IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'B', NEW DELHI

BEFORE SHRI P.K. BANSAL, VICE PRESIDENT
&
SHRI AMIT SHUKLA, ACCOUNTANT MEMBER

ITA No. 3661/Del/2013
A.Y. 2009-10

DCIT (LTU) Circle-3(1) New Delhi	**vs**.	Caparo Engineering India P.Ltd. 101-104, 1st floor, Naurang House 21 KG Marg New Delhi PAN: AABCC7862N
(Appellant)		**(Respondent)**

Appellant by	Sh. Anshu Prakash, Sr.DR
Respondent by	Sh. P.C.Yadav, Adv.
Date of Hearing	20th September, 2017
Date of Pronouncement	22nd September, 2017

ORDER

PER P.K. BANSAL, VICE PRESIDENT

This appeal has been filed by the Revenue against the order of Ld. CIT(A)-VI, New Delhi dated 26.02.2013 for the Assessment Year 2009-10 by taking the following effective grounds of appeal.

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in holding that Rule 8D cannot be invoked in the case of the assessee and in directing the A.O. to delete the addition of Rs.3,55,234/- made u/s 14A r.w.Rule 8D.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in treating UPS as computer peripherals and in directing the A.O. to allow depreciation @ 60% thereon.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in holding that non compete right is an intangible capital asset for the purpose of section 32(1)(ii) of the Income Tax Act and in directing the A.O. to treat the same as intangible capital asset and to allow depreciation thereon."

2. Ground no.1 relate to deletion of addition of Rs.3,55,234/- made u/s 14A r.w. Rule 8D.

2.1. After hearing rival submissions and going through the orders of the tax authorities below, we noted that the Ld. CIT(A) has deleted the said disallowance by holding as under.

"4.4 Now adverting to the case of the appellant company, it is seen that the Assessing Officer has made the disallowance of expenditure u/s 14A read with rule 80 of the IT Rules without recording any reason for doing so. It is observed that the measure investment during the relevant assessment year has been made by the appellant company in the shares of Caparo Vehicles Product India Pvt. Ltd. of Rs.44,47,40,250/-. This investment has been made by the appellant company from the funds received from Caparo India Ltd. U.K. which was received by the appellant company as advance as against share application money on 15.06.2007 and 29.06.2007 of Rs. 22,53,00,000/- and Rs. 18,00,00,000/- respectively. Further investment was made by the appellant company in the shares of Caparao Vehicle Product India P.Ltd. of Rs.16,34,10,500/- on 5.11.2007 out of the sale proceeds of Prudential ICICI Mutual Funds on 5.11.2007 of Rs.6.5 crores. Thus, no interest expenditure has been incurred by the appellant company for its investments. Even the A.O. in his assessment order has not allocated any interest expenditure for disallowances under Rule 8D r.w.s. 14A of the I.T.Act. The A.O. has also not allocated any direct expenses incurred for earning of the exempt income. No

cogent material/evidence has been brought on record by the A.O. to attribute any indirect expenditure which was relatable for the earning of the exempt income. It is also seen that the A.O. has applied Rule 8D r.w.s. 14A in the case of the appellant company without controverting the claim of the appellant company of not incurring any expenditure for the earning of exempt income. Therefore, in my humble opinion, the A.O. has erred in applying Rule 8D in the case of appellant company. Reliance in this regard is placed on the decision of Hon'ble ITAT, Delhi in the case of M/s Jindal Photo Ltd. vs. DCIT (2011-TIOL-653-ITAT-Del) wherein it was held that Rule 8D cannot be invoked in the case of an assessee without recording any satisfaction about the incorrectness of the claim of that assessee. On these facts and circumstances of the case, the A.O. is directed to delete the addition made u/s 14A r.w.rule 8D of the Act of Rs.3,55,234/-.

2.2. The Ld. DR even though vehemently relied on the order of the Assessing Officer to prove that the satisfaction has duly been recorded, but in our opinion the satisfaction u/s 14A before applying Rule 8D had to be recorded with reference to the books of accounts that the assessee has not made the claim correctly. We noted the Assessing Officer has not recorded any satisfaction in this manner, and a similar view has also been taken by the Panaji Bench of the Tribunal in the case of Sesa Goa Ltd. vs. JCIT (2013) 60 SOT 121 (Panaji) following the decision of Mumbai High Court in the case of Godrej & Boyce Mfg. Co. Ltd. vs. DCIT & Another 328 ITR 81 (Mum.) which was subsequently confirmed by Hon'ble Supreme Court, we noted that no contrary decision was brought to our notice. Therefore we confirm the order of Ld. CIT(A) deleting the said disallowance.

3. Ground no.2 relate to allowing of depreciation @ 60% on UPS by the Ld. CIT(A).

3.1. After hearing rival submissions we noted that this issue is duly covered by the decision of Jurisdictional High Court in the case of CIT vs. BSES Yamuna Powers Ltd. (2010) –TIOL-63-HC-Delhi. No contrary decision of the Jurisdictional High Court or Supreme Court was brought to our knowledge by the Ld.D.R. We therefore dismiss ground no.2.

4. Ground no.3 relate to the claim of depreciation u/s 32(1)(ii) and treating the non computation right as intangible capital assets.

4.1. The Ld.DR before us in this regard relied on the decision of Hon'ble Jurisdictional High Court in ITA no. 492/2012 in the case of Sharp Business System vs. CIT-III, in which the Hon'ble High Court vide order dt.05.11.2012 in respect of claim of depreciation, on the consideration paid towards right to compete, held as under.

"12. It is, therefore, apparent that the ruling in Techno Shares & Stocks Ltd. (supra) was concerned with an extremely limited controversy, i.e. depreciability of stock exchange membership. This Court observes that such nature was held to be akin to a license because it enable the member, for the duration of the membership, to access the Stock Exchange. Undoubtedly, it conferred a business advantage and was an asset which and was clearly an intangible asset. The question here, however, is whether a non-compete right of the kind acquired by the assessee against L&T for seven years amounts to a depreciable intangible asset. As discussed earlier, each of the species of rights spelt-out in Section 32(1)(ii), i.e. know-how, patent, copyright, trademark, license or franchise as or any other right of a similar kind which confers a business or commercial or any other business or commercial right of

similar nature has to be "intangible asset". The nature of these rights mentioned clearly spell-out an element of exclusivity which ensures to the assessee as a sequel to the ownership. In other words, but for the ownership of the intellectual property or know-how or license or franchise, it would be unable to either access the advantage or assert the right and the nature of the right mentioned or spelt-out in the provision as against the world at large or in legal parlance "in rem". However, in the case of a non-competition agreement or covenant, the advantage is a restricted one, in point of time. It does not necessarily – and not in the facts of this case, confer any exclusive right to carry-on the primary business activity. The right can be asserted in the present instance only against L&T and in a sense, the right "in personam". Indeed, the 7 years period spelt-out by the non-competing covenant brings the advantage within the public policy embedded in Section 27 of the Contract Act, which enjoins a contract in restraint of trade would otherwise be void. Another way of looking at the issue is whether such rights can be treated or transferred – a proposition fully supported by the controlling object clause, i.e. intangible asset. Every species of right spelt-out expressly by the Statute – i.e. of the intellectual property right and other advantages such as know-how, franchise, license etc. and even those considered by the Courts, such as goodwill can be said to be alienable. Such is not the case with an agreement not to compete which is purely personal. As a consequence, it is held that the contentions of the assessee are without merit; this question too is answered against the appellant and in favour of the Revenue.

4.2. Ld. AR on the other hand vehemently contended that against the said order of the Delhi High Court an SLP has been admitted by the Hon'ble Supreme Court in SLP CC No.19939/2015 which was listed last on 19.9.2017 and admitted on 16.11.2007. The Ld.AR before us also referred to a chart mentioning therein that the facts of this case are different from the facts in the case of Sharp Business Systems. This chart gives the following reasons.

Facts of Sharp	Facts of assessee
Assessee i.e. Sharp and the seller of non-compete rights i.e. L&T were associated with each other by virtue of a joint venture.	Assessee and the seller i.e. M/s STIPL were completely separate entities not associated with each others.
In that joint venture M/s L&T was having only 26% of shares (see page 9 of judgement)	No such fact is there
The presence of L&T was not completely eliminated and it was fee to produce the goods similar to the goods, restricted under the non compete agreement See para 10 of the judgment	The seller was completely eliminated from the market and its affiliates were also debarred from manufacturing and trading in the goods for which non compete fee was paid See page Clause A-B-E Affiliates (defined at page no.50)
The rights transferred under the non compete agreement were not exclusive rights See page 13 of the decision	The rights transferred under the non compete agreement were exclusively as is evident from the fact that not only the seller but also its affilaiates were debarred from carrying out the same business.

5. After hearing the rival submissions, we do agree that each decision has to be applied on the facts and context therein. In the case of the assessee, we noted that the terms and conditions of the agreement has not been examined by A.O. to the right perspective and has not been compared with the facts and circumstances in the case of Sharp Business Systems(supra). We, therefore, in the interest of justice set aside the order of Ld. CIT(A) and restore this issue to the file of the Assessing Officer with the direction that the Assessing Officer shall redecide this issue afresh after comparing the facts in the case of the assessee with the case of Delhi High

Court in Sharp Business Systems (supra) in accordance with law and give clear finding how the case of assessee is covered or not covered by the decision of Delhi High Court in the case of Sharp Business Systems. We may point out that in the case of the assessee there was no joint venture between the person paying the non competition fee and the person receiving the non competition fee. Both the parties were entirely outsiders and the time of the continuity of the agreement was also 10 years not 07 years. We also direct the Assessing Officer that while considering the decision of Delhi High Court he should also consider the decision of Hon'ble Supreme Court in the case of Nut Steel Equipments vs. Collector of Central Excise reported in AIR 988 SC 631 as in our opinion this decision will also have bearing in the case of the assessee. The A.O. is also directed to give proper and sufficient opportunity to the assessee to produce all the relevant evidences and the case laws on which he may rely in this regard. Thus in the result the appeal filed by the revenue is allowed for statistical purposes.

6. In the result the appeal filed by the Revenue stands allowed for statistical purposes.

Pronounced in the Open Court on 22.09.2017.

Sd/- Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

(P.K. BANSAL)
VICE PRESIDENT

Dated: the 22nd September, 2017

**** gmv***

Copy forwarded to: -

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

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By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches
New Delhi