

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

IT(TP)A No.169/Bang/2014
Assessment year: 2008-09

Texas Instruments (India) Private Limited, Bagmane Tech Park, No.66/3, Adjacent to LRDE, Byrasandra, C V Raman Nagar, Bangalore – 560 093. PAN: AA ACT 5445M	Vs.	The Additional Commissioner of Income Tax, LTU, Bangalore.
APPELLANT		RESPONDENT

IT(TP)A No.149/Bang/2014
Assessment year: 2008-09

The Joint Commissioner of Income Tax, LTU, Bangalore.	Vs.	Texas Instruments (India) Private Limited, Bangalore – 560 093. PAN: AA ACT 5445M
APPELLANT		RESPONDENT

Assessee by	:	Shri Percy Pardiwala, Sr. Counsel
Revenue by	:	Shri Muzafar Hussain, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	08.01.2020
Date of Pronouncement	:	06.03.2020

ORDER

Per N.V. Vasudevan, Vice President

IT(TP)A No.169/Bang/2014 is an appeal by the Assessee while IT(TP)A.No.149/Bang/2014 is an appeal by the Revenue. Both these appeals are directed against the order dated 27.2.2012 of CIT(Appeals), LTU, Bangalore relating to AY 2008-09.

2. We shall first take up the appeal of the Assessee for consideration. Ground No.1 raised by the revenue is general in nature and calls for no specific adjudication. Gr.No.2 raised by the revenue in its appeal and Gr.No.4 & 5 raised by the revenue in its appeal are with reference to determination of Arm's Length Price (ALP) in respect of an international transaction of rendering of Software Development Services by the Assessee to its Associated Enterprise in accordance with Sec.92 of the Income Tax Act, 1961 (Act). At the time of hearing it was brought to our notice by the learned counsel for the Assessee that the issue with regard to determination of ALP has been settled under Mutual Agreement Procedure (MAP) between the Assessee and the revenue and the AO has under rule 44H(4) of the Income Tax rules, 1962 has given effect to the MAP resolution vide proceedings dated 22.2.2016. Hence, the relevant grounds of appeal raised by the Assessee as well as the revenue are dismissed as not requiring adjudication.

3. The next issue raised by the Assessee in its appeal in Gr.No.3.1 (sub grounds 3.1.1 to 3.1.4) is with regard to the action of the revenue authorities in not allowing deduction u/s.80JJAA of the Act amounting to Rs.7,57,22,069/-. The provisions of Sec.80JJAA of the Act, as applicable for AY 2008-09 reads as follows:

“Deduction in respect of employment of new workmen.

80JJAA. (1) Where the gross total income of an assessee, being an Indian company, includes any profits and gains derived from any industrial undertaking engaged in the manufacture or production of article or thing, there shall, subject to the conditions specified in sub-section (2), be allowed a deduction of an amount equal to thirty per cent of additional wages paid to the new regular workmen employed by the assessee in the previous year for three assessment years including the assessment year relevant to the previous year in which such employment is provided.

(2) No deduction under sub-section (1) shall be allowed—

(a) if the industrial undertaking is formed by splitting up or reconstruction of an existing undertaking or amalgamation with another industrial undertaking;

(b) unless the assessee furnishes along with the return of income the report of the accountant, as defined in the *Explanation* below sub-section (2) of section 288 giving such particulars in the report as may be prescribed.

Explanation.—For the purposes of this section, the expressions,—

(i) "additional wages" means the wages paid to the new regular workmen in excess of one hundred workmen employed during the previous year :

Provided that in the case of an existing undertaking, the additional wages shall be *nil* if the increase in the number of regular workmen employed during the year is less than ten per cent of existing number of workmen employed in such undertaking as on the last day of the preceding year;

(ii) "regular workman", does not include—

(a) a casual workman; or

(b) a workman employed through contract labour; or

(c) any other workman employed for a period of less than three hundred days during the previous year;

(iii) "workman" shall have the meaning assigned to it in clause (s) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947)."

4. The first reason assigned by the AO for denying the claim for deduction u/s.80JJAA of the Act was that persons working in software industry cannot be said to be "Workmen" for the purpose of Sec.80JJAA of the Act. According to the AO the definition of workmen for the purpose of Sec.80JJAA was the definition of the term as per Sec.2(s) of the Industrial Disputes Act, 1947 and that definition lays down that "Any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical and supervisory work for hire or reward, but does not include employees employed mainly in a managerial or administrative capacity. According to the AO Software professionals are highly skilled workers and the nature of work performed by them were highly skilled whereas the skilled work contemplated by the definition of workmen in the Industrial Disputes Act, 1947 is ordinary skill and therefore the workmen of the Assessee cannot be considered as "Workmen" for the purpose of Sec.80JJAA of the Act. The AO also noticed that in Assessee's own case for AY 2001-02 and 2002-03, the Tribunal had not accepted the stand of the revenue in this regard but still chose not to follow the decision of the Tribunal as the revenue has not accepted the decision of Tribunal and had preferred appeal to the Hon'ble High Court on this aspect of deduction u/s.80JJAA of the Act. On the question whether the employees employed in software industry can be said to be "Workmen", the Bangalore Bench of ITAT has already settled this issue in Assessee's own case. The Tribunal held that Software Industry has also been notified as Industry for the purpose of Industrial Disputes Act, 1947 by the State of Karnataka and that the employees employed in software development industry render technical

services and not services in the nature of supervisory or management character. In view of the aforesaid decision of the Tribunal, we are of the view that the above reason given by the AO for denying the benefit of deduction u/s.80JJAA of the Act cannot be sustained. In fact the CIT(A) in the impugned order has also not sustained the disallowance of deduction u/s.80JJAA of the Act on this ground and has followed the earlier order of the Tribunal in Assessee's own case.

5. Before we deal with the other surviving reasons assigned by the AO for denying the benefit of deduction u/s.80JJAA of the Act, it is appropriate to recapitulate the conditions that need to be fulfilled for claiming deduction. The conditions that need to be fulfilled by an Assessee to claim benefit of deduction u/s.80JJAA of the Act, are:

- 1) The Assessee should be an Indian Company and the gross total income of the Assessee should include profits and gains derived from any industrial undertaking engaged in the manufacture or production of article or thing. Admittedly this condition is satisfied in the case of the Assessee.
- 2) There are certain prohibition laid down in Sec.80JJAA(2) of the Act and it is not the case of the AO that these prohibitions are applicable in the case of the Assessee.
- 3) The new workmen employed must be a regular workmen and the number of such new workmen employed should be in excess of one hundred workmen employed during the previous year.
- 4) The increase in the number of regular workmen employed during the year should not be less than ten per cent of existing number of workmen employed in such undertaking as on the last day of the preceding year;
- 5) If the above conditions are satisfied then 30% of the additional wages paid to new regular workmen employed by the assessee in the previous year, shall be allowed as deduction for three assessment years including the assessment year relevant to the previous year in which such employment is provided.

6. The following are the details regarding the number of regular workmen and new workmen employed by the Assessee during the FY 2002-03 to 2007-08 relevant to AY 2003-04 to 2008-09:

Details of Number of regular workmen :

Particulars	Number of Regular "Workmen"	Number of new workmen added
As on March, 31, 2003 FY 2002-03(AY 2003-04)	775	170
As on March, 31, 2004 FY 2003-04(AY 2004-05)	846	186
As on March, 31, 2005 FY 2004-05(AY 2005-06)	1048	351
As on March, 31, 2006 FY 2005-06(AY 2006-07)	1,056	211
As on March, 31, 2007 FY 2006-07(AY 2007-08)	1,187	295
As on March, 31, 2008 FY 2007-08(AY 2008-09)	1,105	131

7. The details of the new employees in respect of whom the Assessee claimed deduction u/s.80JJAA of the Act are given at page 176 to 182 of paperbook. From a perusal of the said list and the report of auditor for claiming deduction u/s.80JJA of the Act in Form No.10DA, a copy of which is at pages 80 to 85 of the Assessee's paper book, it can be seen that the deduction was claimed by the Assessee u/s.80JJAA of the Act on salary paid to 287 employees. It is also clear from the said report that the Salary paid to new workmen were nil for the Financial Year ending 31.3.2006 and 31.3.2008. Deduction has been claimed only in respect of wages paid to new regular workmen who were employed during the previous year 1.4.2006 to 31.3.2007. All the 287 employees were new employees who joined during the FY 2006-07, on or after 12.06.2006 and therefore could not have put in service of 300 days or more during the FY 2006-07 relevant to Ay 2007-08. It is undisputed that they worked for 300 days during the previous year relevant to AY 2008-09.

8. The second reason given by the AO for denying the benefit of deduction u/s.80JJAA of the Act, which is the reason that survives for consideration by the Tribunal is according to the AO since the additional wages paid to these 287 employees were not eligible to deduction u/s.80JJAA of the Act because these employees did not work for more than 300 days in FY 2006-07 relevant to AY 2007-08, the wages paid to these employees in AY 2008-09 will also not qualify for deduction u/s.80JJAA of the Act. In other words according to the AO if the condition for grant of deduction u/s.80JJAA of the Act is not satisfied with reference to additional wages paid to new employees in the first year of their employment, then the additional wages paid to such new employees will not allowed in the second and third Assessment Years also. There is a reference in the AO's order that only 236 out of the 287 employees were new employees but these observations in the order of assessment is incorrect and contrary to the report of the Chartered Accountant in Form No.10DA. It is admitted position that in respect of additional wages paid to new employees employed in the previous year relevant to AY 2008-09 was not claimed by the Assessee, as the increase in the number of regular workmen employed during the year was not more than ten per cent of existing number of workmen employed in such undertaking as on the last day of the preceding year. It is also not disputed that these 287 employees worked for 300 days in the previous year relevant to AY 2008-09. The total wages paid to new workmen was Rs.25,24,06,897 and deduction u/s.80JJAA of the Act was claimed by the Assessee at 30% of the above viz., a sum of Rs.7,57,22,069/-.

8.1. On appeal by the Assessee against the order of AO denying deduction u/s.80JJAA of the Act, the CIT(A) endorsed the view of the AO on this aspect of deduction under Sec.80JJAA of the Act. Hence this appeal by the Assessee before the Tribunal.

8.2. The learned counsel for the Assessee brought to our notice the order of the AO for AY 2007-08 in which he has while disallowing the claim for deduction u/s.80JJAA of the Act for that AY has accepted the position that on additional wages paid to new workmen employed during the previous year relevant to AY 2005-06 who have worked more than 300 days during the previous year relevant to AY 2007-08, the Assessee is entitled to deduction u/s.80JJAA of the Act. It was pointed out that the ITAT in the appeal relating to AY 2007-08 in the case of the Assessee in IT(TP)A.No.1032/Bang/2011 order dated 16.6.2017 confirmed the disallowance u/s.80JJAA of the Act only on the basis the increase in the number of regular workmen employed during the year was not more than ten per cent of existing number of workmen employed in such undertaking as on the last day of the preceding year. He relied on the decision of ITAT rendered in the case of Bosch Ltd. Vs. ACIT (2016) 74 Taxmann.com 161 (Bangalore-Trib.) wherein at paragraph 23 of the aforesaid order the Tribunal observed that the deduction u/s.80JJAA of the Act is allowed for three years including the year in which the employment is provided. Hence, in each year it has to be seen that the workmen was employed for at least 300 days during that previous year and that such workmen was not a casual workmen or workmen employed through contract labour. Therefore, if some workmen were employed for a period of less than 300 days in the previous year then no deduction is allowable in respect of payment of wages to such work men in the present year even if such workmen was employed in the preceding year for more than 300 days but in the present year, such workmen was not employed for 300 days or more. It was submitted that by the very same reasoning the fact that in the first year of employment the additional wages paid is not allowed deduction for the reason that the workmen did not work for 300 days or more but if the next two Assessment years, if he works for more than 300 days each, then the deduction u/s.80JJAA of the Act has to be allowed. He also drew our

attention to the insertion of a second proviso to Explanation (ii) to Sec.80JJAA of the Act (which defines additional employee) **by the Finance Act, 2018, w.e.f. 1-4-2019, which reads as follows :**

“Provided further that where an employee is employed during the previous year for a period of less than two hundred and forty days or one hundred and fifty days, as the case may be, but is employed for a period of two hundred and forty days or one hundred and fifty days, as the case may be, in the immediately succeeding year, he shall be deemed to have been employed in the succeeding year and the provisions of this section shall apply accordingly;”

8.3 It was his submission that though the aforesaid amendment is applicable w.e.f 1.4.2019, the aforesaid amendment which is intended to remove hardship to getting benefit of an incentive provision, should be held to be curative in nature in nature and should be held to be retrospective in operation on the principle laid down by the Hon'ble Supreme Court in the case of CIT Vs. Calcutta Export Company (2018) 93 taxmann.com 51(SC). The learned DR relied on the order of the AO. However, the Id. AR submitted that the assessee is claiming benefit of deduction for second year only, as it has accepted the fact that it is not eligible to claim deduction in the first year i.e., AY 2007-08 due to non-fulfilment of condition of 300 days.

9. We have given a very careful consideration to the rival submissions. The only reason given by the AO for denying the benefit of deduction u/s.80JJAA of the Act, which is the reason that survives for consideration by the Tribunal is according to the AO since the additional wages paid to these 287 employees were not eligible to deduction u/s.80JJAA of the Act because these employees did not work for more than 300 days in FY 2006-07 relevant to AY 2007-08, the wages paid to these employees in AY 2008-09 will also not qualify for deduction u/s.80JJAA of the Act. In other words according to the AO if the condition for grant of deduction u/s.80JJAA of the

Act is not satisfied with reference to additional wages paid to new employees in the first year of their employment, then the additional wages paid to such new employees will not allowed in the second and third Assessment Years also. As pointed out by the learned counsel for the Assessee, this approach of the revenue authorities is contrary to the AO's stand on claim for similar deduction u/s.80JJAA of the Act in AY 2007-08. In the order of assessment passed by the AO for AY 2007-08, he has while disallowing the claim for deduction u/s.80JJAA of the Act for that AY, accepted the position that on additional wages paid to new workmen employed during the previous year relevant to AY 2005-06 who have worked more than 300 days during the previous year relevant to AY 2007-08, the Assessee is entitled to deduction u/s.80JJAA of the Act. In the decision rendered in the case of Bosch Ltd. Vs. ACIT (2016) 74 Taxmann.com 161 (Bangalore-Trib.) the Bangalore ITAT at paragraph 23 of the aforesaid order the Tribunal observed that the deduction u/s.80JJAA of the Act is allowed for three years including the year in which the employment is provided. Hence, in each year it has to be seen that the workmen was employed for at least 300 days during that previous year and that such workmen was not a casual workmen or workmen employed through contract labour. Therefore, if some workmen were employed for a period of less than 300 days in the previous year then no deduction is allowable in respect of payment of wages to such work men in the present year even if such workmen was employed in the preceding year for more than 300 days but in the present year, such workmen was not employed for 300 days or more. By the very same reasoning the fact that in the first year of employment the additional wages paid is not allowed deduction for the reason that the workmen did not work for 300 days or more but if the next two Assessment years, if he works for more than 300 days each, then the deduction u/s.80JJAA of the Act has to be allowed. It is not proper to say that if the deduction is refused in the first year of employment of the new

employee then for the next two succeeding Assessment Years also, the benefit of deduction will not be available. Such an approach defeats the very purpose for which deduction u/s.80JJAA of the Act is allowed for three consecutive Assessment years. This aspect has now been clarified in the Finance Act, 2018 by adding a second proviso to the definition of additional employee in Explanation (ii) to Sec.80JJAA of the Act. Even prior to such curative or clarificatory amendment, we are of the view that the claim for deduction u/s.80JJAA of the Act cannot be and ought not to have been disallowed on this ground. We therefore direct that the deduction claimed by the Assessee should be allowed.

10. The next issue that arises for consideration in the appeal by the Assessee is projected in Gr.No.3.2 (Sub-Grounds 3.2.1 to 3.2.9) and the same relates the action of the revenue authorities in disallowing claim of the Assessee for deduction of a sum of Rs.4,42,14,942/- in relation to capital work in progress written off. The facts in this regard are that the Assessee in FY 2006-07 relevant to AY 2007-08 was planning expansion of its business premises and in that regard employed consultants and contractors for planning designing and constructing the new building. However toward end of FY 2006-07 relevant to AY 2007-08, the Assessee decided to abandon the expansion plan and accordingly the entire expenditure incurred towards the expansion of the building premises was written off in the profit and loss account for AY 2007-08. Subsequently, in the previous year relevant to AY 2008-09, certain additional claims were made towards planning, designing, architecture fees amounting to Rs.61,04,942/-. Over and above this the Assessee had to pay damages of Rs.3,81,10,000/- to the contractor in respect of a clause in the agreement between the Assessee and the Contractor, who was identified for the purpose of putting up the business premises for the purpose of expansion.

The relevant clause in the Agreement between the Assessee and the contractor in this regard reads thus:-

Clause (d): [Page-4 of the Agreement between the Assessee and Bagmane Developers Pvt. Ltd.]

“If the Client does not construct one or more structures not included in the scope of the project or does not engage the services of a developer (including the Contractor) to construct and develop one or more structures at the Site that are not included in the scope of the Project on or before the 31st of August, 2009, the client shall pay to the Contractor an amount equal to Rs.3,81,10,000/- (Rupees Three Crores Eighty one Lakhs Ten Thousand only) on the 31st of August, 2009.”

11. In Schedule-K Note No.17 to the Notes to Accounts the claim for deduction of the aforesaid two sums of Rs.61,04,942 and Rs.3,81,10,000/- as follows:-

“The Company was planning expansion of building premises and had made payments in the nature of planning, designing and architecture fees, which was accounted as Capital work-in-progress. The management had decided to call off the expansion plan and hence, the expenditure of Rs.2,82,95,253/- had been written off in the previous year. Further during the year, the management has acknowledged certain additional claims towards such planning, designing and architecture fees amounting to Rs.61,04,942/-, which has been charged off in P & L A/c. The company had also entered into an agreement with a real estate developer (‘the developer’) for construction of building in phases. The terms of the agreement provided for payment of compensation to the developer in the event of non-construction of the subsequent phases of the building within the stipulated time. The management of the company has decided to call off the expansion plan and accordingly, provided for Rs.3,81,10,000/- representing compensation payable to the developer for non-construction of the subsequent phase of the building.”

12. The Assessee's claim for deduction was not accepted by the AO for the reason that the expenditure in question was a capital expenditure and therefore cannot be allowed as deduction. The CIT(A) confirmed the order of the AO. Aggrieved by the order of CIT(A), the Assessee is in appeal before the Tribunal.

13. Before the Tribunal, it is not disputed by the parties that identical issue came up for consideration before this Tribunal in Assessee's case for AY 2007-08 and this tribunal upheld the orders of revenue authorities denying the claim of the Assessee for deduction. The following were the relevant observations of the Tribunal:-

“8. Ground no. 3 challenges the addition of capital work in progress written off during the year amounting to Rs. 28,295,253/-. It was submitted that this assessee-company was planning expansion of building premises and the payments have been made towards planning, designing and architecture fees which are accounted and shown as capital work progress and the management has decided to call off the expansion plan hence the expenditure incurred on the expansion of building had claimed the revenue expenditure which was disallowed by the AO. Being aggrieved, the appellant is before us. The Id. counsel relied upon the decision of Hon'ble Delhi High Court in case of Indo Rama Synthetics (I) Ltd. Vs CIT (333 ITR 18) and the decision of Hon'ble Calcutta High Court in case of Binani Cement Ltd. Vs CIT [2015] 60 taxmann.com 384 and the decision of the coordinate bench ITAT, Mumbai in case of DCIT Vs Mukund Ltd. in ITA No. 2708/Mum/2009 and also decision of High Court of Bombay in case of CIT Vs Idea Cellular Ltd. [2016] 76 taxmann.com 77 in support of the proposition that any capital expenditure incurred in respect of abandoned project should be allowed as a deduction.

9. We heard the rival submissions and perused the material on record. The submission of the Id. counsel cannot be accepted for the simple reason that the decision relied upon by the Id. counsel relates to the expenditure which is in the nature of revenue incurred with the object of enhancing the profitability

and the efficiency of the existing business. Whereas in the present case it is an expenditure incurred to bring into an existence the capital asset. This cannot be allowed as a revenue expenditure. Infact, in the case relied by the Hon'ble counsel for the assessee the decision of Hon'ble Delhi High Court in case of Indo Rama Synthetics (I) Ltd. Vs CIT (supra) The Hon'ble High Court observed vide para 18 as under.

"Once it is accepted as a fact that the assignment given to the said consultants was for the purpose of improving operational efficiencies and was not to incur any enduring benefit in capital field but to carry on the existing business more efficiently and profitably, the irresistible conclusion which follows is that such expenditure was allowable as business expenditure. [See CIT v. Praga Tools Ltd. [1986] 157 ITR 282 (AP) and CIT v. Crompton Engineering Co. Ltd. [2000] 242 ITR 317 (Mad)1."

Therefore, it follows that the expenditure incurred in the revenue field for expansion of an existing unit is allowable, whereas the expenditure on the capital account, the same cannot be allowed as a revenue expenditure. Hence the ground no. 3 of appeal filed by the assessee is dismissed."

14. The learned counsel for the Assessee argued that the expenditure in question cannot be regarded as capital expenditure and was incidental to carrying on business of the Assessee and was revenue expenditure. According to him had the project been completed the expenditure would have been capitalized and depreciation claimed on the capitalized value of assets but since the project was abandoned, the expenditure had to be regarded as revenue expenditure. The following decisions were cited in support of the claim so made, viz., *Empire Jute Mills Ltd. Vs. CIT* 124 ITR 1 (SC); *CIT Vs. ACC Ltd.* 172 ITR 257(SC); *ACIT Vs. Sulej Industries Ltd.* 94 TTJ 108 (Delhi ITAT); *Excel Industries Ltd. Vs. Dy.CIT* 86 TTJ 840 (Mumbai ITAT); *CIT Vs. Graphite India Ltd.* 221 ITR 862(Calcutta). In particular it was argued that in so far as the damages of Rs.3,81,10,000/- is concerned, the claim was not engaging the services of the contractor in

future for other contracts and that cannot be regarded as having any nexus with the capital work in progress written off in the books of accounts of the Assessee and therefore to that extent the claim for deduction ought to have been allowed by the revenue authorities. The learned DR relied on the order of the revenue authorities and the decision of the tribunal rendered on identical issue in AY 2007-08.

15. We have given a careful consideration to the rival submissions and are of the view that since identical claim has been considered capital expenditure by the tribunal in AY 2007-08, we find no reason to take a contrary view. The nature of the capital work in progress written off being identical, respectfully following the decision of the Tribunal, we uphold the orders of the revenue authorities. We also find all the case laws cited by the learned counsel for the Assessee before us were dealt with and distinguished by the AO. We are also of the view that the damages of Rs.3,81,10,000/- though was in connection with a claim for not engaging the services of the contractor in future for other contracts cannot be regarded as having no nexus with the capital work in progress written off in the books of accounts of the Assessee and therefore to that extent the claim for deduction and cannot be allowed as deduction and were rightly held to be capital expenditure by the revenue authorities. We however find that in Gr.No.3.2.9 the Assessee has submitted that a sum of Rs.61,04,942/- was disallowed u/s.40(a)(i)/(ia) of the Act and that sum is also part of the sum of Rs.4,42,14,942 which was disallowed by the AO as capital expenditure and therefore to the extent of Rs.61,04,942/- there has been a double addition made by the revenue authorities. We are of the view that it would be just and appropriate to direct the AO to look into this aspect while giving effect to the decision of the Tribunal after affording opportunity of being heard to the Assessee and if the contention is found to be correct, allow relief to the Assessee. Thus the relevant grounds of

appeal being Gr.NO.3.2.1 to 3.2.8 are dismissed while Gr.No.3.2.9 is treated as allowed for statistical purpose.

16. The next issue that arises for consideration is disallowance of additional depreciation claimed by the Assessee. The grievance in this regard is projected by the Assessee in Gr.No.3.3 (sub-grounds 3.3.1 to 3.3.4) of the grounds of appeal filed before the Tribunal. The facts with regard to the claim of additional depreciation made by the Assessee are that the Assessee claimed additional depreciation of Rs.1,61,35,457/- on additions to Plant & Machinery during the previous year. The details of the Plant & Machinery on which additional depreciation was claimed by the Assessee is given as **Annexure-1 to this order**.

17. The AO on perusal of the details of Plant and Machinery on which additional depreciation was claimed by the Assessee was of the view that the description of the items of plant and machinery on which additional depreciation was claimed by the Assessee were such that those items cannot be regarded as Plant and Machinery but were to be regarded as "Office Equipment" on which additional depreciation cannot be claimed u/s.32(1)(iia) of the Act. Besides the above, the AO was also of the view that the Assessee was in the business of Software Development and only computer systems can be considered as Plant & Machinery in the case of the Assessee. He was also of the view that the plant and machinery on which additional depreciation is claimed should be used in manufacture of article or thing and since the Assessee was only a manufacturer of software, the aforesaid items which were claimed as Plant & Machinery, even if were to be regarded as Plant & Machinery, additional depreciation cannot be allowed because these items were not used by the Assessee in the manufacture of computer software. In response to a query by the AO as above, the Assessee submitted that any appliance capable of being installed and used in any place where people work or gather, and desire to

communicate, such items cannot be construed as office appliance and in this regard placed reliance on the decision of Hon'ble Punjab & Haryana High Court in the case of *CIT Vs. Punjab Wireless Systems Ltd. 296 ITR 489(P & H)*. The Assessee further gave a list of assets on which additional depreciation has been claimed, which we have annexed as annexure-2 to this order. The AO however proceeded to hold that the definition of Plant as given in Sec.43(3) of the Act is an inclusive definition and the word "Plant" has been defined to include ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business or profession but does not include tea bushes or livestock or buildings or furniture and fittings. The AO laid emphasis on the words "used for the purpose of business" in the definition of Plant and concluded that the Assessee failed to show how the items of assets on which additional depreciation was claimed was used for the purpose of business of Manufacture of Software by the Assessee. He also held that the assets in question were not used in manufacture of software and the condition laid down in Sec.32(1)(iia) of the Act for claiming depreciation is that the assets on which depreciation is claimed should be used for the manufacture or production of an article or thing. The AO accordingly denied the claim of the Assessee for additional depreciation. The CIT(A) confirmed the order of the AO as there was no other facts brought to notice by the Assessee before CIT(A). Aggrieved by the order of the CIT(A), the Assessee is in appeal before the Tribunal.

18. We have heard the submissions of the learned counsel for the Assessee and the learned DR. The provisions of Sec.32(1)(iia) of the Act based on which the additional depreciation was claimed by the Assessee reads thus:

“Sec.32 Depreciation.

(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:

“(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to twenty per cent. of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):”

19. A bare reading of the aforesaid provisions shows that the new machinery or plant should be used **by an assessee** engaged in the business of manufacture or production of any article or thing and the new machinery or plant need not be used in manufacture or production of any article or thing. The learned counsel has before us relied on the decision of the Hon'ble Madras High Court in the case of *CIT Vs. VTM Ltd.*³¹⁹ *ITR 336 (Madras)* wherein the assessee-company was engaged in the business of manufacture of textile goods. During the relevant assessment year, it had set up a wind mill for generation of power and claimed additional depreciation thereon under section 32(1)(*iia*). The

Assessing Officer disallowed the claim on the ground that the assessee was engaged only in the manufacture of textile goods and the setting up of a wind mill had absolutely no connection with the manufacture of textile goods. However, the Commissioner (Appeals) as well as the Tribunal allowed the assessee's claim of additional depreciation. On appeal to the High Court, the Hon'ble High Court held that for application of section 32(1)(iia) what is required to be satisfied in order to claim the additional depreciation is that a new machinery or plant, which has been set up, should have been acquired and installed after 31-3-2002 by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The said provision does not state that the setting up of a new machinery or plant, which was acquired and installed after 31-3-2002 should have any operational connectivity to the article or thing that was already being manufactured by the assessee. Therefore, the contention that the setting up of a windmill had nothing to do with the manufacture of textile goods was totally not germane to the specific provision contained in section 32(1)(iia). In the light of the aforesaid decision, we are of the view that one of the basis on which the revenue authorities disallowed the claim of the Assessee for disallowance of additional depreciation cannot be sustained.

20. As far as the question whether the assets on which the Assessee claimed additional depreciation should be regarded as "Plant" or "Office Equipment", we do not find sufficient material before the revenue authorities to come to a conclusion one way or the other. The learned counsel for the Assessee submitted in the course of his arguments that the assets on which additional depreciation is claimed were used for testing process while designing semi-conductors which was also a business which the Assessee was carrying on. These details have not been brought on record by the Assessee before the lower authorities nor before us. He also

placed reliance on the decision of the Hon'ble Bombay High Court in the case of *CIT Vs. IBM World Trade Corpn. (1981) 130 ITR 739 (Bombay)* wherein the Hon'ble Bombay High Court held the expression "office equipment" used in Sec.33 should be construed in context of appliances which are generally used in office as an aid for proper function of office and that EA machines, data processing machines installation and operation of which is on scientific basis, and which has their roles to play cannot be equated with office appliances and therefore such machines are "Plant" and not "Office appliances". As we have already observed there is complete lack of details to decide whether the assets in question are "Plant" or "Office equipment" in the absence of the role these assets perform and purpose for which these assets are used by the Assessee. We therefore set aside the order of CIT(A) on this limited issue of determining whether the assets on which additional depreciation is claimed by the Assessee can be regarded as Plant. The Assessee is directed to furnish the details and description to the AO in this regard, who shall decide the issue afresh in accordance with law, after affording Assessee opportunity of being heard. In the event of the AO coming to the conclusion that the assets in question are in the nature of plant, the claim for additional depreciation should be allowed. With these observations we allow the relevant grounds of appeal for statistical purpose.

21. The other ground of appeal in the Assessee's appeal with regard to levy of interest u/s.234B and 234D are purely consequential and the AO is directed to give consequential relief.

22. In the result, appeal by the Assessee is treated as partly allowed.

23. Now we shall take up the appeal of the revenue for consideration. Gr.No.1 and 6 are general in nature and calls for no specific adjudication. Gr.No.4 & 5 are with regard determination of ALP in respect of an

international transaction between the Assessee and it's AE. The issue has already been settled between the Assessee and the Revenue in Mutual Agreement Procedure (MAP) under the Double Taxation Avoidance Agreement between India and USA. Hence, these grounds are dismissed as infructuous. Gr.No.2 & 3 alone remain to be adjudicated.

24. As far as Gr.No.2 raised by the revenue is concerned, the same relates to the action of the CIT(A) in holding that payment of lease rental on finance lease of cars will not attract Tax Deduction at Source (TDS) provisions and thereby deleting the addition made by the AO u/s.40(a)(i) & 40(a)(ia) of the Act. The facts with regard to this ground of appeal are that the Assessee obtained certain vehicles on lease on a finance lease arrangement. On payment of lease rents under finance lease arrangement of Rs.7,87,93,536/-, the Assessee did not deduct tax at source. It was the plea of the Assessee that the payment in question was not in the nature of "Rent" within the meaning of the term u/s.194-I of the Act and therefore no tax was deducted at source at the time of making payment to the finance company. The AO however held that the payment was in the nature of a payment to a contractor for execution of a work and the Assessee ought to have deducted tax at source u/s.194-C of the Act. Since no tax was deducted at source, the AO disallowed deduction of a sum of Rs.7,87,93,536/- by invoking the provisions of Sec.40(a)(ia) of the Act.

25. On appeal by the Assessee the CIT(A) held that provisions of Sec.194-C of the Act were not applicable to payment of lease rentals as the payment cannot be considered as payment to a contractor for carrying out any "Work". Explanation III.to Sec.194C of the Act defines Work for the purpose of Sec.194C of the Act as follows:

"For the purposes of this section, the expression "work" shall also include—

- (a) advertising;
- (b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;
- (c) carriage of goods and passengers by any mode of transport other than by railways;
- (d) catering.”

26. The CIT(A) relied on decision of Delhi bench of the tribunal in *ACIT Vs Sanjay Kumar (2011) 15 Taxmann.com 230 (Delhi)* and Mumbai Bench of ITAT in the case of *Bhail Bulk Carriers Vs. ITO (2011) 20 Taxmann.com 87 (Mum)* in which it has been held that the payment made by the assessee for taking cranes and ships on lease on time basis, did not constitute payment with regard to 'works contract' as defined in sec. 194C and hence the assessee was not required to deduct tax at source under this action.

27. Aggrieved by the order of the CIT(A) the revenue has raised Gr.No.2 before the Tribunal. The learned DR relied on the order of the AO and further submitted that the applicability of provisions of Sec.194-I of the Act has not been considered by the CIT(A). We are of the view that the AO made the addition only on the basis of provisions of Sec.194C of the Act and he did not invoke the provisions of Sec.194I of the Act. As far as provisions of Sec.194C of the Act is concerned, we are of the view that the CIT(A) has rightly come to the conclusion that payment of lease rentals under a finance lease will not attract the provisions of Sec.194C of the Act. We find no grounds to interfere with the order of the CIT(A). Accordingly Gr.No.2 raised by the revenue is dismissed.

28. Gr.No.3 raised by the revenue is with regard to the grievance of the revenue in treating amount paid towards automation software as revenue

expenditure. The facts with regard to this ground of appeal are that the Assessee claimed deduction of a sum of Rs.135,52,51,594/- while computing income from business under the head "Data Automation software Expenses". The AO called upon the Assessee to explain the nature of the aforesaid expenditure. The Assessee vide its letter dated 28.7.2011 explained to the AO that the software in question were "Electronic Design Automation"(EDA) which are used by the Assessee's designers for product design and verification. The Assessee pointed out that EDA software license is acquired by the Texas Instruments Inc. USA under a global agreement from vendors of such software like Synopsis, Cadence, Mathwork, Magma, Rational etc., and the Assessee is allowed to use such software and billed on the basis of actual hours the Assessee uses the software. The Assessee therefore submitted that the expenditure was a payment for license to use software and the Assessee never acquired any right or interest in the software and therefore the payment made for right to use such software was purely revenue expenditure and should be allowed as deduction. The AO however did not allow the claim of the Assessee by concluding that the expenditure was capital expenditure and therefore only depreciation at 60% would be allowed and not the entire expenditure. The following were the relevant observations of the AO:-

"5.3 The assessee's submission is carefully considered. The Data Automation Software is a computer software which is being used by the assessee for designing its products. Electronic design automation (EDA) is a category of software tools for designing electronic systems such as printed circuit boards and integrated circuits. The tools work together in a design flow that chip designers use to design and analyze entire semiconductor chips. The expenditure on computer software under the head. "Data Automation Software expenses" is necessarily an expenditure which is required to be capitalized by the assessee. Assessee's relies on the Hon'ble Supreme court decision in the case of Empire Jute Co Ltd Vs CIT [124 ITR 1] is misplaced since the

decision was given by the Hon'ble Court in a different set of facts and circumstances. The assessee has not stated or clarified in its submission dated 28.07.2011 as to how it has applied the judgment in the case of Empire Jute Co Ltd in its case.

5.4 The computer software expenses have been held to be capital in nature by the Hon'ble Rajasthan High Court in the case of CIT Vs Arawali Construction Co. (P) Ltd. (259 ITR 30). The Hon'ble Court held as under:

"The fact on record is that the payment of Rs 1,38,360/- was not made as consultancy fee to Hindustan Computers Ltd_ in fact, the payment was made for outright sale of 'computer software' which is used as technique in mining operations. The finding of the Commissioner (Appeals) was that the acquisition of software cannot be treated to be an asset of endurable nature. If the programme is used in one mining to another mining operation, why it should not be treated as capital asset and expenditure on that, capital expenditure. Considering these facts and decision of their Lordships and later decision of the Bombay High Court, in our view, the acquisition of technical know-how is a capital expenditure, therefore, the assessing officer has rightly treated the expenditure on acquiring the computer software as expenditure of capital nature and rightly allowed depreciation as per rules."

5.5 Reliance is also placed on the decision in the case of Amway India Enterprises Vs. DCIT (ITAT, Del-Special Bench) [111 ITD 112]. In this case the Hon'ble ITAT held that computer software was tangible asset eligible for depreciation @ 60%.

In the result, the Automation software expenses of Rs. 135,52,51,594/- are held to be capital in nature. The amount as claimed in P 86 L a/c is disallowed and added back. Instead, the assessee is allowed depreciation on the amount @ 60%.

[Addition Rs. 54,21,00,637/-]"

29. On appeal by the Assessee, the CIT(A) deleted the addition made by the AO holding that the Assessee acquired on purchase by the Assessee and as per the Agreement with the owner of the software the Assessee had only a right to use the software and that the software was an

enabling tool in the business of the Assessee and therefore the expenditure question was revenue expenditure. Aggrieved by the order of the CIT(A), the revenue is in appeal before the Tribunal.

30. We have heard the rival submissions. A copy of the group cost allocation Agreement dated 24.3.2006 is at page -406 of Assessee's paper book. The agreement is between Texas Instruments Inc., USA and the Assessee. The Agreement refers to the US parent company of the Assessee having acquired license to use EDA tools from the vendors and the right of the Assessee to use the same and the fact that billing will be done on the Assessee on the basis of actual use of the software by the Assessee. It is thus clear that the Assessee had acquired no right or interest whatsoever in the EDA tools and had only a right to use the software. It is not the case of the revenue that the EDA tools was not connected to the business of the Assessee. In such circumstances, we are of the view that the deduction was rightly allowed by the CIT(A) as revenue expenditure. We find no grounds to interfere with the order of the CIT(A) and dismiss Gr.No.2 raised by the revenue.

31. In the result, appeal by the revenue is dismissed while the appeal by the Assessee is partly allowed.

Pronounced in the open court on this 6th day of March, 2020.

Sd/-

(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 6th March, 2020.

/Desai S Murthy /

Copy to:

- | | | | |
|-------------------------|------------|---------------|-----------|
| 1. Assessee | 2. Revenue | 3. CIT | 4. CIT(A) |
| 5. DR, ITAT, Bangalore. | | 6. Guard file | |

By order

Assistant Registrar
ITAT, Bangalore.

ANNEXURE-I TO ORDER

TEXAS INSTRUMENTS (INDIA) PRIVATE LIMITED
ASSESSMENT YEAR 2008-09

DETAILS OF ASSETS ON WHICH ADDITIONAL DEPRECIATION HAS BEEN CLAIMED DURING ASSESSMENT
YEAR 2008-09

Description	Date put to use	Net Amount	
		>= 180 days	< 180 days
PN9500B System; all basic system	29-Feb-08	-	3,612,243
ROH-SMA100A With options	31-Mar-08	-	1,114,346
SML O3 1090.3000.13 Signal generator	31-Mar-08	-	664,224
E5052B - 10 MHz to 7 GHz Signal Source A	31-Mar-08	-	3,526,569
Variable 3120	31-Mar-08	-	722,759
Bus Doctor MC (Memory Card)	31-Mar-08	-	483,097
SYS-2722A Audio Analyser	31-Mar-08	-	1,305,643
MSO4034-Mixed Signal Oscilloscope	31-Mar-08	-	404,430
Security Systems for Chennai	31-Mar-08	-	943,875
Stulz Precision Chilled water unit-ASD15	31-May-07	68,225	-
Stulz Precision Chilled water unit-ASD15	31-May-07	68,225	-
Stulz Precision Chilled water unit-ASD15	31-May-07	68,225	-
Stulz Precision Chilled water unit-ASD15	31-May-07	68,225	-
Stulz Precision Chilled water unit-ASD15	31-Jul-07	68,225	-
Emerson UPS- SL#200204H1C054-58-301095	30-Sep-07	1,147,500	-
UPS	30-Sep-07	1,027,395	-
ACCESS CONTROL FOR WIPRO SITE	31-Oct-07	-	142,662
ZXL-M8F-SDP - ZeBu-XL-SDP 8F Module	31-Jul-07	61,875	-
STANDALONE GSS6560 TO ULTS-ADSAX	31-May-07	20,887	-
Model 2505 Gain Phase Analyzer	30-Sep-07	7,476	-
200kVA Galaxy Model PW UPS system	31-Jul-07	557,099	-
SIGNAL GENERATOR - 9 KHZ, 3.3 GHz, AM/FM/PHM	31-May-07	282,329	-
Total Plant and Machinery for additional depreciation		42,851,151	75,652,270
Total of Plant and Machinery previously used added		3,422,485	31,880,766
TOTAL PLANT AND MACHINERY		46,273,636	107,533,036