee is obliged to pay the rent due under the leased unaffected by any circumstance. The relevant clause is reproduced hereunder:

“1.3 Term Not cancelable and Obligations Absolute, *The Original Term of a Lease with respect to each item of Equipment leased or the Financing Transaction with respect to each Financed item under a Schedule shall commence on the date as specified in the Schedule (the “Commencement Date”) and shall continue for the term provided in that Schedule, except in cases provided in sections 5.4, 10.2 and 11.”*

- d) All cost, expenses and liability relating to the equipment including taxes, insurance and maintenance have to be borne by the assessee as per clause 2 of the agreement.
- e) Further the lessee is responsible, at its own expense, for the delivery of the equipment and even in installation thereof.
- f) Further all risks pertaining to damage, loss or destruction of the equipment is the sole responsibility of the lessee.
- g) Further the lessee is required to obtain all risk, insurance coverage with respect to the equipment for ensuring against any causality, commercial liability etc.
- h) The lessee has been given a right to sublease the asset also.
- i) Further as per schedule attached forming part of the agreement, the lessee can remove the permanent marking of the equipment evidencing lessee's ownership, security and other interest therein.

27. Considering the above clauses of the lease deed in question and in the light of proposition settled through various decisions of the higher courts and highest court of the country that when the terms of the contract looked into with the relevant circumstances that are determinative of the nature of the such contracts, we have no hesitation to hold that the transaction in the present case is that of a

loan/Finance. After going through the various terms of the deed, we find that the only role of the lessor in the present arrangement is to finance the transaction of purchase of equipment, with the lessee selecting the equipment to be supplied by the dealer, using it for its expected economic life, paying back the entire cost of the equipment over the lease tenure and exercising all rights of ownership over the asset and also bearing the risks of losses, damages, etc. associated with the ownership of the asset and no option to the lessee to terminate the lease and return the asset before the end of the lease term. Thus, it is neither a lease, nor a hire purchase agreement, but a loan/finance arrangement between the parties.

So far as the contention of the Ld. Counsel for the assessee that the title of the asset remains with the lessor is concerned, we find from the clauses of the agreement that the said title is retained for the purpose of security for recovery of principal amount.

So far as the contention of the Ld. counsel for the assessee that in view of the mandatory requirement for the companies Act as per Companies Act to follow the Accounting Standard AS-19, the lease transaction with CISCO was booked as Finance Lease is concerned, though the law is well settled that the entries in the books of account are not determinative of the nature of the transaction , however we do not agree with

the contention that the assessee in this case was mandatorily required to treat the lease as Finance lease in the books of account. We agree with the submission of the Ld. DR that AS-19 only defines the nature of the lease transaction; however, it does not mandate that every lease transaction is to be treated as finance lease in the books of account. The assessee in this case, fully knowing the facts and as per the actual intentional between the parties relating to the nature of the transaction, out of its own will, has treated the transaction in question as finance lease. However, we have already held that said treatment by the assessee of the transaction in question as per AS-19 has no relevance so far as the claim of deductions under Income Tax Act is concerned.

The contention of the Ld. Counsel for the assessee that the lessor, CISCO had been allowed depreciation on the assets by the ITAT from A.Y 2008-09 to 2010-11, thus proving that its ownership of the assets stood accepted by the Revenue, in our view, is of no consequence since the present lease agreement was entered into on 07-12-2011, relating to A.Y. 2012-13 which is a subsequent assessment year. Even otherwise on going through the orders of the ITAT in the case of CISCO it is revealed that the issue before the Co-ordinate Bench of the ITAT related only to the rate of depreciation to which the assessee was eligible on the leased assets and the question regarding entitlement of claim of depreciation was never before

it. Therefore, it cannot be said that the ITAT had decided the allowability of claim of CISCO of being owner of the asset.

Even otherwise, if the CISCO has retained some ownership rights over the assets for the purpose of security of the loan amount and therefore, assuming, for the sake of arguments that the assets are not fully owned by the assessee, even then the provisions of section 32 will be attracted as it provides for claim of depreciation on assets owned fully or partly by an assessee.

The contention of the Ld. Counsel that the Ld. CIT(A) himself has mentioned, "there is no doubt about the genuineness of the lease agreement", in our view, is of no help to the assessee. The impugned order is to be read as a whole, and a single line or word can not be chosen to interpret a different meaning. What the Ld. CIT(A) has conveyed is that though the execution of the lease deed is not doubted but the real intention behind the deed is to be gathered from the various clauses of the deed and facts and circumstances of the case. Thus, we have no hesitation in holding that the arrangement in the present case was a loan / finance arrangement in the guise of a lease agreement.

28. However, the controversy does not end here. Though the assessee is held to be the owner of the asset, however, the next question that arise is whether the asset is held by the

assessee as business/trading asset or as a capital asset. The assessee, admittedly, further gives on hire the STBs to various consumers and installs those in their premises. The consumers deposit refundable security amount almost equal to the cost of the STBs to the assessee. Assessee charges monthly rent from the consumers for three years. After the expiry of three years, the STBs become the property of the consumers and at the same time the security deposit gets forfeited and appropriated to the income of the assessee, which is also offered/subjected to income tax. The transaction with consumers, thus, apparently appears to be of a “hire-purchase”, the assessee being the lesser cum seller, the detail of the transaction we will discuss in the later part of the order. However, the question that will arise at this stage as to an asset, held or further given on hire- purchase by an assessee who is in the business of letting & selling a particular type of good (STBs) on hire-purchase basis which is essential to and integral part of main business of ‘broadcasting of channels’ of the assessee, is to be treated as business/trading asset of the assessee eligible for claim of deduction of expenditure u/37 of the Act or as a capital asset of the assessee eligible for claim of deduction of depreciation under section 32 of the Act. Since, no arguments have been advanced on this issue by any of the parties, hence, in view of the discussion made in earlier paras of this order, we proceed

to decide the next controversy treating the asset as a capital asset in the hand of the assessee.

The assessee, therefore, is entitled only to claim interest paid as part of the said lease rentals as expenditure u/s 36 (1) (iii) of the Income Tax Act. The assessee, in view of the discussion made above, is not entitled to claim the principal component of alleged lease rent paid as 'revenue expenditure' u/s 37(1) of the Act. However, the assessee is also entitled to claim depreciation on the said assets purchased from borrowed capital.

Additional Ground:

29. Now the issue raised through Additional Ground of appeal before us is as to at what rate depreciation is allowable to the assessee on the equipment so purchased by the assessee after obtaining finance from the CISCO.

30. The Ld. DR has objected to the admission of additional ground of appeal at this stage. It has been submitted the additional ground is not a legal ground as the allowability of depreciation @ 60% or @ 15% is purely based on facts and classification of this Act, therefore, the above additional ground cannot be admitted at this stage. In the alternative, the Ld. DR has submitted that if the additional ground is to be admitted, the same may be restored to the file of the CIT(A).

She, in this respect, has relied upon the decision of the Hon'ble M.P. High Court in the case of "CIT Vs. M/s Tollaram Hassomal" (2006) 153 Taxmann 532 (MP).

However, The Ld. AR of the assessee has submitted that the issue as to 'whether the assessee is eligible for depreciation at the rate of 60%?' was well before the Assessing Officer and all the relevant facts have been discussed by the AO in the order for AY 2012-13 and 2013-14. He has further submitted that the issue of classification of computer peripherals as computer equipment eligible for depreciation was decided by the Hon'ble Delhi High Court in the case of "CIT Vs Birlasoft Ltd.", ITA No.1284/2011 which was further affirmed by the Hon'ble Supreme Court. He, therefore has submitted that the mere fact that the issue of classification was admitted in both the High Court and Supreme Court goes to prove that it is a legal issued as both the courts, as per the provisions of Income Tax Act, 1961, can only entertain appeals which have a question of law. The Ld. Counsel has further submitted that if the relevant facts are already on record in respect an additional claim which in this case is purely a legal issue, there is no bar in raising the same at any stage of the litigation. He in this respect has relied on the decision of the Hon'ble Supreme Court in the case of "NTPC Vs. CIT", 229 ITR 383 (SC).

31. We have considered the rival submissions of the Ld. representatives of the parties on this issue. It is not disputed that the issue raised by way of additional ground of appeal was already before the Assessing Officer in the proceedings for assessment year 2012-13, the appeal against which is also being adjudicated with this common order. Even for the year under consideration, the assessee had raised this issue before the AO by way of rectification application u/s 154 of the Act. Neither any new fact, nor any new evidence is required to be produced for adjudication of the above issue as all the relevant facts relating to the issue are already on the file. The question as to whether the assessee can take an additional ground at the appellate stage even when the same has not been raised before the lower authorities has been thoroughly discussed by the Co-ordinate Division Bench of the Tribunal at Mumbai, one of us (Judicial Member) being part of the said Bench, in the case of “Pandoo P. Naig” in ITA No.7089/Mum/2011 decided on 24.06.2016 [2016 (9) TMI 1062]. The Tribunal, while relying upon the decision of the Hon’ble Supreme Court in the case of “National Thermal Power Company Ltd. vs. CIT” 229 ITR 383, Full Bench of the Hon’ble Bombay High Court in the case of “Ahmedabad Electricity Co. Ltd. vs. CIT” (1993) 199 ITR 351, another decision of the Hon’ble Bombay High Court in the case of “CIT vs. Pruthvi Brokers and

Shareholders Pvt. Ltd.” (2012) 349 ITR 336 (Bom.) has held that the appellate authorities have jurisdiction to deal not merely with additional ground which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The relevant part of the order of the Tribunal in the case of “Pandoo P. Naig” for the purpose of reference is reproduced as under:

“19. Now coming to the point, whether, the claim put by the assessee Shri Pandoo P. Naig by way of additional ground before the Ld. CIT(A) regarding the deletion of addition of Rs.4 crore offered during the survey action and thereby offered in the return of income can be allowed at this stage?

The Ld. Counsel for the assessee in this respect has placed reliance on the decision of the Hon’ble Supreme Court in the case of “National Thermal Power Co. Ltd.” vs. CIT” 229 ITR 383. The facts before the Hon’ble Supreme Court were that the assessee in that case offered the interest amount for taxation and the assessment was completed on that basis. Before the Ld. CIT(A), the assessee though had taken a number of grounds of appeal, however, the inclusion of the said amount of interest was not challenged. The inclusion of the said amount of interest was not objected to even in the grounds of appeal as originally filed before the Tribunal. However, the assessee by way of subsequent letter raised the additional ground in relation to the said inclusion of interest into the income of the assessee. In the above circumstances, the question before the Hon’ble Supreme Court was “Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same?” The Hon’ble Supreme Court while answering the said question observed that under section 254 of the Income Tax Act, the power of the Tribunal in dealing with the appeals is expressed in the widest possible terms; the power of the Tribunal under section 254 is not restricted only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals); that both the assessee as well as the department have a right to file an appeal/cross objection

before the Tribunal and the Tribunal is not prevented from considering questions of law arising in assessment proceedings although not raised earlier. While answering the question in affirmative, the Hon'ble Supreme Court concluded that the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee.

20. The facts of the case in hand are on better footing. In the case in hand, though under consistent pressure, the assessee offered the additional income for taxation in the assessment proceedings but when he was burdened with many more additions, he at the first instance during the appeal before the Ld. CIT(A), challenged the offer of additional income on the basis of statement recorded under section 133A. Even the said ground was also admitted by the Ld. CIT(A) for adjudication though finally decided against the assessee. The full bench of the Hon'ble Bombay High Court in the cases of "Ahmedabad Electricity Company Ltd. vs. CIT" and "Godavari Sugar Mills Ltd. vs. CIT" by way of a common order dated 30.04.1992 (1993) 199 ITR 351 has observed that the basic purpose of an appeal procedure in an income tax matter is to ascertain the correct tax liability of the assessee in accordance with law. Therefore, at both the stages, either by the Appellate Assistant Commissioner or before the Appellate Tribunal, the appellate authority can consider the proceedings before it and the material on record before it for the purpose of determining the correct tax liability of the assessee. The appellate authorities, of course, cannot travel beyond the proceedings and examine new source of income, for that purpose other separate remedies are provided to the department under the Income Tax Act. The Hon'ble full bench of the Bombay High Court observed that apart from the above, there was nothing in section 254 or section 251 which would indicate that the appellate authorities are confined to considering only the objections raised before them or allowed to be raised before them either by the assessee or by the department, as the case may be. They can consider the entire proceedings to determine the tax liability of the assessee."

32. The Hon'ble Bombay High Court in the case of "CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd." (2012) 349 ITR 336

(Bom.) has observed that the assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The words 'could not have been raised' must be construed liberally and not strictly. There may be several factors justifying the raising of a new plea in an appeal and each case must be considered on its own facts.

In view of the above discussion, the additional ground raised by the assessee is admitted for adjudication. Since as discussed above, all the facts relevant to the issue raised through the above stated additional ground of appeal are on record and even the identical ground has already been adjudicated by the Ld. CIT(A) in assessment year 2012-13 and the appeal against the said order of the CIT(A) for assessment year 2012-13 is being adjudicated with this common order wherein the said ground has been taken as one of the main grounds, hence in our view, no useful purpose will be served for restoring the additional ground of appeal to the file of the CIT(A) for the year under consideration. Hence, we proceed to adjudicate the additional ground of appeal.

33. The Assessing Officer has allowed the depreciation @ 15%, whereas, the contention of the counsel for the assessee is that STBs were classifiable under the head "Computers including Computer Software" as provided under Item-III (5) of the table of rates of depreciation in Appendix 1 to the Income-tax Rules, 1962 and were eligible for depreciation @ 60%.

The Ld. Counsel to demonstrate that a STB is not only in itself a computer but also is part and parcel of a larger computer system from which it gets the signals, decode the audio -video signals and pass on to the television. He in this respect has made the following written submissions:

“Without prejudice, it is further respectfully submitted that even in a scenario the aforesaid arrangement is treated as finance lease and the appellant is deemed to be the owner of these equipment's, then depreciation on STBs should, in our submission, be allowed to the appellant at the rate of 60%, being classifiable under the head "Computers including Computer Software" as provided under Item-III (5) of the table of rates of depreciation in Appendix 1 to the Income-tax Rules, 1962 for the reasons explained hereunder:

What is STB?

In this regard, it is respectfully submitted that set-top boxes are basically hardware devices that allows a digital signal to be received, decoded and displayed on screens. In other words, it is an audio-visual equipment that decodes and performs input /output processing functions.

A set-top box is a device that enables a television set to become a user interface to the Internet and also enables a television set to receive and decode digital television (DTV) broadcasts. The main components of set top box are: System bus;

- Tuner(s);
- Modulators and demodulators; Demultiplexer and decryptor;
- Decoders; Graphic processors; CPU and memory;
- Storage devices;
- Physical interfaces; and
- Physical characteristics

A set-top box contains one or more microprocessors for running the operating system, possibly Linux or Windows CE, and for parsing the MPEG transport stream. It also includes RAM, an MPEG decoder chip, and more chips for audio decoding and processing. Further it contains a hard drive for storing recorded television broadcasts, for downloaded software, and for other applications provided by DTV service provider.

Definition/Meaning of the term Computer/Computers including Computer Software

Definition under Income Tax Act

The term "computer" has not been defined under the Act. However, the term 'computer system' has been defined under Explanation (a) to clause (xi) of section 36(1) of the Act which reads as under:

*"computer system' means **a device or collection of devices** including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, or more of which contain computer programmes, electronic instructions, input data and output data, that **performs***

functions including, but not limited to, logic, arithmetic, data storage and retrieval, communication and control"

Definition under Information Technology Act 2000

Further, the term "computer" has been defined in the Information Technology Act, 2000, to mean electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or relates to the computer in a computer system or computer network.

Definition as per ICAI

Attention in this regard is further invited to the study material for PEE II Information Technology Paper VI issued by the ICAI, which states as follows:

"The term "Computer" can logically be applied to any calculating machine. However, in common usage, the definition of a computer has become more limited in a contemporary usage. We now define a computer as an electronic data processing device capable of receiving input, storing sets of instructions for solving problems and generating output with high speed and accuracy. Computers are composed of switches, wires, motors, transistors and integrated circuits assembled on frames. The frames form components such as keyboards, printers, visual display units, disk drives, magnetic tape drives and central processing units. These components are wired together into a network called a computing system often called a computer." [emphasis supplied]

Thus, from the above, it is evident that "computers" do not simpliciter mean CPU's, but any device which contain computer programmes, electronic instructions, input data and output data and performs functions including, but not limited to, logic, arithmetic, data storage and retrieval, communication and control qualify as "computers" for the purpose of claiming

depreciation @ 60% in terms of section 32 of the Act. Thus, from the above, if an analysis can be drawn as to how STB's constitute a computer / computer software is as follows:

S. No.	As per Definition of Computer	As per specification of STB, how it classifies as STB
1.	Device that contains computer programme and electronic instructions	A Set Top Box comprises of algorithms which enable the network to determine which channel to operate based on the electronic instructions received by it.
2.	Has the capability of receiving inputs and then transforming then input into the desired output using the electronic instructions	it is an audio-visual equipment that decodes and performs input /output processing functions wherein the Conditional Access System (CAS) sends input to the STB which in turn enables the STB to give output as to which package should be displayed on this (Refer Table 3 at Page 3 of the specifications).
3.	Comprises of a Central Processing Unit (CPU)	STB comprises of Powerful 420 DMIPs 32 bit RISC Processor, which is evident from the specification enclosed. (Refer Table 3 at Page 3 of the specifications).
4.	Comprises of an Operating system which enables the giving of various commands.	Power KEY Conditional Access System, which secures digital services using an RSA encryption algorithm that mathematically matches pairs of keys and is compliant with DVB (ETR 289) Common Scrambling Algorithm (Refer Table 3 at Page 3 of the specifications).
5.	Performs the function of Logic/Arithmetic	Already explained above. (Refer Table 3 at Page 3 of the specifications.)
6.	Performs the function of Data Storage	Base model contains - 4MB Flash Ram Memory (upto 8Mb option) - 32MB DRAF, 4KB EEPROM
		Refer Table 3 at Page 3 of the Specifications.)

Thus, it is evident that a set top box is a nothing but a computer for the Cable Industry to function in as much as set

top boxes too responds to a specific set of instructions in a well-defined manner and perform input/output processing. Thus, in view of the above, it may be appreciated that set top boxes clearly qualify as "computer".

Without prejudice to the above, it is submitted that STB's are capable of being a computer and are also an integral part of the network of computers, such as Oracle Based Billing System and Conditional Access System (CAS) which processes the content and the individual STB usage for the subscriber. The fact that the STB is an integral part of the entire computer network responsible for transmitting signals and displaying the relevant output on the monitor screen/Television is explained diagrammatically as per **Annexure 1**.

Further, apart from the above and even otherwise, it may be appreciated that set top boxes are functionally dependent on computers as demonstrated hereunder:

It may be pertinent to note that set-top boxes comprise three separate subsystems—TV, conditional access (CA), and PC components. The TV subsystem includes a number of tuners and video decoders that are responsible for processing streams of digital information. The CA system provides MSOs with unprecedented control over what their subscribers watch and when they watch it. The PC subsystem itself is modular-based, which means that set-top designers can add and subtract various components depending on user requirements. For instance, MSOs that want to offer Internet services to their subscribers will incorporate some type of storage solution into their PC subsystem.

Moreover, detailed technical specifications proving the fact that set top box is its self it computer device and entire technical functions are not only digitally driven through the software programs but it also contains flash memory, CPU (central processing unit), power key, processor etc. on the lines of the computers. Detailed technical specifications are enclosed herewith as per **Annexure-2**.

Thus, for the aforesaid reason too, it is respectfully submitted that since the functioning of STB's are dependent on computers

and software, thus on this account as well they are eligible to be classified as "computers" and eligible for depreciation @ 60%.

It has been concluded from the above discussion that the Set Top boxes and audio visual streaming equipment are same as former being the trade name of the equipment. Further Set Top Boxes are itself minicomputer with inbuilt hardware and software, Technical specification of Set Top Boxes has already been discussed above which verbatim tallies with technical specifications of computer such as Decoders, graphic processors, CPU and memory etc. It has also been proved that computer is integrated with back end servers and computers for transmission of signals. Then judicial pronouncements also support the contention of the assessee that the Set Top Box is out and out computer and thus have to be classified under the category of computer and software for the purpose of depreciation.”

15. Apart from above submissions, the Ld. Counsel for the assessee has placed reliance on the decision of Specific reliance in this regard is placed on the decision of Bangalore Bench of Tribunal in the case of Cisco Systems Capital (India) Pvt. Ltd. vs. ACIT: ITA No. 1558 of 2012 to submit that under similar facts and circumstances, the CISCO has been granted 60% depreciation on the audio visual conferencing equipment. The Ld. Counsel has further submitted that the assessee has always been allowed depreciation @ 60% on STB's in the preceding as well as subsequent assessment year(s) in assessments concluded under section 143(3) of the Act in respect of STB's that were owned by the assessee. Hence the principle of consistency should be followed. He in this respect has made the following submissions:

“ Specific reliance in this regard is placed on the decision of **Bangalore Bench of Tribunal** in the case of **Cisco Systems Capital (India) Pvt. Ltd. vs. ACIT: ITA No. 1558 of 2012**. In that case, the assessee claimed depreciation @ 60% on audio visual conferencing equipment and video streaming equipment's

treating them as computers. However, the assessing officer restricted the claim of depreciation to 15% treating it as plant and machinery. On objections filed before the DRP, the addition made in draft assessment order was confirmed by DRP.

On appeal filed before the Tribunal against final assessment order, it was held as under:

8. Having heard both the parties and having considered the rival contentions, we find that to treat the equipment as computer or computer system, the nature of the equipment and the functions they perform are to be examined.

8.1 As per the details furnished by the learned counsel for the assessee, audio and video conferencing system comprise of audio-video devices/equipments which facilitate in bringing people at different sites together for a meeting. Besides the audio and visual and meeting activities, these systems can also be used to share document, computer information and boards, Conferencing works across IT net-work, ISD through computers/computer network etc., and audio/video facility consist of many elements including the use of CODEC which stands for coder-decoder. Codec is a device, which converts and compresses an analog audio-video signal into digital data and then sends it over a digital line. The decoder reverses the processes at the receiving end and this compression and decompression allows large amount of data to be transferred across a network at close to real time. Conferencing systems make use of various end points in a system such as video input consisting of camera, video output in the form of microphones and speakers etc. The data transmission happens in a number of ways depending on the technology being used including digital technologies as well as analog technologies, broadband internet connection and radio frequencies which can include satellite transmission and Wifi. Therefore, according to the learned counsel for the assessee, computer system is extremely important to conferencing process and therefore the audio visual transmission equipment should be considered as part of a computer.

8.2 Regarding the video streaming equipment, it was submitted that the video streaming allows user to begin viewing the video clips stored in a server without first downloading the entire file and after a brief period of

initiating and buffering, the file will begin to stream or play in real time. Video streaming involves a series of steps involving the use of media content, a computer that runs encoding software, servers for upholding the streamed media format and access to such media through various devices. From the above submissions, it is clear that the equipment used by the assessee for audio visual conferencing and also video streaming involves the use of computer. As certain input and output equipment may have independent functionality and existence but the computer devices which are involved in these activities would be of no use if these input and output devices are not used. Therefore, though the input and output devices may have independent existence and functionality in so far as the activity of the assessee is concerned, they do form part of the computer network system without which the computer used for the purpose of audio and video conferences would be useless. The Special Bench of the Tribunal in the case of *Datacraft India Ltd.*, (cited supra) has held that peripheral equipments used along with computer are also part of the computer. We find that a similar issue had come up before 'B' Bench of the Tribunal at Delhi in the case of *M/s.Crabtree India Ltd. vs. ACIT* in ITA Nos.3638 & 3639/Del/2008 and the Tribunal vide orders dated 25-2-2010 has held that video conferencing system is a computer device that accepts information in the form of digital data by way of video input i.e. with the help of web/cam or video camera and audio input with the help of microphone and the system thereafter processed the data and transfer through analogue or digital telephone network or LAN and digital gives the output data by way of audio video output. Therefore, it is a technical device whose functions are similar to the computer because basically computer also responds to a specific set of instructions in a well defined manner. The Tribunal considered the decision of the IT AT, Calcutta Bench in the case of *ITO vs. Simran Majumdar* (98 ITD 119) wherein the Tribunal had considered the similar issue wherein depreciation at the rate of 60% was claimed on printers and scanners and it was held that they were eligible for depreciation at the rate of 60%. The Tribunal, however, held that the contentions of the assessee therein were not before the AO and therefore the issue was set aside to the file of the AO to consider each of the items in detail and find out which can be equated and construed as computer for the purpose of granting depreciation at the rate of 60% after providing the assessee due opportunity of hearing.

8.3 In the case before us also, all the components of the equipment are necessary for fulfillment of the objective of the audio-visual conferencing and video streaming. Some of the components may exist independently and may also be functioning independently but in the assessee's business they are only performing the functions as input and output devices. The assessee can also use this equipment independent of the computer system used in the audio visual conferencing and video streaming activity. But did the assessee use them independently is the question. **In view of the same, we are of the opinion that the AO, instead of classifying the entire equipment as plant and machinery and not computer, is required to examine each item in detail as regards its functional dependency on the computer and its independent existence. The items which are functionally dependent on computers are definitely part of computer and the items with independent existence may not be computers but wherever it is found that the device is not used independent of the computer system and the purpose of audio visual conferencing and video streaming, the same shall be treated as computers and wherever it is used independently for any other purpose it shall be treated as plant and machinery. The A O, shall, thus allow depreciation at the rate of 60% on the equipment which could be classified as computer and at the rate of 15% on the equipment which could be classified as plant and machinery.** This issue is accordingly set aside to the file of the AO for re-adjudication in accordance with law and our observation above. " (emphasis supplied)

It is pertinent to note that in the remand proceedings, the assessing officer allowed depreciation @ 60% on audio-visual equipments.

Further, it is submitted that in the assessment order passed in the case of CISCO for the assessment year 2013-14, the assessing officer has accepted the fact that audio-visual equipments (Set-Top Boxes) are eligible for depreciation at the rate of 60%. The relevant findings of the assessing officer are reproduced as under:

"9.1 The issue of the percentage of depreciation to be allowed in the case of audio- visual equipments had been remanded to the assessing officer for AY 2008-09 and 2009-10. This issue was discussed in detail with the authorized representatives during the passing of the remanded back order for the AY 2008-09 and 2009-10.

Based on the submission of the assessee, it was concluded that the assessee is making use of these audio-visual equipments along with the computers and they form part of the integral computer system and hence it was decided that they are eligible for depreciation at 60%. Hence, the same is applicable here and the audio visual equipments are being allowed depreciation at 60%. "

Further, even otherwise, it is settled law that various equipment and peripherals which are attached to the computer system and/or their functionality is dependent on computers are classifiable under the head "computers" and eligible for depreciation @ 60%.

Reference in this regard may be made to the decision of the **Delhi High Court** in the case of **CIT vs. Birlasoft Ltd: ITA No 1284/2011** wherein it was held that computer peripherals should be included under the head 'computer equipment' and are therefore, entitled to depreciation @ 60%. The said decision has been **affirmed by the Supreme Court** in CIT vs Birlasoft Ltd: SLP No. 20645/2012.

It was held likewise by the jurisdictional Delhi High Court in the case of **CIT vs. BSES Rajdhani Powers Ltd. in ITA No 1266/2010**. In that case, the Court while adjudicating the issue of depreciation on computer accessories and peripherals held that computer accessories and peripherals such as printers, scanners and server, etc., form an integral part of the computer system. Further, the Court observed that computer accessories and peripherals cannot be used without the computer and consequently, as they are the part of the computer system, they are entitled to depreciation at higher rate of 60%.

Reliance is also placed on the following decisions wherein depreciation at higher rate of 60% applicable to computers has been upheld in respect of various equipment and peripherals attached to the computer system:

- Income Tax Officer vs Samiran Majumdar : 98 ITD 119 (Kol)
- DCIT vs Datacraft India Ltd : (2010) 133 TTJ 377 (Mum) (SB)
- Inspecting Assistant Commissioner vs Commission and General Agency : 17 ITD 6 (Bangalore)
- Escorts Tractors Ltd vs Asstt CIT : 101 Taxmann 171 (Delhi)
- CIT vs Karnataka Power Corporation : 247 ITR 268

- Expeditors International (India) (P) Ltd vs Addl CIT : 118 TTJ 652

Accordingly, it is respectfully prayed that the assessing officer may kindly be directed to allow depreciation @60% on the aforesaid STB's, in case the appellant is deemed to be the owner of such assets.

“ Principle of Consistency

The appellant is providing 'Digital Cable Service' to its customers since 2009 and for carrying on this business, it had purchased Set Top Boxes ('STBs') in the earlier assessment years out of its own funds and claimed depreciation @ 60% thereon which was allowed **by** the tax authorities after due application of mind.

In this regard, it is respectfully submitted that though principle of res-judicata does not apply to income tax proceedings, it is well settled that if there being no change either in facts or in law, as compared to the earlier and subsequent years, the position accepted/ determined by the Department needs to be followed even on the principle of consistency.

Reliance in this regard is placed on the following decisions:

- CIT vs. Excel Industries Ltd.: 358 ITR 295 (SC)
- Radhasoami Satsang v. CIT: 193 ITR 321 (SC)
- DIT (E) v. Apparel Export Promotion Council: 244 ITR 734 (Del)
- CIT v. Neo Polypack (P) Ltd: 245 ITR 492 (Del.)
- CIT v. Dalmia Promoters Developers (P) Ltd: 281 ITR 346 (Del.)
- DIT v. Escorts Cardiac Diseases Hospital: 300 ITR 75 (Del.)
- CIT v. P. KhrishnaWarrier: 208 ITR 823 (Ker)
- CIT v Harishchandra Gupta 132 ITR 799 (Ori)
- CIT v. SewaBharti Haryana Pradesh: 325 ITR 599 (P&H)
- CIT v. Rajasthan Breweries Limited.: ITA 889/2009 (Del)
- SLP dismissed.

Thus, in view of the above, the department having accepted that STB's are eligible for depreciation @ 60% in earlier as well as subsequent years, the same stand ought not to be changed/ modified during the year under consideration even on the principle of consistency, particularly, when no new fact/ information has been brought on record for the same.

Brief note on the assessment proceedings of CISCO Systems Capital (India) Private Limited.

CISCO Systems Capital (India) Private Limited is the owner of set top boxes. These have been classified as audio, video conferencing and video streaming equipment's. This matter has been decided by Income Tax Appellate Tribunal Bangalore Bench-C Bangalore vide its order dated 19-09-2014 for the AY 2008-09, at page 10 of this order it was held that the above said equipment, is to be treated as computer and accordingly the AO shall thus allow depreciation @60%. Similarly for the AY 2010-11 vide its order dated 19-02-2016 ITAT Bangalore-A Bench Bangalore has also held that the depreciation @60% of the equipment shall be allowed.

Keeping in view the import of detailed submissions made above it is crystal clear that the appellant company is entitled to claim of lease rentals paid to M/s CISCO Systems Capital (India) Private Limited and it is prayed that the appeal be kindly adjudicated accordingly.”

34. The Ld. DR on the other hand, has submitted that the contention of the Ld. Counsel is that the CISCO has been allowed depreciation @ 60% on STBs is not coming out of the order of the Tribunal (supra); That in the case of CISCO, depreciation @ 60% has been allowed on routers and switches and not on STBs. The Ld. DR has further submitted that STBs are Information Application Devices designed to perform a definite electronic function. That the function of the STBs is to receive input signals decode those signals and pass on to TV. He, in this respect has relied upon the decision of the ITAT (Special Bench) of the Tribunal in the case of “Data Craft India Ltd.” (2010) 40 SOT 295 (Mum.) (SB) ITAT), wherein it has been held that TV is not a computer. He has further

submitted that a device can be said to be part of computer system when its functions depends upon computer. If it is independent of computer and it can function independently then it will not fall within the scope of the device that may be included in the term 'computer system'. He has submitted that the STBs just pass information to the TVs, it is not a computer. He has further submitted that the STBs would not also fall within the definition of Audio-Visual Equipment upon which depreciation @ 60% has been allowed in the case of CISCO. He, therefore, has submitted that the Assessing Officer has rightly allowed the depreciation @ 15%. The Ld. DR has also relied upon the observations and findings made by the Assessing Officer on this issue in the Assessment order for AY 2014-15. The Ld. DR, has also strongly relied upon the decision of the co-ordinate Cochin Bench of the Tribunal in the case of 'ACIT vs Kerala Communicators Cable Limited' (ITA No. 271/Cochi/2018 dated 30.4.2019), to submit that the Co-ordiante Bench of the Tribunal has decided the issue of depreciation @ 15% on STBs in favour of the Revenue. The Ld. DR in this respect has also made the following written submissions:

“Note on Depreciation allowable on Set Top Box 60% or 15%”

“ 1. It is worth noting that during the assessment proceedings for AY 2017-18 the assessee has made elaborative submissions to justify that it is eligible for 60 % depreciation on STBs. The assessee has made the following major submissions:

- " Company has also started direct purchase of Set Top Boxes apart from the Set Top Boxes procured through lease, the company has claimed 60% depreciation on these assets due to nature of asset being integrated with computers and run through software aided by memory card and mother board. Thus Set Top boxes are computer in itself and are also integrated with large computer system which provide from the backend directions for the updations in packages and commands for the running of programs.
- Cisco being the owner of Set Top Boxes has claimed depreciation @60% on Set Top Boxes.

• In the Hon^{ble} IT AT Income Tax Appellate Bangalore Bench 'C' Bangalore in case of Cisco Systems Capital (India) Private Limited for the AY 2008-09 it was held that "as regard Audio visual conferencing equipment's and video steaming, the learned counsel for the assessee has filed detailed submissions before the AO as well as before us to convince us that they are also part of the computer system and are not independently functional. He has drawn our attention to the detailed submissions filed by the assessee which has also been reproduced by the AO in his order".

• It is evident that a set top box is a technical device whose functions are similar to a computer in as much as set top boxes too respond to a specific set of instructions in a well defined manner and perform input/output processing.

• It is respectfully submitted that since the functioning of STB's are dependent on computers and software, thus on this account as well they are eligible to be classified as "computers" and eligible for depreciation @ 60%.

• Specific reliance in this regard is placed on the decision of Bangalore Bench of Tribunal in the case of Cisco Systems Capital (India) Pvt. Ltd. vs. ACIT: ITA No. 1558 of 2012

• Further, it is submitted that in the assessment order passed in the case of CISCO for the assessment year 2013-14, the assessing officer has accepted the fact that audio-visual equipments (Set-Top Boxes) are eligible for depreciation at the rate of 60%. "

2. What is a Smart TV- A TV or a Computer ? Similarly what is a smart phone which can make video calls, display unlimited videos from youtube etc websites? So what is that distinguishes pre-configured special electronic devices from computers? Different devices now-a-days have embedded many different hardware like relays, transistors, memory chips, digital gates etc. and further they also include various software in order to execute pre-configured

functions. Such devices include toasters, washing machines, microwave ovens, mobile phones, smart TVs, digital wristbands etc.

3. Therefore various courts have come with the concept of computer network. Further under Income tax act for computer or computer network 60 % depreciation is allowable. What falls under computer and computer network has been defined

3.1 ITAT Special Bench in the case of Datacraft India Ltd. (supra) had the occasion to consider the meaning of word 'computer'. After elaborately considering the Special Bench has expounded as under:

*"Thus in order to determine whether a particular machine can be classified as a computer or not, the predominant function, usage and common parlance understanding, would have to be taken into account. To analyse further, let us take the case of a Television, the principal task of which is to deliver visuals accompanied with audio. The signals are received through the relevant networks such as Dish TV, Tata Sky etc. But TV does not become computer for the reason that its principal function cannot be done only with the aid of 'computer functions' notwithstanding the fact that in the entire process of networking or receiving the output from different channels and making it available to the viewers, some sort of computer functions are necessarily involved. Similarly take the case of mobile phone. Its principal task is to receive and send calls. It is not a stand-alone apparatus which can operate without the relevant network, such as Airtel, BSNL, Reliance. It, therefore, follows that any machine or equipment cannot be described as computer, if its principal output or function is the result of some sort of 'computer functions' in conjunction with some non-computer functions. **In order to be called as computer, it is sine qua non that the principal output/object/function of such machine should be achievable only through 'computer functions'**"*

3.2 From the above exposition it is evident that just because some sort of computer functions are necessarily involved, mechanical system cannot be said to be computer unless its principal function cannot be done without the aid of computer function. In other words, any machine or equipment cannot be described as computer if its principal output or function is the result of some sort of 'computer functions' in conjunction with some non-computer functions. It was held that in order to be called as computer, it is sine qua non that the principal output/object/function of such machine could be achieved only through 'computer functions'

4. STB is an information appliance device that generally contains a TV-tuner input and displays output to a television set and an external source of signal, turning the source signal into content in a form that can then be displayed on

the television screen or other display device. They are used in cable television, satellite television, and over-the-air television systems, as well as other uses.

4.1 The main purpose of STBs is to deliver the audio-video signals to the TV viewers. But using the complex technology, more and more value is added for the operator i.e. maintaining the database of the clients, maintaining the viewer's log registers, the list of the channels subscribed by viewers, the payment schedule of the viewers etc. these additional features are achieved using computers at the back end. The STBs installed at the premises of the users helps the operator to actualize this informational and supervisory control. However, the main function of the STBs is to deliver the audio-video feed to users. The major function of the STBs i.e. decoding and thus delivering the audit video signals to the TV sets is independent of the various servers installed at the premises of MSO (Multiple System Operator). Therefore, the main functions of the STBs do not depend on servers and other electronic devices installed in the premises of operator. This main function is not dependent on backend computers installed at the premises of operator because STBs are devices which are used even in cable television, over the air televisions etc.

4.2 Therefore STBs are neither a part of Computer Systems nor a dependent on Computers. They can be at best called as Information Appliances attached to Television sets to enjoy multiple contents. Further as per case law of DCIT Mumbai v. Data Craft India Ltd. (2010) 40 SOT 295 (Mum.) (SB) ITAT, it is already decided by Hon'ble ITAT that televisions cannot be treated as computers. Therefore, any assembly attached to televisions i.e. STBs in this case cannot be treated as 'Computers'. Therefore, depreciation rate of 60 % should not be allowed to assessee.

5. Further various submissions made by the assessee during the assessment proceedings are analyzed as under:

- However, first of all it is observed that the order of Hon'ble ITAT in the case of CISCO System(India) Pvt. Limited is related to the Audit Video Conferencing devices and depreciation of 60% has been allowed by the Hon'ble ITAT and thus by the A.O. on such Audit Video Conference devices. The important points of the judgment are mentioned as below:

o Audio and video conferencing system comprise of audio-video devices/equipments which facilitate in bringing people at different sites together for a meeting. Besides the audio and visual and meeting activities, these systems can also be used to share document, computer information and boards, Conferencing works across IT net-work, ISD through computers/computer network etc.,

o Conferencing systems make use of various end points in a system such as video input consisting of camera, video output in the form of microphones and speakers etc. The data transmission happens in a number of ways depending on the technology being used including digital technologies as well as analog technologies, broadband internet connection and radio frequencies which can include satellite transmission and Wifi

o Video streaming allows user to begin viewing the video clips stored in a server without first downloading the entire file and after a brief period of initiating and buffering, the file will begin to stream or play in real time. Video streaming involves a series of steps involving the use of media content, a computer that runs encoding software, servers far upholding the streamed media format and access to such media through various devices

o From the above submissions, it is clear that the equipment used by the assessee for audio visual conferencing and also video streaming involves the use of computer. As certain input and output equipment may have independent functionality and existence but the computer devices which are involved in these activities would be of no use if these input and output devices are not used. Therefore, though the input and output devices may have independent existence and functionality in so far as the activity of the assessee is concerned, they do form part of the computer network system without which the computer used for the purpose of audio and video conferencing would be useless

- However the assessee in the present case has failed to justify how STBs are on par with Audio-Video Conferencing Devices.

- Further, it is observed that the assessee himself has made claim of depreciation of 15% on STBs in previous years. It is worth noting that for AY 2012-13 to AY 2016-17, the assessee has always been claiming 15 % depreciation on STBs. For AY 2017-18, the assessee for the first time has claimed that it is eligible for 60 % depreciation on STBs. Therefore, it is inferred that without any proper justification assessee is claiming higher depreciation rate i.e. 60% on the same kind of STBs which is not acceptable.

6. Further, a brief note on analogy of the STBs with the mobile phone is discussed as

under:-

6.1 The STB is a self-contained system installed at the premises of the customers. The functioning of the STB is analogous to the functioning of the mobile phones.

1. Like the Mobile Phone the data is transmitted and received using RF waves further the signal is encrypted when it is transmitted via satellite. The mobile decodes signal and allow the persons to talk. Similarly, STBs receive encrypted signals and it is decoded by STBs to allow the users to watch the programs. In mobile phones, if there is no balance then outgoing calls can't be made till the SIM is recharged. Similarly if the customer has not recharged its smart card embedded in STBs then the corresponding signal will not be decoded by the STB.
 2. When we recharge SIM of mobiles, then telecom operators change few bits of the signals transmitted by the mobiles which allow the user to make phone calls. Similarly, when the customer requests the MSO or makes an online payment to recharge its smart card the MSO merely modify few bits of the encrypted signal which gives the commands to STB to decode the same and thus allow the customer to enjoy the program. This is analogous to Mobile recharge as discussed above.
 3. The mobiles are not the part of the computer/server systems installed at the premises of the telecom operators. Although Hardware/Software installed at the telecom operator premises control the mobile phone functioning by giving commands. For example to keep the control over the billing payment of the mobile phones the telecom operator uses number of servers and other devices. Further, the functioning of the mobiles is also enriched by the hardware and software installed at the premises of the telecom operators. However, it cannot be said that the mobiles are part of the servers systems installed at the premises of the telecom operators. The same is also applicable on the STB, the servers installed at the premises of the MSO only add o the functioning **of** the STBs the major function **of** the STBs i.e. decoding and thus projecting the audit video signals to the TV sets is independent **of** the various servers installed at the premises of **MSO**. Therefore, the main functions of the mobile phones as well as STBs do not depend on such servers.
- 6.2 Since, it is established fact that the mobile phones are eligible for 15% depreciation. Further, the assessee has no fair justification how STBs are a part of computer systems or how STBs are on par with Audio Video Conferencing Devices, therefore the claim of the assessee for higher depreciation is inadmissible. Further the Reliance is also placed on the following case laws:-

- ITAT Special Bench in the case of Datacraft India Ltd. (supra) had the occasion to consider the meaning of word 'computer'¹., as explained in above mentioned paras.
- In the case of DCIT Mumbai v. Data Craft India Ltd.(2010) 40 SOT 295 (Mum.) (SB) ITAT), the issue was related to router and switches which were part and parcel of le "computer" hardware and other functions were found to be integrated one. In the case of CIT v. Bses Yamuna Powers Ltd. ITA 1267 of 2010 (Delhi High Court, depreciation was allowed at the rate of 60% on "computer" accessories and peripherals such as printers, scanners and server as these were integral part of the computer system responsible for completing the required working. Here is not the case like that.
- In the case of Nestle India Ltd. v. DCIT111 TTJ 498 (ITAT Delhi) it has been held that UPS is not an integral part of computer, hence not entitled for higher rate of depreciation. Similarly, though ATM is run on the basis of computer devise, is not entitled for higher depreciation applicable to the computer. This propositions is there in the case of HDFC Bank Ltd. v. ACIT 2011 TIOL - 101 (ITAT Mumbai). Similarly, machines for designing and printing using computer technology had not been regarded as computers, vide: ST. Reddiar & Sons v. DCIT129ITD 475 (ITAT Cochin).
- In the case law of Federal Bank Ltd. v. Asstt Commissioner of Income-tax Hon'ble Kerela high court held that the rate of depreciation at 60 per cent is available on computers. Since EPABX and mobile phones are not computers, the assessee was not entitled to depreciation at 60 per cent.

In view of the above mentioned discussion, it is requested to Hon'ble ITAT depreciation rate of 60 % on Set Top Boxes should not be allowed to assessee.”

35. However, the Ld. Counsel for the assessee has made the following submissions to rebut the observations of the Assessing Officer and as well as regarding the applicability of the decision of the special bench of the ITAT in the case of “Data Craft” (supra):

Reasoning against Assessment Order for AY 2012-13 where 60% not allowed

Para No.	As per Order	Applicability to Fastway
6.2.4	The Ld. AO has stated that the said equipments are neither computers nor energy saving devices as per the requirement of the Appendix I & IA of Income Tax Rules 1962. It also goes to say that the STB's are not electrical equipments.	It is submitted that the Ld. AO did not go into the technicality of the product and has summarily decided that STB's are not computers without citing any reasoning or rationale.
6.2.5	Reliance on the Order of CISCO by the assessee is not in place because the order does not talk about STB's but about audio visual conferencing equipments and video streaming equipments, wherein it was contended that they were part of the computer system. Since the word STB was not mentioned in that order, the assessee is not eligible. Further, it has also been mentioned that in the other judgement of CISCO it talks about giving depreciation to routers and switches @ 60% and not to STB's	It is submitted that when the Hon'ble Bench has allowed audio visual streaming equipment to be part of computer system, STB is way advanced and a computer in itself. The Ld. Assessing Officer did not examine this in detail and has summarily concluded that it is not part of a computer.

Applicability of DCIT vs Datacraft India Limited to the case of Fastway Transmissions Private Limited

Para No.	As per Order	Applicability to Fastway
31.1	In short, "Router" is a hardware device that routes data (hence the name) from a local area network (LAN) to another network connection. A router acts like a coin sorting machine, allowing only authorized machines to connect to other computer systems. Most routers also keep log files about the local network activity. Now the question is whether this "machine" can be	It is submitted that the assessee has already established that the STB's have all the capabilities of a computer and therefore eligible for depreciation of a computer.

	used independent of Computer. If yes, then it cannot be called "Computer Hardware" in all circumstances.	
31.4	In view of the above discussion, we are of the considered view that router and switches can be classified as a computer Hardware when they are used along with a computer and when their functions are integrated with a 'computer' In other words, when a device is used as part of the computer in its functions, then it would be termed as a computer.	In the case of Fastway Transmission Private Limited, the STB's are computer in themselves and are also part of a larger computer system at the back end. It is submitted that while STB's are computers in themselves, the are also integrated with a computer making them eligible for depreciation of a computer
32	Now we will advert to the decisions relied on by the rival parties. We have set out above the cases decided by various Benches of the Tribunal in favour of the assessee. The lead order is in the case of Samiran Majumdar (supra) which has been followed, directly or indirectly, in most of the subsequent cases. We will take up this case for discussion, in which the question was whether printer and scanner could be allowed a higher rate of depreciation as applicable to computers. The Bench noticed that the printer and scanner cannot be used without computer. It was on this appreciation of the factual position that the printer and scanners were held to be part of computer qualifying for depreciation at the rate applicable to computer.	The Hon'ble Bench has relied on the judgement of Samiran Majumdar wherein the) ¹ have argued that printers and scanners cannot be used without computers and therefore they are eligible to be treated as computers. Similarly, STB's again, while being computer in themselves, cannot be used independently unless integrated with a computer and thus qualifying the assessee for depreciation of a computer.
32	In the opposition the orders taking view in favour of the Revenue are led by the case of routermania Technologies(supra). In this case it was observed that the	In the opposing judgement, the argument was that routers do not perform any logical, arithmetical or memory functions and thus not eligible.

	router is a device which links or connects the computers for the exchange of relevant data. In reaching the conclusion that router is not eligible for depreciation at the rate applicable to computer, the Bench noticed that the router at its own does not perform any logical, arithmetical or memory functions by manipulations of electronic, magnetic or optical impulses.	In the case of the assessee, the STB's have their own CPU, Operating System, Input / Output mechanism enabling them to carry out all the functions of a computer. Accordingly, it is submitted that the said judgement is not applicable to the company.
33	We prefer the view taken in the case of Samiran Majumdar (supra) over that in the case of Routermania Technologies (supra) ; With utmost respect, the Mumbai Bench had taken a narrow view on this issue, by holding that only a device which can perform logical, arithmetical or memory functions by manipulations of electronic impulses etc. is computer. <u>It has restricted the meaning of computer only to the CPU of the computer and pulled out the input and output devices from the ambit of computer.</u> No doubt the function of the computer, as one composite unit, is to perform logical, arithmetical or memory functions etc., but it is not only the equipment which performs such functions that can be called as computer ; All the input and output devices, as discussed above, which support in the receipt of input and outflow of the output are also part of computer. CPU alone, in our opinion, cannot be considered as synonymous to the expression 'Computer'. The function of CPU is akin to the brain playing a pivotal role in the conduct of the body. As we do not call the brain alone as	In the instant case, the assessee has already filed detailed chart of the system how a STB functions which establishes the fact that they are an absolute integral part of the CAS Server Computer and without the STB these computers cannot function. It is the STB's that while performing their independent functions as a computer, give the entire network the functioning. As has been held by the Hon'ble Bench that the brain cannot be called the body alone and that all parts of the body along with the brain comprise of the body. Similarly, the STB's cannot be seen in isolation and have to be seen part of the entire computer/network system which it is an integral part of in the industry of the assessee. Thus, in light of these submissions, the assessee is entitled to depreciation as computers.

	the body, similarly the CPU alone cannot be described as computer. Thus the computer has to necessarily include the input and output devices within its scope, subject to their exclusive user with the computer, as discussed above. If we constrict the definition of computer only to processing unit, as has been held in the case of Routermania (supra), then even the keyboard and mouse etc. will not qualify to be called as computer because these equipments also do no performlogical, arithmetical or memory functions. In the light of the meaning of 'computer' discussed in earlier paras, we are inclined to agree with the view taken by the Kolkata Bench in Samiran <u>Majumdar</u> (supra).	
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36. A perusal of above submissions reveals that both the ld. Representatives of the parties in their rival submissions have tried to demonstrate from the operation and functioning of the STBs as to the whether the STBs perform functions as that of a standard 'computer' or not. The counsel for the assessee, as noted above, has firstly submitted that the components of the STB are same as that of a computer and that the STB in itself is a mini computer, the only difference being that it is devised to perform specialized functions. That in the STBs hardware and software architecture used is that of a computer. That the STBs have their own CPU, operating system, input-output mechanism

enabling them to carry out all the functions of a computers. Further, he has also demonstrated from the functioning of the STBs that an STB performs function of a computer with a slightly reduced instructions set. That the system software or the device drivers are also as that in a personal computer but instructed to perform the specialized functioning meant for the STBs.; that even the application software in STBs is same and developed with the same programming language as for a computer, but for specific and specialized functions.

However, the main thrust of the argument of the Ld. DR has been that just because some sort of computer functions are necessarily involved, mechanical system cannot be said to be a computer unless its principal function cannot be done without the aid of the computer function. The ld. DR relying upon the decision of Special Bench in the case of “Data Craft India Limited” (supra) has submitted that any machine or equipment cannot be described as computer unless its principal output or function is the result of some sort of computer function in conjunction with some non-computer functions. That since the main function of STBs is to deliver the Audio / Video feed to user, thus the major function of the STBs i.e. decoding and thus delivering the audio video signals to the TV sets is independent of the various servers installed at the premises of Multi System Operator (MSO). That the main functions of the STBs do not

depend on servers and other electronic devices installed in the premises of MSO. He, therefore, has submitted that STBs cannot be described as computer rather at the best called informatization appliances attached to TV set to enjoy multiple contents. The main argument of the Ld. DR is that as per the decision of the 'DCIT vs Data Craft India Limited.' (2010) 40 SOT 295 (Mum)(SB)(ITAT), the televisions cannot be treated as computers and hence any assembly attached to television, i.e. STBs in this case cannot be treated as computers. That in the case of CISCO, 60% depreciation has been allowed by the ITAT on audio / video conference devices. However, the assesses in the present case has failed to justify how STBs are at par with Audit / Video conferencing devices. Further, the ld. DR has submitted that the functioning of the STBs is analogues to the functioning of the mobile phones. The ld. DR, therefore, has submitted that since the mobile phones cannot be said to be computers, hence, similarly, the STBs also cannot be said to be computers.

On the other hand, the Ld. Counsel for the assessee also relying upon the decision of the Special Bench in 'DCIT vs Data Craft India Ltd.' (2010) 40 SOT 295 (Mum)(SB)(ITAT) has submitted that the assessee has also demonstrated that STBs have all the capabilities of a computer and that they are not only mini computers in itself but also part of a larger computer system at the back-end. That the STBs cannot be used

independently unless integrated with a computer. The ld. counsel for the assessee in this respect has relied upon the decision of the tribunal in the case of 'Samiran Majumdar' (supra), wherein, it has been held that the printer and scanner cannot be used without computer and, hence, were held to be a part of computer qualifying for depreciation at the rate applicable to the computers. The ld. representatives of both the parties, therefore, have mainly stressed upon the functioning of the STBs to submit whether they perform the functions of a computer or not; although the submission of the Ld. counsel of the assessee is that an STB is a computer itself and yet, it is further attached to a larger computer network at back and thus being part and parcel of a larger computer system also, whereas, the Ld. DR has stressed that although the STB may be performing many functions as that of a computer, yet the primary function of the STB is decoding of the audio - video signals and further delivering the audio - video signals to TV sets, hence, the primary function is not of computing, hence, they cannot be said to be computers.

37. In our view, though both the ld. representatives have gone too technical regarding the specific functions of the STBs to submit whether they fall within the definition and scope of computer or not? However, in our view, neither under the

provisions of Income Tax Act nor in the Appendix 1 to Income Tax Rules, 1962 (providing for rate of depreciation) any such hyper technical approach has been taken. The rate of depreciation on a capital asset under the provisions of Income Tax Act and Rules thereto has been provided taking into consideration the general or approximate age of the asset and the speed at which it depreciates. Similar type of assets irrespective of their quality, make or the material used in, are placed under the same category on which rate of depreciation is same/equal e.g. all type of buildings except purely temporary erections have been placed under the same category irrespective of their strength and quality of the material used to erect such buildings. All types of furniture and fittings have been placed in the same category. All types of motor vehicles irrespective of their quality and material used, which may affect their life span, have been placed in one category and so on. The only difference is whether the asset is used for commercial hiring/renting or for own usage/consumption. At Serial No.5 of Appendix 1 to the rules, the computer including computer software have been placed with admissible rate of depreciation thereupon @ 60% . As per 'Note 7' appended below the appendix 1, it has been mentioned that 'computer software means any computer programme recorded on any disc, tape perforate media or other information storage device.' The various courts of law while adjudicating on the issue of allowability of rate of depreciation have interpreted

'computer and computer software' as a 'computer system' which includes the other associated equipment attached with the CPU such as monitor, mouse, key board, printer, scanner etc. as these equipment/devices though, in themselves will not be doing the function of computer but they are required to be attached with the computers and cannot be operated independently. The life span of these devices attached to the CPU goes with that of the computer. In the modern era of fast evolution in technology sector, the technological devices based on computer programming and software are being replaced or required to be replaced in a very short span of time with their new and improved versions with enhanced capabilities and performance features etc. due to revolutionary developments in this sector. A businessman has to replace the old equipment with the new/improved one to compete in the market. Hence, these types of computer devices become obsolete very soon due to their new versions and substitutes. Therefore, the higher rate of depreciation has been given on computers and software as compared to ordinary plant and machinery. There are many case laws wherein the expenditure incurred on software etc. claimed as Revenue expenditure by the assessee has been so allowed by the courts due to its short life as it is required to be replaced with the new and improved versions in a short span of time. The growth in technology sector is very fast and the older devices become useless and obsolete, not always due to the reason that these devices have outlived

their life but due to the fact that they are required to be replaced with their new version to keep pace with the time and to compete in the market.

In our view, it is not only the primary function that may be the sole criteria for deciding whether the STBs will be eligible for depreciation as applicable to the computers or not, rather the overall facts and circumstances such as the architectural design, nature of its components, the economic life of the STBs and their functions both primary and other functions, that are the deciding factors.

A perusal of the Appendix 1 to Income Tax Rules, 1962 reveals that the rate of depreciation provided is not item or quality specific, rather, the depreciation rate has been mentioned taking the genre of the particular type of assets and not on the basis of any specific species or to say not on the basis of differentiating nature or qualities of the assets falling within one genre/category. As noted above, different type of assets may be of different species but falling in one or same genre will be eligible for depreciation at the same rate. A broader aspect of the nature and type of asset has been taken under the Appendix 1. Apart from the criteria of normal age of an asset, a higher rate of depreciation has also been provided for certain assets for the purpose of giving incentives in certain type of business such as

lifesaving equipment, energy saving equipment and environment and pollution controlling equipment etc.

38. It is pertinent to mention here that in the category of 'Energy Saving Devices' mentioned under Serial No. 8 (ix) (E) under Electrical Equipment, on the following type of devices a higher rate of depreciation i.e. @ 80%, as applicable for the assessment year under consideration, has been given:-

“k) Remote terminal units/intelligent electronic devices, computer hardware/software, router/bridges, other required equipment and associated communication systems for supervisory control and data acquisition systems, energy management systems and distribution management systems for power transmission systems.”

A perusal of the above reveals that in case of the aforesaid devices used for supervisory control and data acquisition systems, energy management system and distribution management system for power transmission systems, the various devices which are either computer hardware or software or are closely linked to or associated with or attached to and generally performing either the same or identical functions, have not only been placed under the same category but they have been mentioned together but separated with “/” (slash) which means same or similar or inclusive of or to say ‘either / or’ . It is used for connecting non-contrasting items or as a shorter

substitute for the conjunction “or” and ‘inclusive of’ i.e., ‘A’ or ‘B’ or ‘Both’. When certain things are so closely related that one overlaps the other and it is difficult to make a clear distinction between the two or both are inclusive irrespective of any distinction, such items are separated by ‘/’ instead of symbol of comma “ , ” which gives a separate identity to each of the item included in the same list.

Another example in this respect is given in respect of ‘Life Saving Medical Equipments’ which reads as under:

“(xia) Life saving medical equipment, being—

- (a) D.C. Defibrillators for internal use and pace makers
- (c) Heart lung machine
- (d) Cobalt Therapy Unit
- (e) Colour Doppler
- (f) SPECT Gamma Camera
- (g) Vascular Angiography System including Digital Subtraction Angiography
- (h) Ventilator used with anaesthesia apparatus
- (i) Magnetic Resonance Imaging System
- (j) Surgical Laser
- (k) Ventilator other than those used with anaesthesia
- (l) Gamma knife
- (m) Bone Marrow Transplant Equipment including silastic long standing intravenous catheters for chemotherapy

- (n) Fibre optic endoscopes including, Paediatric resectoscope/audit resectoscope, Peritoneoscopes, Arthroscope, Microlaryngoscope, Fibreoptic Flexible Nasal Pharyngo Bronchoscope, Fibreoptic Flexible Laryngo Bronchoscope, Video Laryngo Bronchoscope and Video Oesophago Gastroscope, Stroboscope, Fibreoptic Flexible Oesophago Gastroscope
- (o) Laparoscope (single incision)"

A perusal of the above details reveals that separate items though falling under the heading "Life Saving Medical Equipment" have been mentioned separately under different alphabetic numbers, however, the items at (n) above shows that Paediatric resectoscope and audit resectoscope have been separated with " / " (slash), whereas, the other items though of similar nature have been separated with ", " (comma) and whereas, the other items which are not similar but falling under the main head "life saving equipments" have been separated with different alphabetic numbers.

From the above discussion, it is logically inferred that the devices such as Remote terminal units/intelligent electronic devices, computer hardware/software, router/bridges are inclusive of or are overlapping each other because of the similarity of the functions or their functions are in aid to each other's functions for a collective main function. The STBs no doubt would also fall within the category of the above named

‘intelligent electronic devices’, however, STBs since are not are electric energy saving devices, hence, the same will not be eligible for higher rate of depreciation @ 80%. However, clue from the above can be taken to include the above devices for claim of depreciation as is eligible for ‘computer and software’ as these devices(STBs) are identical to computers not only in their architectural design but also in their functioning. Even it has also not been disputed by the ld. DR that the STBs also perform computing functions but he has only tried to make distinction between the two by stating that the main function of an STB is decoding of audio video signals. However, in our view, such hyper technical criteria cannot be adopted in view of the general and broader criteria adopted in Appendix 1 relating to the classification of the items for the purpose of depreciation rate. So far as the argument of the Ld. DR that since like a smart TV or a mobile telephone cannot be said to be computer, hence, the STBs can also be not categorized as computer, in our view, has no force. Now a days, the smart TVs are in market. The word ‘smart’ added before a TV shows that it is capable of performing certain smart or intelligent functions as that of a computer. In fact, these smart TVs have all the features and functions of a computer and in the absence of any specific classification in Appendix 1, It will be required to be seen whether such appliance is a simple TV or an advance appliance with an inbuilt computer system and performing functions as that of a computer.

There has been a great evolution in Mobile phones also. Now a days, mobile phones are mini computers. Considering the speed at which these devices are evolved to new and improved versions, the component of such devices being delicate and sensitive and the functioning of such devices being a mixture of communication and computing, which is akin to that is performed by a computer, the mobile phones, in our view, cannot be placed and equated with simple plant and machinery of every type, rather, it will be appropriate to place these under the genre 'computers and software'. So far as the argument of the Ld. DR that just because some sort of computer functions are necessarily involved, mechanical system cannot be said to be computer, we agree to that extent with this argument of the Ld. DR. Now a days with the advancement of technology, even the machines meant to perform mechanical functions such as a washing machine or a Lift have also been embedded with some sort of computer device, which gives command to said machine to perform certain specific functions; however, considering the material and components of such machines, their life, their main and associated functions and characteristics, they can be categorized either as mechanical devices, electrical devices, electronic devices or computer devices. Even where such division is generally not possible, the composition of such type of machines can be divided and their components can be segregated to find which component would fall in the category of plant and

machinery and which in computer category. Which device would fall under what category of Appendix 1 will depend upon the overall characteristics and not a single or sole factor can be said to be determinative of. Hence, considering the nature of the equipment, their architecture, their components, their functions and also their average life, STBs in our view would fall under the category of computer for the purpose of determination of rate of depreciation.

39. The next contention of the Ld. DR , relying upon the decision of Special Bench in the case of “Data Craft India Limited” (supra), has been that any machine or equipment cannot be described as computer unless its principal output or function is the result of some sort of computer function in conjunction with some non-computer functions; that since the main function of STBs is to deliver the Audio / Video feed to user, thus the major function of the STBs i.e. decoding and thus delivering the audio video signals to the TV sets is independent of the various servers installed at the premises of Multi System Operator (MSO). He, therefore, has submitted that STBs cannot be described as computer rather at the best called informatization appliances attached to TV set to enjoy multiple contents. The main argument of the Ld. DR, thus, has been that as per the decision of the ‘DCIT vs Data Craft India Limited.’ (supra) since the televisions cannot be treated as computers and hence any assembly attached

to television, i.e. STBs in this case cannot be treated as computers. However, in our view, the STBs are not just attachments to the television. They are essential for the business of the assessee to provide the broadcasting/D2h services offered by the assessee to the consumer's premises. It is part of the setup essential to transmit, decode and send the audio/video signal to the television. These, thus are attached being its part and parcel of the main server system of the operator receive commands, decode them as per programming and transmit to the TV. The mere attachment of STB with television will not be of any use unless it is connected with the main server system. Under the circumstances, even as per the parameters laid down by the Special Bench in the case of 'Data Craft India' (supra), STBs would form part and attachment of the computer systems.

40. Even it is an admitted fact that in the case of CISCO, the matter relating to the depreciation on audio visual conference devices had been restored by the Tribunal to the file of the assessing officer for decision a fresh on the issue as per the observations/guidelines of the tribunal. It is also an admitted fact that the Assessing officer in the set aside proceedings has granted depreciation @ 60% on those Audio-Visual equipment on the analogy that they being attached, form part of the computer systems. However, the sole contention of the Ld. DR in this respect has been that it is not proved that STBs and Audio visual

conference device mentioned in the CISCO's case were similar to the STBs. However the Ld. Counsel for the assessee in this respect has submitted that a letter was written by the Assessing Officer himself to the CISCO for clarification on this point, to which the CISCO vide their letter dated 18.02.2016 replied as under:

“5. Details of Depreciation claimed by us on Assets under Lease with Fastway transmission for AY 2013-14 & AY 2014-15:

The Assets provided on Lease to M/s Fastway Transmission Pvt. Ltd. are “Networking Equipments’ which would fall within the “Computers” Blocks we have accordingly claimed the depreciation @ 60% as applicable to “Computers” Block. The total amount claimed as depreciation in our Tax Returns for AY 2013-14 is INR 573,385,590 & for AY 2014-15 depreciation claim is INR 812,535,709”

The matter therefore stands clarified by the CISCO itself.

41. Even otherwise, may be the audio-visual device as mentioned in the order of the CISCO not be the same equipment i.e STBs , but these would fall in the same category being ‘Information Appliances’. Ld. DR in his arguments has also stressed that STB is information appliance. Under the circumstances, the case of the assessee can not be differentiated from that of CISCO on the issue of rate of depreciation admissible on such ‘Information Appliances’ being treated as part of the computer systems in the case of CISCO.

42. So far as the reliance of the Ld. DR on the decision of the coordinate Cochin Bench of the Tribunal in the case of ACIT vs Kerala Communicators Cable Limited (supra) is concerned, we find that at in that case the assessee had claimed the depreciation at the rate of 80% by claiming them to be energy saving devices. The coordinate Bench held that the STBs did not fall within the definition of energy saving devices. The facts of the said case are therefore distinguishable.

43. Even otherwise, it is the own case of the Department that the STBs has a short life of three years. Referring to the clauses of the Master Lease Agreement with CISCO, as discussed above, it has been vehemently contended by the Department that the lease deed was so devised that the term of lease ends with the life of the equipment; that after the payment of the last installment, the equipment is rendered valueless; That the average life of the STBs is three years only and that is why the lease deed also ends at three years. In this respect, in the written submissions filed on 13.12.2017 by the Department, strong reliance has been placed on the observations of the Assessing officer in the assessment order in this respect, which reads as under:-

“The economic life span of asset namely Set Top Box (STB) is 3 to 4 years. This fact is ascertained

as per the TRAI guideline (page 232, Para 19 & 21 of DPB-II) and the sworn statement recoded u/s 131 on 20.2.2014 of Sh Sushil Thakur S/o Sh. Karam Singh Thakur working as Assistant Manager (accounts) in the assessee company since 2008 (page 143 of DPB-III) wherein he had categorically stated that 'that usage life of STB is approx. 3-4 years only and lease tenure is also 3-4 years'. The tenure as per lease schedule is nearly the same as economic life of the equipment. Thus, lease period is settled in such a way so that the CISCO fully recovers the investment in the asset together with interest thereon within the life span of the asset."

Further, in the written submissions dated 26.2.2018, it has been submitted as under:-

"The physical life of the assets is not relevant here. It is the economic life span of STB which is relevant as per ITAT Special Bench decision in Indus Ind Bank and accounting standard. As per TRAI guideline and sworn statement u/s 131 of Shri Sushil Thakur the economic life span is 3 to 4 years. Even otherwise the assessee has charged depreciation of these assets @ 27.82% (page 176 of DPB 1 on STB / Headends) in its books viz-a-viz charging of depreciation on other assets @ 14%. Thus major part of the life of STB is covered in 3 to 4 years."

Further, the assessing officer has also placed reliance on TRAI notification No. 1-19/2012-B&CS dated 27.3.2013 as reproduced in the assessment order as under:

Sl.	Particulars	Tariff
1.	Rent per month per set top box for the first three years	Rs.32.93 (exclusive of taxes)

2.	After three years from the date of installation	No rent. The set top box shall become the property of the subscriber except smart card/viewing card
3.	Security Deposit (Adjustable)	Rs. 800/-
4.	Amount of Security Deposit refunded on return of the Set	As per attached Table-B
5.	Installation Charges	Nil
6.	Activation charges	Nil
7.	Smart Card/Viewing Card Charges	Nil
8.	Repair and Maintenance Charges for three years from the date of installation	Nil

The Assessing Officer has observed that as per the above tariff plan adopted by the assessee with the consumers, at the end of 3 years from the date of installation of the STB in consumer's premises, the consumer becomes the owner of the property. The assessing officer in this respect has observed that if the assessee was not the owner of the equipment, how can it pass on the ownership to the consumer after 3 years from the date of installation. We have already agreed in this respect with the contention of the Department.

However, as per the TRAI notification also, the life of the STBs has been taken at 3 years. As per the said notification of the TRAI, after 3 years, the consumer becomes the owner of the equipment but at the same time, the service provider (assessee herein) is also absolved of the liability of any warranty / guarantee or maintenance of the equipment, meaning thereby the assessee recovers the rent for 3 years from the consumer and

further the security deposit received from the consumer is forfeited/appropriated to the assessee at the end of 3 years and on the other hand the consumer becomes the owner of the equipment. As observed in the assessment order, at the end of the 3 years, the security deposit so forfeited or appropriated to it is offered as income by the assessee. The equipment thus is deemed to be sold to the consumer. Thus, the agreement of the assessee with consumers in substance is a hire purchase agreement for a term of 3 years. The equipment remains on hire for 3 years with the consumer but is deemed to be sold at the end of 3 years. Here, the interesting point is that when at the end of 3 years, the equipment is sold and the receipt / sale price along with the hire charges received from the consumer during the period already offered to the income tax, how can the deduction of corresponding investment / expenditure incurred for the purchase of such equipment can be postponed beyond such date of sale of equipment? The income under the Income Tax Act is the resultant profit after deduction of the investment / expenditure incurred from the total sale price received / receivable. Therefore, when the total receipt relating to the equipment either in the shape of hire charges or sale price in the shape of security deposit appropriated at the end of 3 years, is accounted for as receipt/income, then the deduction of the corresponding expenditure either in the shape of depreciation or in the shape of revenue expenditure, under no circumstances,

can be delayed or postponed beyond the date of sale of equipment. The expenditure incurred for the purchase of such equipment is required to be set off from the final receipt / sale price by whatever manner either as a deduction on account of depreciation or as revenue expenditure. When the assessee no more remains the owner of the equipment, how can it claim depreciation on the same, which is sine qua non for claim of depreciation. The entire cost incurred by the assessee on the equipment is required to be squared off at the time of sale of equipment. Hence, under the circumstances, the assessee will be entitled either to the deduction of the cost of the equipment either as revenue expenditure and if the same is to be treated as capital asset, then depreciation cannot be postponed beyond the actual life / ownership of the equipment and the assessee will be entitled to the deduction of the written down value of the equipment at the end of 3 years from the sale price received. However, the peculiar facts and circumstances of the case are that it is the own case of the department that the life of the equipment is 3 years and that the asset in the hands of the assessee is a capital asset, then we cannot understand, how can the department press an argument for the grant of depreciation at a lower rate which may be extended beyond the life of the asset. Under these circumstances also, the assessee, in our view, is entitled to the higher rate of depreciation which is commensurate with the life of the asset.

In view of our findings given above, it is held that the assessee is entitled to depreciation @ 60% as applicable to the computers for the year under consideration. This ground is accordingly stands allowed.

44. **Ground No. 6:** Vide Ground No.6 the assessee has contested the confirmation of disallowance of the deduction claimed u/s 35D of the Act of 1/5th of the preliminary expenses amounting to Rs.2.40 crores.

45. The facts of the case are that the assessee had acquired 100% shares in a company 'Cable Network Limited' (CBSL) from its parent company which had owned 100% shares in it namely DIGI Western Network Pvt. Ltd. (DWNPL) in financial year 2010-11 for Rs.1 crores. On 1.8.2010 it had entered into an IRU agreement with CBSL and as per the said agreement it was given fibre links on lease on a route of 2000 kms for a period of five years commencing from 1.4.2010. A payment of Rs.12 crores was made for the same. This payment was treated as preliminary expenses by the assessee and 1/5th of the same was claimed as deduction u/s 35D of the Act. The A.O. denied the same to the assessee for the following reasons:

- 1) CBSL had acquired the user rights of these fibre links from a company HFCL Infotel Ltd.(HITL) and as

per the terms of agreement entered into by CBSL with HITL only user rights of the fibre links could be given by CBSL to any other concern. As per the A.O. the leasing out agreement was, therefore, void ab initio and hence any transaction entered into in pursuance to the same was not a business transaction and the assessee, therefore, could not be claim any benefit out of this transaction.

2) That this was not even normal lease agreement since no service tax had been paid by the assessee which it was bound to pay if it was a lease agreement.

3) That it was only a pay out to CBSL as part of consideration of takeover in the guise of IRU agreement.

4) That even otherwise the payment was not for expansion of the business of the assessee but was only for carrying out the current business since it could be used only own existing cable TV licence.

5) In the books of CBSL the said transaction had been shown as a loan and, therefore, the claim of the assessee was of preliminary expenses, was only an afterthought.

6) Lastly, that even otherwise it did not qualify as a preliminary expense as provided for in section 35D of the Act.

46. The CIT(A) confirmed the disallowance so made by the A.O.

47. Before us, the Ld. counsel for assessee contended that may be the expenses incurred for acquiring lease rights of fibre links did not fall within the definition and scope of preliminary expenses under the provisions of section 35D, however the same were allowable either as business expenses or as depreciation on the leased asset acquired by virtue of this IRU agreement. This contention has been raised before us for the first time. Even the CIT(A) has not gone into this aspect having denied the claim of deduction u/s 35D of the Act only. We, therefore, restore this issue to the CIT(A) to examine all the facts of the case on this issue and thereafter decide the claim in accordance with law.

48. **Ground No. 7.** The Ld. counsel for the assessee has stated at Bar that ground No. 7 is not pressed, hence, the same is dismissed as not pressed.

49. **Ground Nos.8:** Vide Ground No. 8, the assessee has challenged the disallowance of interest expenditure u/s 36(1)(iii) of the Act.

50. Brief facts relating to the issue are that during the course of survey at the business premises of the assessee, a document mentioning transactions between M/s G.S. Majestic and

Municipal Corporation Ludhiana was seized. On being confronted with the same during assessment proceedings, it was submitted by the assessee, that it was working in the rental office owned by M/s G.S Majestic Developers Pvt. Ltd. and an amount of Rs.3.20 crores was given as an advance to the company for booking of corporate office. The A.O. did not accept the contention of the assessee as Rs.2 crores was received back by the assessee company as per ledger account out of the advance stated to be given for booking of corporate office. As the assessee failed to prove the business exigency of this payment made, disallowance of interest @ 14% amounting Rs.28,68,096/- was made u/s 36(1)(iii) of the Act.

51. The CIT(A) confirmed the disallowance so made by the Assessing Officer.

52. Before us, the Ld. counsel for assessee has contended that it was possessed of sufficient own funds for the purpose of making the impugned advance and, therefore, no disallowance u/s 36(1)(iii) of the Act was warranted. It was pointed out that the assessee company had reserves and surplus of Rs.107.36 crores and share capital of Rs.105 crores, while advance given to M/s G.S. Majestic was Rs.3.20 crores only out of which a sum of Rs.2 crores had been

received back. The Ld. counsel for assessee has contended that in the light of the above facts, no disallowance u/s 36(1)(iii) of the Act was warranted. He in this respect has relied on the decision of the Hon'ble Jurisdictional High Court in the case of M/s Bright Enterprises Pvt. Ltd., reported in 381 ITR 160.

53. The Ld. DR, on the other hand, has relied upon the orders of the lower authorities.

54. We have heard the rival contentions. We find merit in the contention of the Ld. counsel for assessee. The Ld. Counsel has demonstrated that there were sufficient own funds available with the assessee company in the form of share capital and reserves to the tune of Rs.105 crores and Rs.107 crores respectively to meet the advance given of Rs.3.20 crores. The issue is now squarely covered by the various decisions of the High Courts as well as of the apex court of the country including that of the Hon'ble Jurisdictional High Court in the case of 'Bright Enterprises Pvt. Ltd Vs. CIT, Jalandhar' (supra), 'CIT Vs. Kapsons Associates' (2016) 381 ITR 204 (P&H) and the latest decision of the Coordinate Bench of the Tribunal in the case of 'ACIT Vs. Janak Global Resources Pvt Ltd' ITA No. 470/Chd/2018 order dated

16.10.2018, holding that that if the assessee is possessed of sufficient own interest free funds to meet the investments / interest free advances, then, under the circumstances, presumption will be that interest free advances / investments have been made by the assessee out of own funds / interest free funds. Reliance in this respect can also be placed on the decision of the Hon'ble Supreme Court in the case of 'Hero Cycles (P) Ltd Vs. CIT' 379 ITR 347 (SC) and also on the latest decision of the Hon'ble Supreme Court in the case of 'CIT (LTU) Vs. Reliance Industries Ltd.' [2019] 410 ITR 466 (SC). Thus, as per the settled law no disallowance u/s 36(1)(iii) of the Act is warranted on this issue. This ground is accordingly allowed in favour of the assessee.

55. **Ground No. 9:-** Ground No. 9 is general in nature and does not require any specific adjudication.

This appeal of the assessee stands partly allowed.

ITA NO. 139/Chd/2019 (A.Y. 2012-13)

56. The assessee in ITA No.139/Chd/2019 has raised the following grounds of appeal:-

1. *That the order dated 29.12.2018 passed u/s 250(6) of the Income Tax Act, 1961 (hereinafter called the "Act") by the Learned Commissioner of Income-Tax (Appeals)-3, Gurgaon is against law and facts on the file in as much as he was not*

justified to uphold the action of the Ld. Assessing Officer in restricting the claim of depreciation on set top boxes at the rate of 15% as against the claimed by the Appellant at the rate of 60% thereby restricting the claim of depreciation by Rs. 18,49,30,878/-.

- 2. That the order dated 29.12.2018 passed u/s 250(6) of the Act by the Learned Commissioner of Income-Tax (Appeals) -3, Gurgaon is against law and facts on the file in as much as he was further not justified to disallow/restrict depreciation amounting to Rs. 91,28,670/- in respect of certain assets which were allegedly not put to use during the relevant period or were allegedly put to use after September, 2011.*
- 3. That the order dated 29.12.2018 passed u/s 250(6) of the Act by the Learned Commissioner of Income-Tax (Appeals) -3, Gurgaon is against law and facts on the file in as much as he was not justified to decide the appeal on the basis of principles of natural justice.*
- 4. That the order dated 29.12.2018 passed u/s 250(6) of the Act by the Learned Commissioner of Income-Tax (Appeals) -3, Gurgaon is against law and facts on the file in as much as he has gravely erred in adjudicating the grounds of appeal relating to the appeal.*
- 5. That the appellant company reserves its rights to raise any additional grounds of appeal.*

57. **Ground No.1** : A perusal of above reproduced ground No.1 reveals that the issue taken in this ground is identical to that has been adjudicated vide ground Nos.2 to 5 of ITA No.547/Chd/2017 as above. The only differentiating fact

pointed out by both the learned representatives of the parties is that in this case the claim of deduction of depreciation @ 60% as against 15% allowed by the A.O. was taken by the assessee during the reassessment proceedings carried out u/s 147 of the Act carried out by the Assessing Officer. The Assessing Officer noticed that the assessee had claimed depreciation on STBs @ 35% i.e. @15% and also further additional depreciation @ 20%. The Assessing Officer after recording reasons show caused the assessee as to why the depreciation on STBs be not restricted to 15% as the assessee was not engaged in the business of manufacturing or production. The assessee however in the return of income filed in response to notice u/s 148 of the Act claimed depreciation @ 60% as allowable on computers. The Assessing officer did not allow the above claim put by the assessee inter alia on the ground that the above claim of higher depreciation cannot be allowed to be taken for the first time in the reassessment proceedings.

58. The Ld. CIT(A) also upheld the above findings of the A.O.

59. Both the lower authorities i.e. the Ld. Assessing Officer as well as the Ld. CIT(A) have in this respect relied upon the decision of the Hon'ble Supreme Court in the case of CIT Vs. Sun Engineering Works Pvt. Ltd. (1992) 198 ITR 297 (SC) to

hold that the proceedings u/s 147 of the Act are for the benefit of the Revenue and not for the benefit of the assessee. The Ld. CIT(A) in this respect has observed that mere fact of the issue u/s 148 of the Act calling for filing of return of income and deeming such return as a return filed u/s 139 of the Act did not entitle the assessee for an extended period of limitation u/s 139(5) of the Act. He observed that the benefit of section 139(5) is not available to an assessee in relation to a return filed pursuant to notice u/s 148 of the Act.

60. We have heard the rival contentions on this issue and also gone through the decision of the Hon'ble Supreme Court in the case of 'CIT Vs. Sun Engineering Works Pvt. Ltd.'(supra) and find that that the Hon'ble Supreme Court in the said case has held that the proceedings under section 147 are for benefit of revenue and are aimed at gathering 'escaped income' of an assessee, and that the same cannot be allowed to be converted as 'revisional' or 'review' of assessment proceedings. That in a reassessment proceeding under section 147, assessee cannot seek a review of concluded item, unconnected with escapement of income for purpose of computation of escaped income. However, we note that in this case, the claim of the assessee is directly related and connected with the issue on which the A.O. has reopened the assessment. The case of the A.O. has been that the

assessee has claimed depreciation at a higher rate i.e. @ 35% as against its entitlement of 15% whereas the assessee in the return filed in response to notice u/s 148 of the Act has claimed the depreciation @ 60%. The very issue of rate of depreciation was the subject matter of the proceedings and under the circumstances, in our view, the assessee had got right to put his stance of application of higher rate on the said issue as against of lower rate proposed by the AO. However, we are of the further view that even the above proposition laid down by the Hon'ble Supreme Court otherwise will not be applicable as such in this case because of the direct statutory provisions on the issue involved of allowability of depreciation. Explanation 5 to section 32(1) Inserted by the Finance Act, 2001, w.e.f. 1-4-2002 reads as under:

“ Explanation 5.—For the removal of doubts, it is hereby declared that the provisions of this sub-section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income;”

As per Section 32 (1) of the Income Tax Act, 1961 (as reproduced in the earlier para of this order) an assessee is entitled to claim of deduction on account of depreciation on tangible as well as intangible assets owned or partly owned by the assessee and used for business purposes at the rate as may be prescribed. Hence, in view of Explanation 5 to section 32(1), the Assessing Officer is duty bound to allow depreciation at the prescribed

rates as admissible to an assessee on the assets irrespective of the fact that the assessee has claimed it or not in the return of income or otherwise. The Assessing Officer, thus, is mandatorily required to allow the depreciation as per prescribed rates and as legally admissible to the assessee especially when the very issue of rate of depreciation is the subject matter of the proceedings irrespective of the fact that whether the assessee has made a claim in that respect or not. Hence the plea that the assessee can not make a claim of higher admissible rate of depreciation is not available to the revenue in view of the express statutory provisions of Explanation 5 to section 32(1) of the **Act**. The Assessing officer is duty bound to apply and allow correct rate of depreciation irrespective of the fact that after allowing such depreciation, the assessed income of the assessee may get reduced from the returned income. Explanation 5 to section 32(1) has been held to be mandatory and prospectively applicable w.e.f. 01.04.2002 through various judicial pronouncements. Reliance in this respect can be placed on the decisions of Kerala High Court in the case of “CIT v. Kerala Electric Lamp Works Ltd.” [2003] 261 ITR 721; Madras High Court in the case of “CIT v. Sree Senhavalli Textiles (P.) Ltd.” [2003] 259 ITR 77; Punjab and Haryana High Court in the case of “Ram Nath Jindal and Jagjiwan Ram v. CIT” [2001] 252 ITR 590; Kolkata Bench of ITAT in “Bhagwati Sponge (P.) Ltd. v. DCIT” [2016] 72 taxmann.com 40 ; “Dilip Kumar Roy v. DCIT” [2011] 11 taxmann.com 107

(Kolkata); “Surat Textile Mills Ltd. v. Income-tax Officer” [2014] 46 taxmann.com 419 (Gujarat); “Sakun Polymers Ltd. v. Joint Commissioner of Income-tax” [2015] 57 taxmann.com 65 (Gujarat) and in the case of “Dr. Mrs. Sudha S. Trivedi Vs ITO” 318 ITR 356 (Mumbai- Tribunal).

61. In the case of ‘Bhagwati Sponge (P.) Ltd.’ (supra), the co-ordinate Kolkata Bench of the tribunal has observed,

“ With regard to the claims made in the revised return, we find that the Learned CITA had not considered the same in view of the fact that the revised return was filed by the assessee beyond the prescribed period u/s 139(5) of the act. The Learned CITA had applied the decision of Goetze India Ltd. supra and accordingly rejected the claim of the assessee. But we find from the last paragraph of the decision of Goetze India Ltd, supra, wherein the Hon'ble Apex Court observed that revised return though filed belatedly could be considered by the Appellate Authority and hence we hold that the assessee is entitled to make its claim by way of revised return.”

It has been further observed,

“when there is a mandate to grant depreciation to the assessee whether or not such claim is made by the assessee in the return in terms of Explanation 5, it would be just and fair that the same mandate would get automatically extended to the claim of additional depreciation also”.

62. The ITAT Chennai Bench in the case of “ITO v. Sri Balaji Sago & Starch Products” [2012] 19 taxmann.com 313/53 SOT

15 where in the assessee was engaged in power generation and claimed depreciation on a newly installed windmill on the basis of WDV method at the rate of 15% and subsequently, when assessee realised its mistake noting that the correct rate of depreciation to which it was entitled to was @ 80%, hence, it filed a letter before Assessing Officer to rectify claim and to provide depreciation at the rate of 80%. The Assessing Officer rejected this claim purportedly following the decision of the Supreme Court in *Goetze (India) Ltd.'s* case [2006] 157 Taxman 1 (SC)/[2006] 284 ITR 323 (SC)/[2006] 204 CTR 182 (SC) by stating that a fresh claim cannot be made by assessee other than by filing a revised return. The claim of the assessee was allowed at the first appeal stage and on appeal by the Revenue the Tribunal held that the assessee was not making a fresh claim before Assessing Authority; In fact, assessee had made a claim for depreciation but rate chosen was not a correct one; thus, judgment of Supreme Court in *Goetze (India) Ltd.'s* case (*supra*) would not apply in that case; it was further held that as per Explanation 5 to section 32(1), depreciation would be allowed whether or not assessee has claimed depreciation in computing total income; therefore, assessing officer was duty bound to allow depreciation computed at correct rate provided under Act. The Tribunal in this respect while relying upon the decisions of the Hon'ble Punjab & Haryana High Court rendered in the case of '*CIT v. Ramco International*' [2011] 332 ITR 306/[2009] 180

Taxman 584 (Punj. & Har.); of Hon'ble Gujarat High Court in the case of "*Chokshi Metal Refinery v. CIT*" [1977] 107 ITR 63 (Guj.) and of Chennai Bench in the case of "*K.K.S.K. Leather Processors (P) Ltd. v ITO*" [2010] 126 ITD 215 has held as under:

" **18.** Regarding the question, whether a claim made by the assessee in the course of assessment proceedings by way of other than filing a revised return, we have to state that exactly similar issue was considered by the Punjab & Haryana High Court in the case of *Ramco International* (*supra*). In that case, the assessee had claimed deduction under sec.80IB. Though the assessee had furnished Form 10CCB and other requisite documents, the Assessing Officer made the assessment without referring to those documents. In first appeal, the Commissioner of Income-tax(Appeals) allowed the claim of the assessee which was the second appeal before the Tribunal. When the matter was again taken before the Hon'ble High Court, their Lord-ships held that as per Form 10CCB filed by the assessee in the assessment proceedings, the claim of deduction made by the assessee was admissible. The court held that the assessee was not making any fresh claim and had duly furnished and submitted the Form for claiming deduction under sec.80IB and in such circumstances, there was no requirement of filing any revised return. **In the present case also, the assessee has made a claim for depreciation on WDV method but the rate chosen was not a correct one. The assessee asked for adopting the correct rate which is in fact, was only a prayer to rectify a mistake apparent on record.** The assessee was not claiming any fresh claim before the assessing authority. Therefore, the judgment of the Hon'ble Supreme Court in the case of *Goetze (India) Ltd.* (*supra*) does not apply to the present case.

19. The above position is fortified by the order of the ITAT, Chennai Bench 'D' rendered in the case of *K.K.S.K. Leather Processors (P.) Ltd.* (*supra*). The Tribunal, after examining the Explanation 5 to sub-sec. (1) of sec.32, held that the provisions of sub-sec.(1) of sec.32 was applied whether or not the assessee has claimed the deduction in

respect of depreciation in computing his total income. The Tribunal held that the **Assessing Officer is duty bound and under obligation to allow the deduction of depreciation as per the provisions of sec.32(1)**. When such a statutory obligation is cast on the assessing authority, it is incumbent on him to apply the correct rate of depreciation, especially in the present case where the option exercised by the assessee is manifestly clear.

20. In the present case, the assessee has not made any fresh claim, as far as depreciation is concerned. It has already made a claim for statutory allowance of depreciation, subject to the mistake occurred in choosing the correct rate. **The ratio of the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) needs to be carefully applied in the matters of statutory allowances available to an assessee. There is a genetic difference in the concept of deduction by way of statutory allowance and deduction by way of other expenditure."**

(emphasis supplied by us)

63. Similarly the co-ordinate Pune Bench of the Tribunal in the case of "Income-tax Officer v. Gajraj Constructions" [2015] 62 taxmann.com 18 has observed as under:

" So, however, even if one were to import the reasoning raised by the learned Departmental representative based on the judgment of the hon'ble Supreme Court, to the present case, yet we do not find that it would debar the assessee from claiming deduction under section 80-IB(10) of the Act on the impugned additional income declared in the return filed in response to notice under section 153A(1)(a) of the Act. In the present case, the claim of deduction under section 80-IB(10) of the Act was made in the return of income originally filed and in the return filed in pursuance to the notice under section 153A(1)(a) of the Act, the claim under section 80-IB(10) of the Act is only enhanced and therefore, it is not a fresh claim. Therefore, in our

view, the judgment of the hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. does not help the Revenue in the present case."

64. Further in the case of "Goetze India Ltd vs CIT" (supra) the issue that was settled by the Hon'ble Supreme Court was limited to the bar on the power of the assessing officer to entertain a claim for deduction otherwise than by filing a revised return , however, the Hon'ble Supreme Court made it clear that it does not impinge on the power of the Income-Tax Appellate Tribunal under section 254 of the Income-tax Act, 1961 as held by the Apex Court in the case of "NTPC Ltd." (supra). Applying the same ratio, the bar, if any, to entertain a counter claim by the assessee as laid down by the hon'ble supreme court in the case of " Sun Engineering" (supra) is on the powers of the Assessing Officer, however, in our humble view, that does not impinge or curtail the Powers of the Tribunal and higher authorities to entertain an Additional/ fresh claim based on the facts on the file in the light of proposition laid down by the hon'ble supreme court in the case of "NTPC Ltd." (supra) and other case laws (supra) as discussed in earlier paras (Para No. 31 & 32 above) of this order.

In view of the above discussion, we hold that the Assessing Officer as well as the Ld. CIT(A) were legally duty bound to consider and entertain the issue raised by the assessee of admissibility of statutory deduction of depreciation at a higher

rate as prescribed and adjudicate upon it. Even there is no bar on the Tribunal in this respect to entertain and adjudicate upon the issue of rate of depreciation despite the fact that the claim relating to admissibility of higher rate of depreciation was made for the first time in the return filed in response to section 148 of the Act.

So far the issue on merits is concerned, in view of our detailed discussion as above on the issue while adjudicating upon the additional ground taken in assessee's appeal bearing ITA NO.547/Chd/2017 and in view of our decision rendered therein and the facts being similar in this appeal, the issue is accordingly decided in favour of the assessee and it is accordingly held that the assessee is entitled to depreciation on the assets in question @ 60%.

65. **Ground No.2:** Vide ground No.2 of this appeal, the assessee has agitated the action of the CIT(A) in confirming the disallowance made by the A.O. in respect of deprecation claimed on the STBs which were not put to use during the year and further in restricting the claim of depreciation at the lower rate in respect of the STBs which were not put to use before September, 2011 on the ground that the same were used for a period less than 180 days. The relevant findings of the CIT(A) on the issue are reproduced as under:

“The AO has made this disallowance on following grounds:-

- (i) With regard to bill of entry of Remotes for Rs.59,36,553/- and Rs.10,89,452/- the appellant could not file any documentary evidence to prove that these were put to use during the year itself and hence depreciation claimed on the same was disallowed.*
- (ii) With regard to bill of entry for purchase of STBs dated 23.09.2011 amounting Rs.1,68,56,293/-, the appellant could not file any documentary evidence to prove that these assets were put to use before September 2011 and therefore depreciation was allowed for a period less than 180 days and not for the complete year as claimed by the appellant.*

During the appellate proceedings, no submission or any evidence to rebut the findings of the AO have been filed. The addition had been done by the AO on the facts of the case as per provisions of the Act. In view of the same, this ground of appeal of the appellant cannot be accepted and hence the addition made by the AO on this account is confirmed.”

66. The Ld. Counsel for the assessee has submitted that though the assets may not be put to use as alleged above during the relevant period, however, the assets were ready to use. As per our observations as noted above, it has been held that the transaction of acquiring of STBs by the assessee was a loan/financial transaction meaning thereby the STBs were purchased by the assessee to put to use in its business. As further observed as above, the STBs are further given to the consumers on hire purchase agreement which are deemed to be sold to the consumers after three years from the date of delivery/installation. Under the circumstances, it can be

safely concluded that the assessee had put the STBs in its business from the date it acquired/purchased the same. In view of this, the assessee is entitled to depreciation irrespective of the date of installation of STBs in the premises of the consumers. This issue is accordingly allowed in favour of the assessee.

67. **Ground Nos.3 to 5:**

The above grounds are general in nature.

In view of our findings given above, this appeal of the assessee stands allowed.

842/Chd/2018 (A.Y. 2014-15):-

68. The assessee in this appeal has taken following grounds of appeal:-

1. *That, the Ld. Commissioner of Income Tax (Appeals)-3, Gurgaon has erred in deciding the case without affording sufficient and reasonable opportunity of being heard.*
2. *That it had been contended before the Ld.CIT(A) that the appeal for earlier year of the same assessee involving same issue i.e. for Asstt. Year 2013-14 was being heard before the Hon'ble Bench of ITAT, Chandigarh Bench, Chandigarh and, as such, it was requested for keeping the appeal in abeyance till the disposal of earlier year's appeal by the ITAT, Chandigarh Bench, Chandigarh and which should have been considered.*
3. *Notwithstanding, the above said ground of appeal, the Ld. CIT(A) has erred in confirming the action of the Assessing Officer in disallowing the deduction on account of*

principal component of lease rental amounting to Rs.63,59,83,743/- as claimed by the assessee in the computation of income and allowing the depreciation u/s 32 of the Act, which was never claimed on the leasehold assets by the Appellant.

4. *That the Ld. CIT(A) has erred in holding that the agreement with M/s CISCO Ltd. was on "financial lease" and not on "operational lease" and has wrongly interpreted the various clauses of the agreement of lease with M/s CISCO Ltd., to hold that it was case of "finance lease" and not an "operational lease" as claimed by us during the course of assessment proceedings.*
5. *That the Ld.CIT(A) has grossly erred in following the judgment of special Bench of ITAT in the case of "IndusInd Bank Ltd" and of the "Asea Brown Boveri Ltd", which has later on been distinguished by number of judicial pronouncements of Hon'ble Supreme Court and Hon'ble High Court and various Benches of the ITAT, wherein, both the above judgments as relied upon by the CIT(A) have been distinguished and not relied upon. Thus, the reliance by the CIT(A) on such Judgments is not proper.*
6. *That the disallowance of lease rental have been made against the facts and circumstances of the case.*
7. *That the Ld. CIT(A) has erred in dismissing the ground of appeal with regard to disallowance of interest component of Rs. 8,21,25,816/- u/s 40(a)(ia).*
8. *That the said disallowance is against the facts and circumstances of the case.*
9. *That the Ld. CIT(A) has erred in confirming the disallowance of Rs.2,40,000/- on account of disallowance u/s 35D of the Act ignoring the fact that in the earlier year's the said deduction have been allowed by the department in the order passed u/s 143(3) for the Assessment ear 2012-13.*

10. *That the Ld. CIT(A) has erred in confirming the disallowance of interest amounting to Rs.80,28,714/- and Rs.20,06,322/- u/s 36(1)(iii) overlooking the fact that there was huge surplus in the shape of share capital and reserves and surplus and as per binding judgment of Hon'ble Supreme Court and Hon'ble Punjab & Haryana High Court, no such disallowance is called for.*

11. *That the Ld. CIT(A) has erred in confirming the disallowance u/s 14A amounting to Rs.63,38,690/- specially, when there was no exempt income and, as such, the disallowance u/s 14A is wholly unjustified.*

12. *That the Appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off."*

69. Apart from the above grounds of appeal, the assessee has taken the following additional grounds of appeal :

"Without prejudice, the assessing officer erred in not allowing depreciation on Set top boxes at the eligible rate of 60%"

70. **Ground Nos.1 to 6** : The issue taken vide ground Nos.1 to 6 as to the allowability of lease rental as revenue expenditure has already been adjudicated in favour of Revenue as per our findings given above while adjudicating ground Nos. 3 to 5 of assessee's appeal in ITA No.547/Chd/2017. Our findings given above on these issues will mutatis mutandis apply to these grounds also.

71. Additional Ground of Appeal:

It was common ground that the above ground is similar to additional ground taken in the appeal of the assessee in ITA NO.547/Chd/2017 and our decision rendered therein will apply mutatis mutandis to this additional ground also. This issue is accordingly decided in favour of the assessee.

72. Ground Nos.7 & 8: Ground Nos.7 and 8 relate to disallowance of the interest component of Rs.8,21,25,816/- under section 40(a)(ia) of the Act for less deduction of TDS. The assessing Officer observed that on the interest component paid by the assessee to the CISCO along with lease rental, the assessee had deducted TDS @ 1% instead of 2% as was required under the provisions of section 194A r.w.s. 194-I of the Act . He therefore made the impugned disallowance u/s 40(a) (ia).

The Ld. CIT(A) has confirmed the additions so made by the AO.

73. Before us, the Ld. Counsel for the assessee has submitted that the Assessing Officer has made a separate addition of Rs.8,21,25,816/- on the interest component on account of non-deduction of TDS. It is submitted that it has been the submission of the assessee before the AO that this interest was part of lease charges claimed u/s 37 of the Act and the assessee had deducted TDS @ 2% on the entire amount of lease charges aggregating to

Rs. 63,59,83,732/- (comprising of lease charges and interest). The assessing Officer in para 4.13(iv) at page 54 of the Assessment Order has observed that TDS has been deducted @ 1% on payment made to CISCO which is factually incorrect whereas the assessee has deducted TDS @ 2% as was stipulated under the relevant provisions of the Act.

This issue, therefore, requires to be factually verified at the end of the Assessing Officer.

Moreover, the issue relating to the alleged lease rental paid by the assessee and claimed as revenue expenditure has already been adjudicated by us as above vide ground Nos. 3 to 5 of ITA No.547/Chd/2017 and it has been held that the said lease rentals in fact were repayment of the loan amount. The assessee, therefore, was not required to deduct the TDS on the principal **component** of the loan amount. The assessee, however, has deducted TDS on the said component also, which under the circumstances, is to be considered as deduction of TDS towards interest component. The issue is accordingly restored to the file of the Assessing Officer for decision a fresh as per our observations made above.

74. **Ground No.9:** The above ground is relating to the disallowance of expenditure claimed u/s 35D of the Act, which is identical to ground No.6 of the assessee's appeal; ITA

No.547/Chd/2017 and our findings and directions given thereupon will apply mutatis mutandis to this ground also.

75. **Ground No. 10:** The above ground is relating to the disallowance of expenditure claimed u/s 36(1)(iii) of the Act, which is identical to ground No.8 of the assessee's appeal; ITA No.547/Chd/2017 and the facts being identical and the assessee being possessed of sufficient funds to meet the advance given, hence, our findings and directions given above on ground No.8 in ITA No.547/Chd/2017 will apply mutatis mutandis to this ground also.

76. **Ground No.11:** Vide ground No.11 the assessee has agitated the confirmation of disallowance made by the AO u/s 14A of the Act in respect of the expenditure incurred for earning of tax exempt income.

The Ld. Counsel for the assessee has submitted that the assessee did not earn any tax exempt income during the year. Hence, no disallowance u/s 14A was warranted.

We find that the issue is now squarely covered by the various decisions of the High Courts in favour of the assessee viz. 'CIT, Faridabad Vs. Lakhani Marketing Inc.' 226 Taxman 45 (P&H), 'CIT Vs. Winsome Textiles' (2009) 319 ITR 204 (P&H),

‘Cheminvest Ltd Vs. ITO’ (2015) 378 ITR 33 (Delhi), ‘Corrtech Energy P. Ltd.’ (2014) 45 Taxman.com 116 (Gujarat High Court) ‘CIT Vs. M/s Shivam Motors (P) Ltd’ (2014) 272 CTR (All) 277. In all the above referred to case laws, the Hon'ble High Courts have been unanimous to hold that no disallowance is attracted u/s 14A of the Act in case the assessee has not earned any income not forming part of the total income. This issue is accordingly decided in favour of the assessee. The disallowance made by the lower authorities on the above issue is ordered to be deleted.

77. **Ground No.12:**

The above ground is general in nature.

78. **140/Chd/2018 (A.Y. 2015-16):-**

The assessee in this appeal has taken following grounds of appeal:-

1. *That order passed u/s 250(6) of the Income Tax Act, 1961 by the Learned Commissioner of Income Tax (Appeals)-3, Gurgaon is against law and facts on the file in as much as he was not justified uphold the action of the Learned Assessing Officer in disallowing the deduction on account of lease rental amounting to Rs. 80,44,97,240/- as claimed by the appellant in the computation of income.*
2. *That the Learned CIT(A) gravely erred in upholding the action of the Learned Assessing Officer in treating the lease agreement between the appellant and CISCO System Capital India Ltd. as a financial lease instead the same being operating lease.*

3. *That the Learned CIT(A) further gravely erred in upholding the action of the Learned Assessing Officer in disallowing a sum of Rs. 2,40,00,000/- claimed on account of the deduction u/s 35D of the Income Tax Act, 1961.*
4. *That he was not justified to uphold the action of the Learned Assessing Officer in making an addition of Rs. 4,21,870/- as alleged unexplained expenditure.*
5. *That he was further not justified to uphold the action of the Learned Assessing Officer in disallowing a sum of Rs. 61,40,984/- made as a disallowance u/s 14A of the Income Tax Act, 1961.*

79. Apart from the above grounds of appeal, the assessee has taken the following additional grounds of appeal :

“Without prejudice, the assessing officer erred in not allowing depreciation on Set top boxes at the eligible rate of 60%”

80. **Ground Nos. 1,2 and Additional Ground:**

Ground Nos. 1, 2 and Additional Ground of this appeal are identical to ground Nos.3 to 5 and Additional Ground in assessee's appeal for assessment year 2013-14 in ITA No.547/Chd/2017, hence our findings given above while adjudicating ground Nos.3 to 5 and additional ground in ITA No.547/Chd/2017 will apply mutatis mutandis to these grounds also.

81. **Ground No.3:**

The above ground of appeal is identical to ground No.6 in ITA NO.547/Chd/2017, hence our findings and directions given above in ITA No.547/Chd/2017 will apply mutatis mutandis to this ground also.

82. **Ground No.4:**

The above ground is not pressed.

83. **Ground No.5:**

This ground relates to disallowance made by the AO u/s 14A of the Act. The assessee admittedly did not earn any tax exempt income during the year. Hence, as per our observations made above while adjudicating ground No.11 of assessee's appeal for A.Y. 2014-15 in ITA No.842/Chd/2018, no disallowance u/s 14A of the Act is warranted. This issue is accordingly allowed in favour of the assessee.

Accordingly, this appeal of the assessee stand partly allowed.

In the result the captioned appeals of the assessee are treated as partly allowed.

Sd/-
(एन. के. सैनी / N.K. SAINI)
उपाध्यक्ष /Vice President
Dated : 06.05.2020

Sd/-
(संजय गर्ग / SANJAY GARG)
न्यायिकसदस्य/ Judicial Member

“rati /आर.के.”

Copy to:

1. The Appellant
2. The Respondent
3. The CIT(A)
4. The CIT
5. The DR

Assistant Registrar,
ITAT, Chandigarh