आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1507/PUN/2012

निर्धारण वर्ष / Assessment Year : 2004-05

Johnson Matthey Chemicals India Pvt. Ltd.,
Plot No.6, MIDC Industrial Estate,
Taloja, Dist. Raigad,
Maharashtra – 410208 …. अपीलार्थी/Appellant

PAN: AABCJ1620M

Vs.

The Dy. Commissioner of Income Tax,
Panvel Circle, Panvel …. प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.2036/PUN/2012

निर्धारण वर्ष / Assessment Year : 2005-06

Johnson Matthey Chemicals India Pvt. Ltd.,
Plot No.6, MIDC Industrial Estate,
Taloja, Dist. Raigad,
Maharashtra – 410208 …. अपीलार्थी/Appellant

PAN: AABCJ1620M

Vs.

The Addl. Commissioner of Income Tax,
Panvel Circle, Panvel …. प्रत्यर्थी / Respondent

Assessee by : Shri Percy J. Pardiwala & Ms. Vasanti Patel
Revenue by : Shri Girish Dave, Spl. Counsel to DR &
Shri Asish Kannali

सुनवाई की तारीख / **Date of Hearing : 14.09.2017**		घोषणा की तारीख / **Date of Pronouncement: 12.12.2017**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

Both the appeals filed by the assessee are against separate orders of CIT(A)-I, Thane, dated 21.03.2012 & 23.08.2012 relating to assessment years 2004-05 and 2005-06 against respective orders passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. These two appeals filed by the assessee on similar issues were heard together and are being disposed of by this consolidated order for the sake of convenience. The facts and issues in both the appeals are same. However, to adjudicate the issues, we refer to the facts in ITA No.1507/PUN/2012, relating to assessment year 2004-05.

3. The assessee in ITA No.1507/PUN/2012, relating to assessment year 2004-05 has raised the following grounds of appeal:-

> *On the facts and in the circumstances of the case and in law, the learned CIT(A) has :*
>
> ***Depreciation on various assets purchased for lumpsum consideration***
>
> *1. Erred in disallowing depreciation amounting to Rs.27,14,07,414 (which included enhancement of Rs.23,83,55,826) claimed by the Appellant on the values of following tangible and intangible assets determined as per the valuation report obtained from an independent valuer by holding that depreciation is not allowable in respect of assets acquired under slump sale arrangement since the Appellant has acquired an undertaking and not individual assets per-se*

Sr. No.	***Nature of Assets***	***Depreciation (Rs.)***	***Total Depreciation(Rs.)***
1	*Plant and Machinery*	*1,76,03,091*	
2	*Building*	*6,12,797*	
3	*Furniture, Fixtures and Equipments*	*2,09,144*	
4	*Computers*	*9,96,222*	
5	*Trade-marks, Patents and know-how*	*21,89,34,572*	
	Total (A)		*23,83,55,826*

6	*Non compete*	*81,45,129*	
7	*Goodwill*	*2,49,06,459*	
	Total (B)		*3,30,51,588*
	Total (A+B)		***27,14,07,414***

Power of enhancement

2. Erred in enhancing the income of the Appellant by Rs.23,83,55,826 by disallowing the depreciation on the assets (stated at serial number 1 to 5 above) acquired under slump sale arrangement without appreciating the fact that the depreciation on the said assets is not disputed by the Assessing Officer in the assessment order.

Not following Rule of consistency

3. Erred in enhancing the income of the Appellant by disallowing depreciation on intangible and other assets amounting to Rs.23,83,55,826 :

a. Without following the rule of consistency which states that the legal position accepted in preceding assessment years in case of an Assessee should be followed if there is no change in the facts in the subsequent assessment year; and

b. Without appreciating that the Assessing Officer had allowed depreciation on the said assets in the AY 2003-04 which was the first year of claim of depreciation and no such allowance was disputed by the Income-tax authorities in the AY 2003-04.

Disallowance of depreciation once the assets has entered the block of assets

4. Erred in holding that for determining the written down value of an asset under Section 43(6) of the Act, the Assessing Officer has to determine the actual cost of the asset every year even when the asset forms part of the block assets.

5. Without prejudice to the above, erred in holding that the actual cost of assets forming part of the block of asset can be changed in subsequent years based on reanalysis and reappraisal of the same facts in the subsequent assessment years.

Disallowance of depreciation on incorrect appreciation of facts

6. Without prejudice to Ground No.1, 2, 3, 4 and 5 above, erred in disallowing depreciation on trademark, patents and know-how on the ground that Appellant has not purchased any knowhow from ICI India Limited and has not used any knowhow for the purpose of its business.

7. Without prejudice to Ground No.1, 2, 3, 4 and 5 above, erred in concluding that the allocation of Rs.94.35 Crores to trade-marks, patents and know-how out of the purchase consideration of Rs.153.18 crores has not been done in a fair and reasonable manner.

Value of land at Taloja and Panki

8. Without prejudice to the above, erred in holding that the value of land at Panki division is Rs.174.36 crores and the value of land at Taloja is Rs.13 crores.

Value of trade-marks, patents and know-how

9. Erred in ignoring the fact that the valuation of trade-marks, patents and know-how has been undertaken by an independent valuer in a fair and reasonable manner and that the value of trade-marks, patents and know-how would not be affected by the value of land.

Depreciation on Non compete

10. Without prejudice to Ground No.1 above, erred in upholding the disallowance of depreciation amounting to Rs.81,45,129 on non-compete payment on the contention that non-compete payment is not in the nature of "any other business or commercial rights of similar nature" as stated in the definition of intangible assets under Section 32(1) (ii) of the Act.

Depreciation on Goodwill

11. Without prejudice to Ground 1 above, erred in upholding the disallowance of depreciation on goodwill amounting to Rs.2,49,06,459 on the contention that goodwill is not in the nature of "any other business or commercial rights of similar nature" as stated in the definition of intangible assets under Section 32(1) (ii) of the Act.

Expenses pertaining to increase in share capital

12. Erred in upholding the disallowance of Rs.603,900 being the expenditure, on filing fees and stamp duty paid to the Registrar of companies, claimed by the Appellant under section 35D of the Act.

13. Without prejudice to the above, erred in not allowing deduction under section 37(1) of the Act on expenditure on filing fees and stamp duty paid to the Registrar of companies.

Initiation of penalty under section 271(1) (c) of the Act

14. The learned CIT(A) has erred in holding that the Appellant has submitted wrong particulars of income and hence penalty proceedings are required to be initiated.

4. Briefly, in the facts of the case, the assessee for the year under consideration had furnished the return of income declaring total loss of Rs.16,93,18,730/-. The assessee was engaged in manufacture and sale of catalysts. The Assessing Officer noted that during assessment year 2003-04 i.e. preceding year, the assessee had acquired goodwill of Rs.10,73,30,000/- from I.C.I. India Ltd. at the time of acquisition of catalysts business. Further, the assessee had entered into non-compete agreement with I.C.I. India Ltd. to

restrain the latter from carrying on the business in similar trade for period of three years. Sum of Rs.3,51,00,000/- was paid by the assessee under this non-compete agreement. The assessee had claimed depreciation for the year on both the above items, on the ground that these were the capital assets. The Assessing Officer further noted that in assessment order for assessment year 2003-04, the claim of assessee was rejected i.e. depreciation claim on both goodwill and non-compete. The assessee was in appeal before the CIT(A). For the year under consideration, the assessee had claimed depreciation on goodwill of Rs.1,49,06,459/- and on non-compete fees of Rs.81,45,129/- both @ 25%. The Assessing Officer show caused the assessee as to why depreciation on goodwill and non-compete fees should not be disallowed for the year under consideration. The reply of the assessee is reproduced under para 3.3 at page 2 of the assessment order. The assessee sought comparison of goodwill with trademark, patents, copyrights, license and franchise. The Assessing Officer rejected the same and held that goodwill was notional asset, which had no wear and tear. Accordingly, the Assessing Officer worked out the disallowance on the same i.e. depreciation on goodwill at Rs.1,49,06,459/- and deprecation on non-compete at Rs.81,45,129/-, totaling Rs.2,30,51,588/-. Further, the Assessing Officer also noted variation in the opening WDV of both goodwill and non-compete. However, since the depreciation was neither allowed in earlier year nor in the year under consideration, variation of opening WDV was not considered by the Assessing Officer.

5. The CIT(A) after considering the reply of assessee noted that the assessee had purchased catalysts business from I.C.I. India Ltd. as going concern vide Business Transfer Agreement (hereinafter referred to as 'BTA')

dated 02.12.2002, wherein the agreement did not specify any value for individual assets. Further, the agreement also does not mention about any payment made for acquisition of goodwill. The CIT(A) observed that when entire business was taken over by the assessee as going concern with all the assets and liabilities, there would remain no competition from the seller i.e. I.C.I. India Ltd. Thus, the payment of non-compete fees at Rs.3.51 crores was nothing but part of composite price paid for acquisition of entire business of I.C.I. India Ltd. and the same needed to be clubbed with total slump price of Rs.153.18 crores. It was further observed that without any explicit payment for goodwill as per BTA and payment towards non-compete fees, which had no business expediency, where the concern was acquired as a whole, clearly indicated the motive of assessee to evade tax, which was not permissible under law. Reliance in this regard was placed on the ratio laid down by the Hon'ble High Court of Madras in Indo Tech Electric Co. Vs. DCIT (2011) 237 CTR 227 (Mad). The CIT(A) thus, held that the assessee was not entitled to the claim of depreciation on goodwill and non-compete fees. Even if it was presumed for the sake of argument, that the assessee had incurred any cost for acquisition of goodwill, this also, it was held to be not eligible for claim of depreciation on goodwill, since the same was not specifically mentioned in the list of intangible assets under section 32(1)(ii) of the Act, which are know-how, patents, copyrights, trademark, licenses, franchises, etc. Further, the same was also not covered by the expression "any other business or commercial rights of similar nature". Thus, the findings of the Assessing Officer in this regard were upheld. Similarly, non-compete fees was held to be not intangible asset eligible for depreciation under section 32(1)(ii) of the Act. The assessee had relied on various decisions which were individually taken up by the CIT(A) and it was held that the ratio laid down by the same were not

applicable to the issue in hand. The CIT(A) placed reliance on various decisions to hold that non-compete fees was not 'any other business or commercial rights of similar nature'. Further, reliance was placed on the Mumbai Bench of Tribunal in R.G. Keswani Vs. ACIT (2009) 120 TTJ 1081 (Mum), wherein it was held that goodwill was not an intangible asset within the meaning of section 32(1)(ii) of the Act and hence, depreciation thereon was not allowable. In respect of non-compete fees, it was observed by the CIT(A) that the same was not capital expenditure and hence, no spread over was permissible.

6. The CIT(A) further issued notice of enhancement to the assessee under section 251 of the Act. The CIT(A) was of the view that the claim of depreciation on know-how, trademark and patents was incorrectly made by the assessee and was allowed by the Assessing Officer since it was neither owned nor used by the assessee and cost of acquisition of intangible assets was also incorrectly taken for the purpose of depreciation. The CIT(A) issued show cause notice to the assessee in this regard, which is reproduced under para 5.1 at page 23 of the appellate order. The CIT(A) show caused that sum of Rs.21,93,02,947/- for assessment year 2004-05 and Rs.17,18,28,318/- for assessment year 2005-06 were claimed as depreciation on know-how, trademark and patents and the claim was allowed by the Assessing Officer. The CIT(A) observed that know-how in question was not owned by the assessee in as much as the same was not purchased as per BTA between the assessee and I.C.I. India Ltd. Further, there was no material available on record to show that the said know-how had been used for the purpose of assessee's business. The CIT(A) also found that the actual cost of intangible assets was not correctly shown in as much as no value to the land at Panki

and Taloja had been allocated out of purchase consideration paid as per BTA. Furthermore, allocation of 90% of total value of intangibles to know-how was done without any justifiable reasons. The CIT(A) thus, was of the view that depreciation on know-how was wrongly allowed and he intended to enhance the assessment of income for assessment years 2004-05 and 2005-06 and the assessee was asked to make submissions.

7. The assessee explained that for the year under appeal, the assessee had calculated depreciation on WDV as on 01.04.2003 in accordance with provisions of section 32(1)(ii) r.w.s. 43(6)(c) of the Act. The facts regarding the actual cost of assets classified under the head 'know-how' were the same as for assessment year 2003-04 in which the Assessing Officer had allowed the depreciation on actual cost of know-how after considering all the material produced before him. The closing WDV of know-how calculated by the Department in the first year had to be accepted in subsequent year. The next plea was that the Assessing Officer had no power under section 43(1) r.w.s. 43(6)(b) of the Act to determine WDV for each assessment year. Reliance in this regard was placed on various decisions. The assessee also furnished complete details of the BTA and also explained allocation of no value to the land at Taloja and Panki, since they were never transferred by I.C.I. India Ltd. to the assessee and hence, nil value. What was transferred was only right to use the land as per the agreement of October, 2002 between HLL, ICI and the assessee. Further, the land at Panki was taken on lease by ICI India Ltd. from Kanpur Development Authority and the same was not valued; the land admeasuring 27.5280 acres only was used by ICI India Ltd. for manufacturing business of the assessee, as per the BTA.

8. The CIT(A) first considered the basic aspects of incorporation of the assessee and purchase of Indian catalyst business of ICI India Ltd. by the assessee for consideration of 19 million pounds, equivalent to Rs.153.18 crores. The said business was purchased as going concern in slump sale transaction without assigning any value to the individual items of assets. He referred to the valuation report of M/s. Mehta and Padamsey Surveyors Pvt. Ltd., who were asked to determine the value of tangible assets of business purchased. In their report, the Valuer valued the tangible assets of PCEO Division (Taloja) at Rs.27.49 crores i.e. Rs.18.91 crores as working capital and Rs.8.55 crores as value of fixed assets. The balance amount of Rs.125.68 crores out of Rs.153 crores paid to ICI India Ltd. was considered as value of intangible assets. The CIT(A) noted that the assessee then appointed another Valuer Ernst & Young Pvt. Ltd. and asked them to determine and allocate sum of Rs.125.68 crores towards cost of various intangibles purchased. The tabulated details are reproduced at page 29 of the appellate order. The CIT(A) noted that the assessee accordingly, claimed depreciation in assessment year 2003-04 on the value of goodwill and non-compete fees @ 25% for both Syngas and PCEO Division, on the value as assigned by the Valuer to the said assets. The CIT(A) further noted that with regard to tangible assets of Syngas Division, which was valued at Rs.17.08 crores, the amount was categorized as value of right to purchase Panki assets on nominal value and no depreciation was claimed. The claim of depreciation on non-compete fees and goodwill was rejected by the Assessing Officer and with regard to other assets including Rs.94.34 crores being value assigned to trademark, patents and know-how, the depreciation was allowed by the Assessing Officer. For the year under appeal, sum of Rs.21,93,02,947/- was allowed as depreciation on trademark, patents and know-how. The CIT(A)

was of the view that depreciation under section 32 of the Act is to be allowed if the capital asset is owned by the assessee and further that the same has been used for the purpose of business of assessee. Only on satisfaction of two conditions, depreciation is to be allowed on the amount of actual cost of capital asset and at the rate specified in IT Rules. Thus, to avail depreciation, capital asset should be owned by the assessee and should have been used for the purpose of business and then the depreciation is to be allowed on the amount of actual cost of assets.

9. The CIT(A) first took up the know-how of Syngas division, Panki which as per him, was neither purchased nor owned by the assessee. The CIT(A) noted that know-how of business was claimed to have been purchased as part of assets of Indian business purchased from ICI India Ltd., as going concern, for consolidated consideration of Rs.153.18 crores as per the terms of BTA. There was however, nothing mentioned in BTA to indicate that know-how of Indian business was specifically sold by ICI India Ltd. to the assessee. The actual cost of know-how was thus, not ascertainable from the terms of BTA. The consolidated purchase price was Rs.153.18 crores, which was allocated to various assets including know-how. The CIT(A) further noted that out of total purchase price of Rs.153.18 crores paid by the assessee, sum of Rs.83.59 crores had been allocated to the value of know-how of Syngas Division, Panki itself. This amount of Rs.83.59 crores was considered by the assessee as actual cost of know-how of Syngas Division and depreciation was claimed. The CIT(A) thereafter, referred to different terms and conditions of BTA, which are reproduced at pages 32 to 34 of the appellate order. The conclusion of the CIT(A) was that the assessee had purchased certain assets of Indian business of ICI India Ltd. as per the said terms and conditions of

BTA other than Panki activities and excluded assets. The CIT(A) further observed as under:-

> *"6.4.2 ……Panki activities is defined as those activities involved in the manufacture of products in Panki and excluded assets are defined as Excluded contracts, Panki site, Panki employees and Panki assets. Panki assets means all plant, machinery, equipment, computer and communications hardware, loose tools, fixtures, fittings, furniture and vehicles located at the Panki site; the leasehold and licensed properties comprising the Panki site, together with all buildings thereon; the Retailed permits; the Contracts in respect of the Panki site relating to the supply of utilities, the supply of consumables (including stores and spare parts) and the maintenance of the items referred to in paragraph (a) above; loans to employees; stocks of consumables, stores and spare parts.*
>
> *6.4.3 It is, thus further clear that all assets of Indian business were not sold by the ICI to the appellant. As per terms of the BTA all assets of Syngas division i.e. Panki such as all plant and machinery; land, contracts, employees including manufacturing activity were specifically excluded from sale and hence were not transferred. Moreover, there is nothing mentioned in the BTA even to suggest that "knowhow" of Syngas division (PANKI) was segregated from the category of 'Excluded Assets' as defined in the BTA and then that "knowhow" was separately sold by the ICI to the appellant. Therefore, it is evident from the terms of the BTA that Panki business along with all its assets and manufacturing activities was not purchased by the appellant. Interestingly, the appellant itself has relied upon the above referred clauses of the BTA in support of its claim that accordingly the Panki leasehold land was not transferred to it and hence, no valuation of the land was required to be done. Consequently the appellant cannot be said to have purchased know-how of Panki business without purchasing Panki assets and activities. Hence, I hold that the appellant has not acquired any know-how, patents etc. of Panki Business.*
>
> *6.4.4 The fact that know-how, patents etc. of Panki Business were not purchased is also established from the terms and conditions of another agreement entered into by the appellant with ICI dated 2.12.02 which is called 'Agreement for the toll conversion of products' (TCA)."*

10. The CIT(A) then, referred to the covenants of Agreement for the toll conversion of products (in short 'TCA') and observed as under:-

> *"6.4.5 It is thus, also clear from the terms and condition of the TCA as reproduced above that ICI shall manufacture products for & on behalf and deliver the same to the appellant at its Panki site and all operating cost of manufacturing incurred by the ICI in Panki shall be reimbursed by the appellant to the ICI. The terms and conditions of the TCA, thus, prove that even after signing of BTA, Syngas division (Panki) and its assets including manufacturing activities are still owned by the ICI and not by the appellant. If the appellant was the owner of Syngas division (Panki), there would have been no need for the appellant to enter into Toll Conversion Agreement with ICI and pay ICI huge charges as operating cost for manufacturing of its products in its own plant.*

6.4.6 Another interesting feature of TCA is that it provides appellant a right to purchase all Panki assets including leasehold rights in the Panki land at a nominal price of Rs.1,00,000/- only a later date as and when option to purchase these assets is exercised by the appellant as provided in the TCA. These terms and conditions of TCA between the appellant and ICI thus clearly establish the fact that the appellant has not purchased Panki assets. It has only acquired a right to purchase Panki business along with its assets and that these assets will be purchased by the appellant only when option to purchase these assets is exercised by the appellant as provided in TCA. Since option to purchase Panki business as mentioned in TCA has not yet been exercised by the appellant, it can be said that Panki assets have not been yet been purchased by the appellant and thus the appellant cannot be regarded as the owner of any of the Panki assets including the know-how.

6.4.7 It is also seen that tangibles assets of Syngas division at Panki have been valued at Rs.17,09,40,489 (Bldg. Rs.2,69,23,388/-, plant and machinery 13,88,60,034/-, Furniture & Fixture 31,66,867/-, Data processing equipment 1,99,220/-). The amount of Rs.17,09,40,489/- has been shown by the appellant as the value of right to purchase Panki assets. Since these assets have been not yet been purchased, the appellant itself has not claimed depreciation on this amount of Rs.17,09,40,489/- for the reason that these assets are not owned by it. The material available on record also reveals that the appellant has submitted time and again that the depreciation on the tangibles assets worth Rs.17.09 Cr. of Syngas division (Panki) has not been claimed because such assets are not owned by the appellant. Tangible and intangible assets are integral and inseparable parts of any business, particularly when the business is purchased as a going concern like in the present case. When the appellant itself admits that tangible assets of Syngas division (Panki) have not been purchased and are not owned by it, then how it can be claimed that intangible assets of the same business being know-how, patents etc. have been purchased and are owned by the appellant, particularly when as per BTA all Panki business assets, Panki activities which are defined as all activities relating to manufacturing product at Panki, employees, contracts and all other assets have been specifically excluded from sale as per BTA and there is nothing in the BTA to suggest that know-how, patents etc. were not part of excluded Assets as defined in BTA. Therefore, I am of the considered view that like tangible assets, intangible assets of Syngas division, Panki have not been purchased and therefore, consideration if any paid for value of intangibles, is required to be clubbed as part of value of right to purchase Syngas division assets at Rs.17,09,40,489/-.

6.4.8 <u>It is, therefore, conclusively established that assets of Syngas division, Panki including its know-how, patents etc. were not purchased by the appellant and hence it is not the owner of these assets.</u> Similarly, <u>it is noticed that no patent or technology claimed to have been acquired in the PCEO division</u>; Taloja is registered in the name of the appellant. There is no other material also to show that appellant has purchased or the <u>ICI has transferred any know-how, patents etc. to the appellant for its Taloja Business.</u> The appellant thus cannot be said to have purchased any know-how/patent from ICI and therefore, cannot be considered as the owner of any patent or knowhow of the PCEO division, Taloja as well."

(underline provided by us for emphasis)

11. The second aspect which was considered by the CIT(A) under para 6.5 was that the assessee has failed to file any evidence to show that know-how,

patents, trademark, etc. had been used for the purpose of business. The case of CIT(A) in this regard was that since the assessee was not new in the line of business of manufacturing of catalyst, wherein the parent company of the assessee was a speciality chemical company with its core focus on precious metal, catalyst and fine chemicals. The CIT(A) noted that Johnson Matthey had operation in 34 countries and its turnover for the year ending 31.03.2002 was 4830 million pounds, wherein it was global leader in this line of business and controlled major market share of global catalyst business. The CIT(A) was of the view that the business was acquired by the group globally primarily with a view to increase its market share and not for the purpose of acquiring any know-how, patents, trademark, etc. from ICI India Ltd. and accordingly, no know-how, patents, trademark, etc. of ICI India Ltd. were used by the assessee for the purpose of its business, was the conclusion of the CIT(A). Reference was made to clauses 14 and 15 of the agreement titled as 'Technology License' and the CIT(A) noted that the products at Panki site were being manufactured by ICI India Ltd. for the assessee using technical information, know-how and brand name owned by the assessee and not by using the same purchased or acquired from ICI India Ltd. The explanation of assessee that know-how license to ICI India Ltd. as per the TCA was first purchased from ICI India Ltd. and then given back to ICI India Ltd. for the purpose of manufacturing of its products, was not accepted by the CIT(A). It was reiterated by the CIT(A) that the assets of Syngas Division, Panki were excluded from the purview of BTA and hence, were neither sold by ICI India Ltd. nor purchased by the assessee. Further, there was nothing mentioned in BTA to suggest that intangible assets were segregated and were not part of excluded assets as defined in BTA. Further, there was nothing to indicate that know-how, etc. was separately sold by ICI India Ltd. to the assessee, as no

consideration of its sale for transfer of technology or know-how by the ICI India Ltd. to the assessee had been mentioned in BTA. The CIT(A) thus, held that the assessee was neither the owner of know-how, patents, trademark, as there was no evidence to prove that these intangible assets were actually acquired, particularly in Syngas Division, Panki nor the same have been used by the assessee for the purpose of business. Hence, the assessee was held to be not entitled for depreciation in respect of know-how, patents, trademark, etc. The CIT(A) also observed that actual cost of intangible assets was not correctly shown vis-à-vis defects in the valuation report. After referring to the valuation report of Ernst & Young Pvt. Ltd., dated 25.04.2003, the CIT(A) held that it was clear that the assessee had acquired the land at Panki site, but had not ascribed any value to it and in the absence of fair value of the land, deprecation charges, etc. were not quantifiable. The CIT(A) held the claim of assessee was not as per law. In view thereof, the CIT(A) held that figure of Rs.125.68 crores did not really represent the correct total value of intangibles of business, as the value of most valuable assets such as land at Panki and Taloja had not been considered and only an amount of Rs.27.49 crores being the value of building, plant & machinery and computers of PCEO Division, Taloja had been deducted from purchase price of Rs.153.18 crores. The contention of assessee that leasehold rights for the land at Taloja had been purchased directly from HLL for Rs.6.73 crores and not from ICI India Ltd. and hence, no part of purchase consideration of Rs.153.18 crores was required to be allocated towards the value of Taloja land, as per the CIT(A), was found to be not correct. The CIT(A) further observed as under:-

> *"6.7.4 …..I find that the catalyst business in Taloja was earlier carried on by another company Hindustan Level Ltd. and was called as nickel catalyst business of HLL. This business was sold by HLL to ICI in December 2001 for a consideration of Rs.21 crores. The same business was later sold by ICI to appellant in December, 2002 and it was renamed as PCEO division by the appellant. The total value of tangible assets of PCEO division was estimated at about Rs.8 crores in December, 02. Since same tangible assets were sold*

by the HLL to ICI in 2001, value of identifiable assets sold by HLL to ICI in 2001 could not have been more than Rs.8 cr. Whereas the business was purchased by the ICI from HLL for Rs.21 crores. It is thus clear that excess amount of Rs.13 crores was paid by ICI to HLL over and above the value of tangible assets on account of value of lease rights of Taloja land. In lieu of consideration paid for land, name of ICI was included in the records of MIDC as sub-tenant of the land in Taloja as is evident from para (g) of Deed of Assignment dt. 09.01.2009. In the meanwhile, before lease rights of Taloja land could be assigned in favour of the ICI by the owner of the land MIDC, the business was sold by ICI to the appellant in December, 2002 and now the name of the appellant was included as sub-tenant of the land area of 23,956 sq. mtrs. covered by the catalyst business in Taloja. If no consideration had been received by HLL from ICI and by ICI from the assessee for land, the HLL and subsequently ICI, would not have agreed for inclusion of the name of the appellant as sub-tenant of land……Eventually rights of this land were assigned in favour of the appellant in the year 2009."

12. The CIT(A) further noted that in the year 2009, the assessee had acquired leasehold rights in respect of 29,422 sq.mtrs. of area, for which an amount of Rs.6.73 crores had been paid. Thus, it was clear that the assessee had acquired leasehold rights in respect of additional area of 5466 sq. mtrs. over and above the area of 23956 sq.mtrs. covered by catalyst business, which had already been sold by HLL to ICI India Ltd. and then by ICI India Ltd. to the assessee. The CIT(A) thus, concluded that payment of Rs.6.73 crores made in 2009 by the assessee to HLL must be for additional area of 5466 sq.mtrs. and not for entire land of 29,422 sq.mtrs. The CIT(A) also noted another transaction in respect of said piece of land at Taloja and was of the view that the contention of assessee that leasehold rights of land had been acquired directly from HLL for Rs.6.73 crores could not be accepted. He also made reference to the valuation of said land for charging transfer fees, wherein MIDC had valued the land at Rs.19.71 crores. The CIT(A) was of the view that it was questionable as to why HLL would accept only Rs.6.73 crores for its property, on market value of Rs.19.71 crores. He was of the view that difference of Rs.13 crores had already been received by HLL from ICI India Ltd. in 2001 and the same was recovered by ICI India Ltd. from the assessee in December, 2002 when the same business was sold by ICI India Ltd. to the

assessee. The CIT(A) thus, held that the assessee had paid land cost of Taloja business at Rs.19.71 crores i.e. Rs.13 crores to ICI India Ltd. and Rs.6.71 crores to HLL, the previous owner of leasehold rights. Therefore, submissions of assessee in this regard were rejected. The related contention of assessee that leasehold rights for Taloja land were agreed to be purchased in the year 2006 and therefore, price prevailing and stamp duty value in the year 2009 could not be used for comparison, was rejected in the absence of any agreement or any other material being brought on record.

13. In respect of Panki land, it was submitted that as per terms of BTA, Panki land was specifically excluded from the sale and therefore, no value was required to be assigned to the said land out of purchase price of Rs.153.18 crores. The CIT(A) found the contention of assessee as not tenable. He agreed that no doubt Panki land was excluded from sale as per the BTA, apparently, however, it was also a fact that purchase price of Rs.153.18 crores paid by the assessee to ICI India Ltd., as per BTA includes the consideration for Panki assets including leasehold rights of Panki land. He was of the view that as per agreement, it was mentioned that right to purchase all Panki assets including Panki land by paying nominal price of Rs.1 lakh only at a later date was not correct. He was of the view that purchase price of Rs.153.18 crores paid by the assessee also included consideration for all the assets of Panki business including the rights in land, in lieu of which the assessee was given a right to purchase Panki assets by paying only Rs.1 lakh. He further noted that tangible assets of Panki division such as building and plant & machinery and computers valued at Rs.17.09 crores had been excluded from sale as per the BTA. However, out of purchase consideration of Rs.153.18 crores, sum of Rs.17.09 crores was allocated to the value of

tangible assets of Panki business and shown in the accounts as value of right to acquire Panki assets at nominal value. In view of the said terms and conditions of agreement, the CIT(A) held that the purchase price of Rs.153.18 crores included the consideration paid for rights in land, otherwise also Panki assets including the land, plant & machinery, etc. could not be transferred for Rs.1 lakh only. He thus, held that fair and reasonable sum representing the value of Panki land was required to be allocated towards the value of Panki assets. He referred to the information received from Shri R.N. Bajpayee, Joint Secretary, Kanpur Development Authority, Kanpur, where total land covered by Panki Division was 279.30 acres and market value of the land in 2002 was estimated at Rs.174.36 crores. He thus, concluded that *since the entire land as per the site option is to be transferred to the appellant, its claim that only 27.5280 acres of land was used for business by ICI India Ltd. had no force.* In view of the aforesaid, the market value of identifiable tangible assets of India business was worked out as follows:-

"*Tangible assets of Syngas (right to acquire Panki assets) (as per Valuer's report)*	*17.08 cr*
Tangible of PCEO, Taloja Business (as per Valuer's report)	*27.41 cr*
Land (Panki) (as per Valuation by KDA)	*174.36 cr*
Land (Taloja)	*13.00 cr*
Total	*231.85 cr"*

14. The CIT(A) was of the view that where the market value of identifiable tangible assets was Rs.231.85 crores as against the slump price of Rs.153.18 crores and where the purchase price had to be allocated firstly to identifiable tangible assets of the business and balance amount, if any, to be considered for intangible; he held that considering the market value of land at Panki and Taloja, which was over Rs.187 crores, virtually nothing remains for intangible

assets. He thus, held that it goes to prove that the assessee had not acquired any intangible assets in the consolidated slump price of Rs.153.18 crores. Thus, the value of Rs.125.68 crores considered by the assessee as the total value of intangible assets of business does not really represent the correct value of intangible assets. He thus, rejected the plea of assessee and held that the value allocated to intangible assets including know-how could not be accepted as actual cost for the purpose of allowing depreciation. He further held that allocation of 90% of total value to know-how was not justified. Referring to the Valuer's report in this regard, he noted that 90% of total value of intangibles was assigned by the Valuer to the know-how only on the suggestion of management, that know-how of the business acquired was very unique. He again referred to the assessee being global leader in the business of manufacture of various catalysts and reiterated that it was not purchased by the assessee from ICI India Ltd. because know-how of the business of ICI India Ltd. was not unique, but for the fact that ICI India Ltd. wanted to divest its global catalyst business and the assessee's principal company wanted to increase its market share. He further observed that there was nothing to show any know-how or patent acquired by the assessee was registered in the name of ICI India Ltd. and further, there was no non-compete agreement. Referring to global figures of acquisition of business and allocation to the assessee's business and CIT(A) compared the same and was of the view that allocation of sum of Rs.93.32 crores i.e. 61% of total price out of purchase consideration to the know-how was extremely arbitrary and unjustified. He further observed that the assessee had got the value of intangibles manipulated by obtaining the valuation report as per wishes of the management in which the glaring example of such manipulation is the non-inclusion of value of land at Rs.187 crores in the valuation report, with the motive of claiming depreciation on

know-how, etc. as lands were not in the category of depreciable assets as per Income-tax laws, therefore, the value so assigned was not considered as actual cost of know-how, etc. for the purpose of section 32 of the Act. The CIT(A) held the assessee was not eligible for any depreciation on the know-how, trademarks and patents, which was claimed at Rs.21.93 crores and the Assessing Officer was directed to disallow the same.

15. The next aspect was the allocation of slump price amongst various assets, in view of AS-10 of the Accounting Principles. The assessee pleaded that as per AS-10, when the business is purchased for a price which is in excess of value of the net identifiable assets, the excess amount paid was to be accounted for as goodwill and precisely that was done by the assessee, was not accepted by the CIT(A) and it was held that in earlier grounds of appeal, the assessee was held not entitled to claim the depreciation on goodwill too.

16. The next issue which was dealt in with by the CIT(A) was the objection of assessee that once depreciation has been allowed by the Assessing Officer, the actual cost / WDV could not be disturbed in subsequent year, since there was no change in facts and law. The CIT(A) held that depreciation in case of block of assets as per section 32(1)(ii) of the Act, was calculated on its written down value, which is defined in section 43(6) of the Act, that first step was to determine the written down value of any asset for any year and it was for the Assessing Officer to determine its actual cost and then reduce the depreciation actually allowed. He further held that since the principles of *res judicata* were not applicable to the Income-tax proceedings, it was the duty of Assessing Officer to ascertain truth and facts stated in the return and where

wrong valuation has been accepted as actual cost of asset in earlier years, where the mistake is detected in later years, then the Assessing Officer is duty bound to rectify the mistakes. In this regard, reliance was placed on the ratio laid down by the Hon'ble Supreme Court in Saharanpur Electric Co. Ltd. Vs. CIT reported in 194 ITR 294 (SC). The CIT(A) further relied on various other decisions including the decision of Apex Court in the case of Radhasoami Satsang reported in 193 ITR 321 (SC) and held that the figure of actual cost accepted in earlier year was not sacrosanct and could be modified in subsequent year if it was found that the same had been wrongly accepted in earlier years. He further held that since from the detailed discussion it was clear that the claim of depreciation on know-how, etc. in the present case, was not legally tenable and had been wrongly allowed by the Assessing Officer while completing assessment. The CIT(A) held to be a fit case for enhancement of assessment for correctly determining the actual cost for the purpose of depreciation. In view thereof, he held that depreciation claimed by the assessee on know-how, trademark and patents at Rs.21.93 crores was not admissible and he enhanced the assessment by Rs.21.93 crores and also initiated penalty proceedings. Thereafter, the CIT(A) dealt with another enhancement of assessment notice under section 251(2) of the Act dated 15.02.2012. The CIT(A) issued another notice under section 251(2) of the Act on the ground that the allocation of slump price to various assets, done by the assessee was with a motive to evade the instance of tax and consequently, no depreciation thereon was allowable. The assessee pointed out that it had acquired business of ICI India Ltd. on a going concern basis under slump sale for lump sum consideration and since the Act does not have any specific provisions for determining the actual cost of assets acquired under slump sale, the actual cost of individual assets had been ascertained by the

assessee on a fair value basis, as determined by the Valuer. Referring to the provisions of the Act vis-à-vis slump sale and referring to the terms of BTA, the CIT(A) held that the assessee had acquired two undertakings namely PCEO Division, Taloja and Syngas Division, Panki without specifying item-wise sale price. Further, no valuation report was ever produced before the Department as on the date of purchase even for determination of slump price of Rs.153.18 crores. The assessee thus, as per the CIT(A), had acquired two undertakings and this was not the case of item-wise purchase of assets by the assessee. He was of the view that the assessee had acquired two undertakings which itself were capital assets and the same were required to be accounted for as separate capital assets in the accounts of assessee. He further pointed out that depreciation is to be allowed on WDV at the rates specified in IT Rules and the said rules did not provide any rate of depreciation for an undertaking. Thus, no depreciation was to be allowed to the assessee in respect of capital assets being an undertaking. The appropriation of total slump price by the assessee towards various tangible and intangible assets and including goodwill and non-compete fees and claim of depreciation in respect of said assets was on the basis of valuation report obtained subsequently, since no value had been assigned item-wise to the individual assets in the purchase agreement. He was of the view that assignment of cost to the individual assets after purchasing the undertaking was mere guess work and the value so assigned would remain estimate and could not be considered as actual cost. He referred to the ratio laid down by the Hon'ble Supreme Court in CIT Vs. Artex Manufacturing Co. (1997) 227 ITR 260 (SC) and other decisions of Apex Court, wherein it was held that when the assessee could prove with documentary proof that slump price was determined on the basis of value of individual items of assets sold, then

composite sale consideration could be bifurcated. He also made reference to the latest decision of Vodafone International Holdings B.V. Vs. Union of India & Anr. (2012) 66 DTR 265 (SC), wherein it was held that sale may take various forms, accordingly, tax consequence would vary. The CIT(A) thus, held that slump purchase price in the case of assessee paid for going concern consisting of various assets, liabilities, clientele, marketing network, market share, etc. could not be split for the purpose of claiming depreciation in the absence of any specific provisions in the Act and in view of various decisions. Reliance on AS-10 by the assessee was also held to be misplaced as the entire business which was over and above the fixed assets and also included other items i.e. employees, debtors, liabilities, benefits of certain business contracts, stock-in-trade, market network as had been mentioned in BTA. He further noted that it was clear from the terms of BTA that no specific cost was paid by the assessee for purchase of specific assets and the value assigned to the assets was merely on guess work and at best an estimated cost of particular asset, which could not be equated with actual cost as mentioned in the IT Act. He further referred to provisions of section 43(6) of the Act and relying on the ratio laid down by the Hon'ble Supreme Court in the case of Mugneeram Bangur & Co. reported in 227 ITR 260 (SC) and Vodafone International Holdings B.V. (supra), he held that slump purchase price being the composite price for bundle of rights / assets could not be apportioned amongst the individual assets for the purpose of depreciation. He was of the view that alternately, but without prejudice to the above, at best where the assessee had acquired certain identifiable fixed assets, value of which was shown in the chart of depreciation at Rs.8.57 crores only, but the assessee has paid over and above the value of said assets towards purchase of business, was to be accounted for in the books as goodwill, on which the

assessee is not entitled to claim of depreciation. Hence, he directed the Assessing Officer to disallow depreciation on all the assets acquired in slump sale accordingly. Since the depreciation on goodwill at Rs.1.49 crores and on non-compete at Rs.81,45,129/- was already disallowed by the Assessing Officer, the CIT(A) enhanced the assessment by Rs.24.83 crores on this count. However, since the income was already enhanced by Rs.21.93 crores vide para 6.12 of his order by disallowing depreciation on know-how, patents and trademark. Further, enhancement of assessment was restricted to Rs.2.90 crores.

17. The assessee is in appeal against the order of CIT(A).

18. The first issue which is raised by the assessee is against non-allowance of depreciation on various assets purchased for lump sum consideration. The second objection is against the power of enhancement exercised by the CIT(A) by disallowing depreciation on assets which were acquired under slump sale agreement. The connected issue vide ground of appeal No.3 is against enhancement of income by the CIT(A) by disallowing depreciation on intangible assets and other assets amounting to Rs.23.83 crores. The connected issues further are in grounds of appeal No.4 and 5, wherein the assessee is aggrieved by the disallowance of depreciation on assets which are entered in block of assets. The grounds of appeal thereafter i.e. grounds of appeal No.6 and 7 are on disallowance of depreciation on trademark, patents and know-how on the premise that the value of land at Panki division was Rs.174.36 crores and the value of land at Taloji of Rs.13 crores, for which ground of appeal No.8 has been separately raised. Further, vide ground of appeal No.9, the assessee is aggrieved by the orders of

authorities below in ignoring the valuation of trademark, patents and know-how undertaken by the independent Valuer, which was adopted by the assessee. Vide ground of appeal No.10, without prejudice to ground of appeal No.1, the assessee has raised the issue of disallowance of depreciation amounting to Rs.81,45,129/- on non-compete payment. Further, vide ground of appeal No.11, the assessee on without prejudice to ground of appeal No.1 has raised the issue of disallowance of depreciation on goodwill amounting to Rs.2.49 crores. The assessee vide grounds of appeal No.12 and 13 has raised another issue of disallowance of Rs.6,03,900/- being the expenditure incurred on filing fees and stamp duty paid to the Registrar of Companies.

19. The learned Authorized Representative for the assessee pointed out that the issue which arises in the present appeal is in respect of depreciation on assets acquired from ICI India Ltd. It was further pointed out that in December, 2001, ICI India Ltd. had acquired the PCEO division consisting of factory at Taloja from HLL. ICI India Ltd. was engaged in manufacture of catalysts used in different industries. It was further pointed out by him that Johnson Mathey UK Company, had acquired ICI India Ltd., UK i.e. worldwide business of ICI India Ltd. of manufacture of catalysts. With an intention to acquire the business in India, on 02.12.2002, a Business Transfer Agreement was entered into to purchase catalysts business of ICI India Ltd. for Rs.153.18 crores. Further, Toll Conversion Agreement was also entered into on the same day, where ICI India Ltd. agreed to do certain manufacturing activities for assessee at Panki unit. For the year ending 31.03.2003, the assessee had allocated price paid over various assets it acquired and whichever asset was eligible for depreciation, it claimed depreciation. In assessment year 2003-04,

the Assessing Officer allowed depreciation as claimed except for the consideration allocated to goodwill. He further stated that the consideration was allocated for conveyance which was restrictive not to compete with assessee. He further pointed out that the Tribunal in assessee's own case in ITA No.1317/PN/2010 and ITA No.7547/PN/2010 relating to assessment year 2003-04 vide order dated 01.01.2016 allowed depreciation on both the counts. For the year under appeal i.e. assessment year 2004-05, he pointed out that the Assessing Officer disallowed depreciation both on goodwill and non-compete fees. Our attention was drawn to pages 13 and 14 of the order of CIT(A) and it was pointed out that the issue now stands covered in favour of assessee. Then, coming to the enhancement notice issued by the CIT(A) dated 03.08.2011, which is placed at page 172 of the Paper Book, the learned Authorized Representative for the assessee pointed out that the CIT(A) wanted to withdraw depreciation allowed by Assessing Officer on know-how, patents, trademark. In respect of second notice of enhancement issued on 15.02.2012, which is placed at page 173 of the Paper Book, the learned Authorized Representative for the assessee stated that the CIT(A) wanted to disallow depreciation on all assets and further, he disallowed depreciation on all the assets and also what was disallowed by the Assessing Officer. He pointed out that the issue which needs to be adjudicated in the present set of facts are as under:-

i) Whether the CIT(A) had the jurisdiction to disallow depreciation on all assets, once they form part of block of assets and depreciation allowed in earlier years?

ii) Whether on merits, the CIT(A) was justified to do enhancement, since the business purchased was going concern and the assessee not entitled to depreciation on individual assets?

iii) Whether depreciation on technical know-how could be disallowed on the ground that the assessee has not acquired any know-how and the same has not been used by the assessee?

iv) Whether if no know-how was acquired, then additional amount is whether goodwill and whether depreciation on goodwill was allowable?

v) Whether the CIT(A) was justified in holding that the assessee has not allocated any value to land, hence method of allocation was wrong?

vi) Whether the CIT(A) was correct in passing order of enhancement?

20. He further made reference to section 32(1)(ii) of the Act and pointed out that it talks of block of assets. He further referred to section 2(11) of the Act which defines tangible assets and intangible assets. In respect of section 43(6) of the Act, which talks of written down value of assets, the learned Authorized Representative for the assessee pointed out that first portion was the cost of assets acquired in previous year and additions thereafter, which was the situation prior to 1998. However, post 1998, the concept of block of assets was brought on record. He further referred to section 43(6) clause (c) and sub-clauses thereunder of the Act and pointed out that test of ownership has been considered by the Hon'ble Bombay High Court in Director of Income Tax (IT) Vs. HSBC Asset Management (I) (P.) Ltd. (2014) 47 taxmann.com 286 (Bom). He stressed that once the assets having entered

into block of assets, then depreciation is to be allowed. He further relied on the following decisions:-

a) *M/s. Godrej Agrovet Ltd. Vs. ACIT in ITA No.1629/Mum/09, relating to assessment year 2005-06, order dated 17.09.2010;*

b) *ACIT Vs. M/s. CLC Global Ltd. in ITA No.2288(Del)2008, relating to assessment year 2003-04, order dated 27.03.2009;*

c) *Kodak Polychrome Graphics (I) P. Ltd. Vs. Addl.CIT in ITA No.1557/Mum/2009, relating to assessment year 2004-05, order dated 26.06.2013;*

d) *M/s. Western Precicast Pvt. Ltd. Vs. JCIT in ITA No.814/PN/2011, relating to assessment year 2007-08, vide consolidated order dated 07.09.2015; and*

e) *Saharanpur Electric Supply Co. Ltd. Vs. CIT (supra)*

21. The learned Authorized Representative for the assessee stressed that earlier law on allowing depreciation was different from the present day law of block of assets with additions and deletions.

22. Referring to merits of the claim, the learned Authorized Representative for the assessee elaborately referred to different paras of the order of CIT(A) and pointed out that the CIT(A) holds that where the assessee acquired business as a whole, then it was different from assets and the assessee is not entitled to depreciation on such business. In order to controvert the findings of the CIT(A) in paras 8.1 and 8.2 at pages 67 to 70 of the appellate order, the learned Authorized Representative for the assessee referred to the following decisions:-

a) *Shreyans Industries Ltd. Vs. JCIT (2005) 277 ITR 443 (P&H)*

b) *Drilbits International (P) Ltd. Vs. DCIT (2011) 142 TTJ 0086 (Pune-Trib)*

c) *DE Nora India Ltd. Vs. CIT (2015) 57 taxmann.com 32 (Delhi)*

23. The learned Authorized Representative for the assessee pointed out that the above said decisions have laid down the proposition that where lump sum payments have been received for all rights transferred including the assets transferred, then the consideration can be allocated amongst the said assets. Referring to the order of CIT(A), the learned Authorized Representative for the assessee pointed out that he had not allowed the claim of assessee in turn, relying on the decision in the case of sellers of business, where it was held not to allow the value over allocation of assets. He stressed that this may be true for the sellers' business, but in the case of purchasers, the accounting standards mandates that the amount is to be allocated as cost to assets acquired as part of slump sale. He further referred to AS-10 and filed copy which is available on record and referred to para 15.3 of the said accounting principle. He further stated that there was no bar in Income Tax to get depreciation on assets acquired under the slump sale. He referred to the ratio laid down in the Rangoon High Court in the case of CIT, Burma Vs. Solomon & Sons (1933) 1 ITR 324 and also by the Hon'ble High Court of Madras in Francis Vallabarayar Vs. CIT (1960) 40 ITR 426 (Mad). He stressed that the Department could not say that no depreciation at all is to be allowed on the said assets. He further pointed out that as per the CIT(A) vide para 6.3, total consideration i.e. Rs.153 crores less cost of assets, if it is not know-how, then the balance is goodwill. The Hon'ble Supreme Court in CIT Vs. Smifs Securities Ltd. (2012) 348 ITR 302 (SC) have held the assessee to be eligible for claim of depreciation on goodwill. Further, reliance was placed on the ratio laid down by the Hon'ble High Court of Delhi in Triune Energy Services (P.) Ltd. Vs. DCIT (2016) 65 taxmann.com 288 (Del). He stressed that the assessee was entitled to claim depreciation on the value of goodwill i.e. Rs.153 crores less cost allocated to tangible assets.

24. He further made reference to the BTA which is placed at page 130 to 288 of the Paper Book Volume – 2. Referring to the Preamble, he pointed out that the same defines Indian business, whereas the term 'business' is for the business as such and business cash component. Further, he referred to the Deed of Restricted Convenants at page 136 of the Paper Book and referred to 'excluded assets' at page 132 of the Paper Book and list of part-I of Schedule 10 at page 255 of the Paper Book, Volume-II. He then referred to the definition of 'Panki assets' at page 141 and 'Panki site' at page 142 of the Paper Book. He then explained that intention of assessee was to acquire Panki site but ICI India Ltd. had larger land and land on which catalyst business was established could not be bifurcated, hence part of excluded assets. He further referred to the transfer of technology information vide Toll Conversion Agreement, which is placed at page 146 onwards of the Paper Book, wherein as per terms of the agreement, what was sold and consideration paid was noted. Further, it was agreed that ICI India Ltd. would conduct business for assessee till actual transfer of the business. He referred to clause 18.5 at page 177 of the Paper Book and pointed out that know-how was part of transfer agreement. He further referred to the understanding for transfer of going concern and for retaining business, which was clear from page 178 of the Paper Book. The learned Authorized Representative for the assessee then referred to page 215, part-II, which related to Taloja site, wherein it was clarified that the land at Taloja belonged to HLL, who in turn, had entered into leave and license agreement with ICI India Ltd. and that leave and license agreement was novated to the assessee. He concluded by saying that pursuant to this agreement, it is clear that ownership of both the lands in question did not pass on to the assessee.

25. The learned Authorized Representative for the assessee referred to the terms of Toll Agreement, copy of which is placed at 285 onwards of the Paper Book. After taking us through the background mentioned in the said Toll Agreement, he pointed out that under the said agreement technical information was transferred to the assessee by ICI India Ltd. but for Toll Agreement, it was transferred back to ICI India Ltd. He further referred to the payment clause, reference to technical license and termination clause. He also made reference to options available to the assessee, which were referred in agreement at pages 292 to 295 of the Paper Book. He further referred to the Schedule 8 next to the agreement, which talked about three options i.e. site option, plant option and put option. He further pointed out that two options out of the same were available, wherein under the site option, the assessee had right to purchase leasehold land, plant & machinery and take over the employees. However, in case the land was not transferred for some reason, then 'plant option' was available. The 'put option' talks of site assets and ICI India Ltd.'s right to sell. He further stated that under the BTA, the business was transferred to the assessee excluding the lease of site at Panki, the leasehold land and certain plant and machinery. Referring to the comments of the CIT(A) at pages 31 and 34 of appellate order, he pointed out that the CIT(A) alleges that there was no transfer of know-how. He referred to the Paper Book-2 filed for assessment year 2003-04, at page 139, wherein under the definition of Indian business, it was clarified that the same includes IP rights and goodwill. At page 141 of the Paper Book, Panki assets were defined which were retained by ICI India Ltd. He also referred to the definition of excluded assets which includes Panki site. He stressed that know-how was transferred as mentioned in the BTA, so in Toll agreement, know-how had to be provided by the assessee to ICI India Ltd. So, the finding of CIT(A) in this

regard was not correct. The learned Authorized Representative for the assessee stressed that the CIT(A) erred in its inclusion at para 6.4.7.

26. The next point raised by the learned Authorized Representative for the assessee was that in case Panki site for some reason could not be acquired but the assessee would definitely like to acquire the know-how and carry on the business from another site. He also referred to the report of the Valuer under which Rs.153 crores was allocated to assets and know-how, etc. Our attention was drawn to page 29 of the Paper Book-I, which lists the assets and allocation of Rs.134 crores, wherein the balance was allocated to current assets for both Panki and Taloja units, under clause (iv), cost which associated for transfer was not booked. He again reiterated that option was for Panki assets and the leasehold rights in land were valued at Rs.1 lakh. He further referred to the observations of CIT(A) at page 40 in para 6.4.8 and para 6.5.2 and pointed out that evidences were filed and reply was also filed that know-how had been transferred. He made reference to the Paper Book-2 at pages 178 and 184 in this regard. He also pointed out that for the transfer of technical know-how, various documents were available but the same were not produced for the reason of secrecy of business. He stressed that all the evidences were available with the assessee and the same were not produced. However, the assessee produced before us carton full of documents and pointed out that these were confidential reports of transfer of know-how. In this regard, application was filed by the assessee along with an affidavit. He stressed that in view of the evidences available, there was no justification in the order of CIT(A) in saying that no know-how was acquired. He also pointed out that certain documents were filed before the CIT(A). He never asked for more documents but went on to disallow depreciation.

27. In respect of land value at Taloja, referring to observations of CIT(A) in paras 6.7.4 to 6.7.6 and Paper Book-2 at page 382, it was pointed out that ICI India Ltd. had leave and license of HLL i.e. in respect of Taloja land. He further referred to novation in favour of assessee, which is placed at pages 393 and 394 of the Paper Book. It was explained by the learned Authorized Representative for the assessee that HLL sold its business to ICI India Ltd. in 2001 and leave and license was given to ICI India Ltd. for Taloja land. However, ICI India Ltd. sold its business to the assessee in 2002, so the leave and license agreement for Taloja land was novated in favour of the assessee. He then referred to the Memorandum of Understanding dated 02.04.2008, which is placed at pages 332 onwards of the Paper Book between HLL and the assessee, where it was agreed to sell Taloja land for Rs.6.93 crores. He also referred to the Deed of Assignment entered into, which is placed at page 399 of the Paper Book. The said Deed of Assignment was entered into after approval from MIDC on 09.01.2009. The market value of the said land was worked out to Rs.19.70 crores i.e. the value as on 2009 as against the date of MOU i.e. April, 2008. He again stressed that while executing BTA, ICI India Ltd. could only transfer leave and license rights as it had no interest in the land and hence, the same could not be transferred to the assessee. In respect of purchase from HLL, the assessee pointed out that negotiations started in 2008. He further referred to the evidence of HLL selling the portion of land to Shanti at Rs.96,782/- per sq.mtr. as against which the assessee had purchased the said land at Rs.28,596/- per sq.mtr. The balance of 24,781 sq.mtrs. had been retained by HLL, so there was no question of attributing any value to the land in December, 2002. So, no part of consideration of Rs.153 crores was allocated to Taloja land.

28. In respect of Panki land, referring to the order of CIT(A) at page 56 under para 6.7.8, it was pointed out by the learned Authorized Representative for the assessee that the CIT(A) re-works the allocation of value to assets. He further stressed that the assessee had allocated Rs.1 lakh to Panki land to be acquired, against which the CIT(A) says whole piece of land of 279.30 acres was acquired by the assessee for Rs.174.36 crores. He further referred to the BTA and Paper Book for assessment year 2003-04 at page 148 and pointed out that Panki site covered all that land using catalysts manufacturing facilities which were only on 27 acres. He referred to page 431 of the Paper Book, wherein in a communication, Kanpur Development Authority has pointed out that total landholding of ICI India Ltd. was 270.9667 acres, out of which ICI India Ltd. had sub-leased 27.528 acres and had retained 241.7726 acres. The learned Authorized Representative for the assessee in this regard pointed out that the CIT(A) said that Rs.174 crores was for 279.30 acres i.e. total landholding. However, if the same rate is applied to 27.52 acres at best the value of land would be Rs.17 crores approximately. He fairly admitted, that at highest, value of land could be taken at Rs.17 crores and the balance value to be reduced i.e. Panki assets at Rs.17 crores.

29. Coming to the next aspect of goodwill decided by the CIT(A), the learned Authorized Representative for the assessee pointed out that the assessee had allocated value both to goodwill and know-how. However, the CIT(A) vide para 6.9.1 observed that excess amount was goodwill. He referred to the valuation report placed at pages 233 onwards of the Paper Book and pointed out that there was bifurcation of net consideration. He also referred to the methodology adopted by the Valuer for each class of assets, which was placed at pages 262 and 265 of the Paper Book. He stressed that

the Valuer had adopted scientific method of valuation and in case the Revenue authorities wanted to disregard the same, then another valuation report should have been obtained. He referred to the decision of Hon'ble High Court in CIT Vs. Pepsico India Holdings P. Ltd. (2011) 334 ITR 404 (Del), wherein the method of valuation by independent Valuer was held to be well accepted method.

30. Coming to the next stand of CIT(A) that the amount allocated to know-how was excessive i.e. 90%. He pointed out that intangibles were Rs.143 crores and in case the value of land is added at Rs.17 crores, then total works to Rs.160 crores, against which the price paid by the assessee is only Rs.125 crores. So, the same should be allocated on the basis of price paid i.e. Rs.125 crores.

31. Coming to the enhancement power exercised by the CIT(A), the learned Authorized Representative for the assessee pointed out that the CIT(A) has gone into new source of income, wherein he has gone into new area especially when in assessment year 2003-04, claim was allowed in favour of assessee. He stressed that as in deduction claimed under section 80IA and 80IB of the Act, the aspect of deduction has to be seen in the first year. Reliance in this regard was placed on the ratio laid down by the Full Bench of the Hon'ble High Court of Delhi in CIT Vs. Sardarilal and Co. (2001) 251 ITR 864 (Del), the Hon'ble Bombay High Court in CIT Vs. Western Outdoor Interactive P. Ltd. (2012) 349 ITR 309 (Bom) and Direct Information Pvt. Ltd. Vs. ITO and Others (2012) 349 ITR 150 (Bom) and he stressed that there was no merit in enhancement notice issued by the CIT(A).

32. The learned Departmental Representative for the Revenue pointed out that various issues need to be looked into. The first was the information received from Kanpur Development Authority on 04.03.2011 that ICI India Ltd. had total landholding of 279 acres, which was sold at Rs.173 crores only. Referring to the decision of Hon'ble High Court of Kerala in B. Raveendran Pillai Vs. CIT (2011) 332 ITR 531 (Kerala), he pointed out that claim of depreciation could be changed in later years. In this regard, he stressed that there was no evidence of know-how of Panki division having been acquired. The second issue raised by the assessee, was referred to by the learned Departmental Representative for the Revenue i.e. WDV cannot be disturbed and the third was enhancement of income by the CIT(A), which, according to the learned Authorized Representative for the assessee, was new source of income.

33. The next issue was whether WDV was sacrosanct. In this regard, he placed reliance on the ratio laid down by the Hon'ble High Court of Kerala in B. Raveendran Pillai Vs. CIT (supra) and he stressed that the decision of the Delhi Bench of Tribunal in Osram India (P) Ltd. Vs. DCIT (2012) 20 taxmann.com 271 (Delhi) was not applicable. He was of the view that there could be circumstances, where WDV can be changed and in the present case, he noted that there was allocation, which was different from actual cost and therefore, section 43(6) of the Act had to be read in tandem i.e. harmonious construction should be given to the provisions of said section. Referring to the said section, it was pointed out that section refers to the cost of block of assets and then clause (b) of section 43(6) of the Act has relevance and the same could not be ignored and actual cost for entire block could be examined, in next year, if there were circumstances necessitating such change. With

respect of reliance of the learned Authorized Representative for the assessee in the case of Director of Income Tax (IT) Vs. HSBC Asset Management (I) (P.) Ltd. (supra), the same was found to be misplaced by the learned Departmental Representative for the Revenue. The learned Departmental Representative for the Revenue time and again referred to the global arrangement made between the parent company i.e. Johnson Matheys PLC and ICI PLC, UK. He referred to various global arrangements and also referred to the value of acquisition of tangible assets and goodwill. He then made reference to the BTA, which was between Johnson Matheys PLC, UK and ICI India Ltd. He stated that the assessee was incorporated on 06.09.2002 and was not party to BTA. Considering the amount paid for the Indian segment vis-à-vis overall consideration, he pointed out that the same was at 7.15%. He also objected to the valuation report, wherein the value of intangibles of Indian segment to total consideration paid for Indian segment was 70%. He also further made submissions controverting the stand of learned Authorized Representative for the assessee, which we shall refer while deciding the appeal of assessee.

34. The learned Authorized Representative for the assessee in rejoinder pointed out that the learned Departmental Representative for the Revenue was wrong in stating that IP was not transferred as per BTA. However, what is transferred by ICI India Ltd. is IP in India. Our attention was drawn to page 179 under para 18.6 of the document in the Paper Book for assessment year 2003-04, wherein the parties were contracted to transfer the know-how and whatever was left, was transferred for one year. The next aspect pointed out by him was that Johnson Matheys PLC and the assessee had joined hands and under clause 2.6 at page 150 of the Paper Book for assessment year

2003-04, there was clause of novation in favour of assessee i.e. Indian purchaser. The novation agreement dated 15.11.2002 which is between HLL, ICI India Ltd. and the assessee, as per clause 2.1, it talks of the transfer time under which actual date of transfer was 02.12.2002 and the IP was transferred, which is also referred in the Toll Agreement dated 02.12.2002.

35. Coming to the next stand of the learned Departmental Representative for the Revenue that know-how was owned by ICI India Ltd. and could not be transferred. He pointed out that the CIT(A) in para 6.4.1 at page 31 has held that know-how was not ascertainable. Referring to the definition of slump sale in section 2(42C) of the Act, where the cost of assets were not known, then the steps to be taken. He also referred to the definition of excluded assets which does not include know-how. Referring to para 6.4.5 of CIT(A)'s order, the learned Authorized Representative for the assessee pointed out that business was taken over by the assessee and not the plant & machinery and plot of land at Panki; hence the know-how had to be taken, otherwise, how the business would go on. In para 6.4.7, the CIT(A) refers to the Toll Agreement and license to be given to ICI India Ltd. to manufacture on assessee's behalf. The assessee became the owner of know-how under the BTA and that is how it could give same to ICI India Ltd. under Toll Agreement.

36. The learned Authorized Representative for the assessee distinguished the reliance placed upon by the learned Departmental Representative for the Revenue. He further pointed out that for period of four years after perusing the details given by the assessee, the Assessing Officer was satisfied and no addition was made. In the fourth year, the Commissioner exercised jurisdiction under section 263 of the Act and the CIT(A) thereafter, exercised

his jurisdiction in the second year itself. Objecting to the comments of learned Departmental Representative for the Revenue on the report of Ernst & Young Pvt. Ltd., he pointed out that there was due diligence in valuation report. He further pointed out that no fault was found with the Valuer. In respect of reliance of the learned Departmental Representative for the Revenue on the ratio laid down by the Hon'ble Supreme Court in CIT Vs. Nirbheram Deluram (1997) 91 Taxman 181 (SC), the learned Authorized Representative for the assessee in reply pointed out that the Full Bench of Hon'ble High Court of Delhi in CIT Vs. Sardarilal and Co. (supra) had covered the said decision. He concluded by saying that whether after allocation of value to assets, the balance is taken is know-how or goodwill, there is no difference as the depreciation on same is allowable in the hands of assessee, in view of the decision of the Hon'ble Supreme Court in CIT Vs. Smifs Securities Ltd. (supra).

37. We have heard the rival contentions and perused the record. The assessee was carrying on the manufacturing and sale of catalysts. The worldwide catalysts business of ICI India Ltd. was purchased by Johnson Matheys, consequent to which Business Transfer Agreement (BTA) was entered into on 02.12.2002 for the purchase of catalysts business from ICI India Ltd. as going concern. The assessee claimed that it had acquired goodwill of Rs.10.73 crores from ICI India Ltd. Further, the assessee had also entered into non-compete agreement with ICI India Ltd., under which sum of Rs.3.51 crores was paid. The assessee had claimed depreciation on both the said items on the ground that the same were capital assets. The first such claim was made in assessment year 2003-04. The Assessing Officer denied depreciation claimed on both goodwill and non-compete fees. However, the

Tribunal (supra) allowed the claim of assessee. The Assessing Officer following his earlier order denied depreciation on goodwill claimed at Rs.1.49 crores and depreciation on non-compete fees at Rs.81,45,129/- totaling Rs.2.30 crores. The CIT(A) while deciding the appeal for instant assessment year observed that where the entire business was taken over by the assessee as going concern, with all assets and liabilities, there would remain no competition from the seller and hence, so-called payment of non-compete fees at Rs.3.51 crores was nothing but part of composite price paid for acquisition of entire business of ICI India Ltd., which had to be clubbed with total slump sale price of Rs.153.18 crores. The second observations of the CIT(A) was that there was no explicit payment for goodwill as per the BTA and/or the payment towards non-compete fees, hence the assessee was not eligible to claim depreciation on goodwill; since it was not specifically mentioned in the list of intangible assets under section 32(1)(ii) of the Act, which talked about know-how, patents, copyrights, trademarks, license, franchise, etc. Further goodwill was also not covered by the expression 'any other business or commercial rights' of similar nature. The CIT(A) thus, denied the depreciation on goodwill and non-compete fees. Further, during the appellate proceedings, the CIT(A) issued enhancement notice to the assessee under section 251 of the Act vis-à-vis claim of depreciation on know-how, trademark and patents, which was allowed by the Assessing Officer. The objection of CIT(A) was that two-fold that it was neither owned nor used by the assessee and the cost of acquisition of intangible assets was also incorrectly taken for the purpose of depreciation. The CIT(A) thus, show caused as to why sum of Rs.21.93 crores claimed as depreciation on know-how, trademarks and patents, should not be withdrawn. The basis for making the aforesaid disallowance was that the assessee had not purchased the

same as per BTA. Further, there was no material available on record to show that the said know-how had been used for the purpose of assessee's business. The next objection of CIT(A) in this regard was that where no value was attributed to the land at Panki and Taloja, which were the premises on which ICI India Ltd.'s business was being carried out, hence cost of intangible assets was not correctly shown. The explanation of assessee vis-à-vis allocation of no value to the land at Taloja and Panki, as the same were not transferred by ICI India Ltd. and hence, adoption of Nil value, was not accepted by the CIT(A). The CIT(A) elaborately considered the takeover of assets both movable and immovable and the intangible assets and also the trademarks, patents and know-how and held that slump price paid by the assessee at best would take care of the value of the land at Taloja and Panki and hence, no part of it could be attributed to any other asset. Another linked aspect which was taken note of by the CIT(A) was the failure of assessee to file evidences to show that know-how, patents and trademarks, etc. were used for the purpose of business. In this regard, the first plank of observation of CIT(A) was that where the assessee was not new in the line of business of manufacturing catalysts and also where the parent company of assessee was speciality chemical company with its core focus on precious metal, catalyst and fine chemicals, there was no merit in the plea that the purpose for acquiring ICI India Ltd.'s business was to acquire know-how, patents and trademarks, etc. He was of the view that acquisition was primarily with a view to increase its market share i.e. of Johnson Matheys. Another linked observation of the CIT(A) was that as per Toll Conversion Agreement (TCA), the business was first purchased from ICI India Ltd. and then given back to ICI India Ltd. for the purpose of manufacturing of its products, was not acceptable. Referring to the terms of BTA, the CIT(A) held that there was no

segregation of assets both tangible and intangible in the same. His main plank of decision was the value of assets i.e. lands at Panki and Taloja. After deliberations, he was of the view that the purchase price of Rs.153.18 crores paid by the assessee included consideration paid for the rights in land and hence, after working out the market value of identifiable tangible assets, he was of the view that where the market value of said tangible assets worked out to Rs.231.85 crores as against slump price of Rs.153.18 crores, then no balance amount was left to be allocated to intangible assets. He was of the view that the assessee had not acquired any intangible assets in consolidated slump price of Rs.153.18 crores. Accordingly, he did not accept the working of asset vis-à-vis value allocated to intangible assets including know-how, patents, trademarks, etc. and rejecting the report of the Valuer who was assigned this job of bifurcating value of tangible and intangible assets, the CIT(A) held that the assessee was not eligible for any depreciation on know-how, trademarks and patents. Accordingly, he made enhancement of Rs.21.93 crores. The second issue for enhancement which was considered by the CIT(A) was the depreciation on assets acquired in the slump sale. He was of the view that as apparent from the terms of BTA, no specific cost was paid by the assessee for purchase of specific assets and the value which was assigned to the assets was merely guess work and at best an estimated cost of particular assets. He was of the view that slump price paid for acquiring bundle of rights / assets could not be apportioned amongst the individual assets for the purpose of depreciation. At best, since the assessee had acquired certain identifiable fixed assets, the value of which was shown in the chart of depreciation, depreciation was allowable on same. He was of the view that balance value has been accounted for in the books as goodwill, on which the assessee was not entitled to claim of depreciation. Hence, he

directed the Assessing Officer to disallow the depreciation on all the assets acquired in slump sale. In this regard, since depreciation on goodwill at Rs.1.59 crores and on non-compete fees at Rs.81,45,129/- was already disallowed by the Assessing Officer, the CIT(A) enhanced the assessment by Rs.24.83 crores in this account. However, since the income was already enhanced by Rs.21.93 crores by disallowing depreciation on know-how, patents and trademarks, further enhancement of assessment was restricted to Rs.2.90 crores.

38. The assessee is in appeal against the order of CIT(A). The issues which arise in the present appeal before us are manifold and overlapping. Elaborate submissions have been made by both the learned Authorized Representatives for and against the orders of authorities below with special emphasis on enhancement made by the CIT(A) and we proceed to decide the same after referring to various facts and aspects of the case. First of all, the issues which need adjudication are as under:-

a) Claim of depreciation on tangible assets and intangible assets i.e. non-compete fee and goodwill;
b) Bifurcation of slump price into the value of tangible assets and intangible assets;
c) Determination of value of land at Taloja and Panki for its value to be attributed from slump price;
d) Allocation of value to trademarks, patents and know-how and goodwill, out of purchase consideration of Rs.153.18 crores;
e) Claim of depreciation on such trademarks, patents and know-how and goodwill;

f) Basis for exercise of power of enhancement by the CIT(A);

g) Disallowance of depreciation once the assets had entered into block of assets, in view of section 43(6) of the Act;

h) Corporate issue of expenses pertaining to increase in share capital.

39. In order to adjudicate the issues raised in the present appeal, first reference is to be made to sequence of events relating to transaction of acquisition of Synetix division of ICI India Ltd. by Johnson Matheys Pvt. Ltd. The BTA between the two parties i.e. ICI India Ltd. and Johnson Matheys PLC is dated 02.10.2002 and placed at pages 127 to 288 of the Paper Book, Vol-II for assessment year 2003-04. Under the agreement, ICI India Ltd. had agreed to sell and transfer certain assets comprising of Indian business as going concern and the purchaser had agreed to purchase the same and had also assumed the liabilities and other obligations of Indian business. Various terms were defined and agreed upon, under which business was defined to mean the business carried on by ICI India Ltd. under the name of Synetix and/or Tracerco. The term 'business goodwill' was defined as all the goodwill of ICI India Ltd. in relation to the business, including exclusive right for the purchaser to trade under the name of business and to carry on the business in succession to ICI India Ltd., but excluding all goodwill attaching to and all rights under excluded IP and excluded trademark. 'Business IP' was also defined to mean all intellectual property which at the ROW transfer time is owned by ICI India Ltd. and which is or has been used exclusively, in or which exclusively relates to, the business, excluding the excluded IP and all intellectual properties, license to the purchasers under the IP agreement. Another definition which is relevant is 'Deed of Novation' to mean the deed of that name in the agreed terms to be entered into between ICI India Ltd., the

purchaser and the Indian purchaser on the Novation date providing for Novation to the India purchaser of purchasers rights, benefits, interest, obligations, etc. under the agreement. The next term which was defined was 'Deed of Restrictive Covenant' to mean the deed of that name in the agreed terms between ICI India Ltd. and the Indian purchaser i.e. assessee which is listed in part I of Schedule 12. The next term which is relevant for the issues raised is 'Excluded assets' which means each of those assets which are listed in part I of Schedule 10, copy of which is placed at page 255 of the Paper Book. Referring to the same, we find that the said list of 'excluded assets' talks of the following:-

1. the Excluded IP;
2. the Shared Assets;
3. the Shared Contract;
4. the Excluded Contracts;
5. the Panki Site;
6. the Panki Employees;
7. the Panki Assets; and
8. the servers located at the Gurgaon site

40. Similarly, 'Excluded IP' was also defined. Another term was the 'Indian business' which defined the business which was carried on by ICI India Ltd. under the name of Synetix other than Panki activities together with

(a) the Employees;
(b) the Business Plant & Machinery;
(c) the Business properties;
(d) the Debtors;
(e) the benefits of Business Contracts;
(f) all right and title of ICI India in or to the Business IP;
(g) the Business Goodwill;
(h) the Business Stock; and
(i) the Primary Books and Records and the Secondary Books and Records;

but for the avoidance of doubt excluding the Excluded Assets.

(underline provided by us for emphasis)

41. 'Panki activities' were the activities involved in the manufacture of products (as defined in TCA) pursuant to the TCA. 'Panki assets' meant the following assets of ICI India Ltd.:-

(a) all plant, machinery, equipment, computer and communications hardware, loose tools, fixtures, fittings, furniture and vehicles located at the Panki Site;
(b) the leasehold and licensed properties comprising the Panki Site, together with all buildings thereon;
(c) the Retained Permits;
(d) the Contracts in respect of the Panki Site relating to the supply of utilities, the supply of consumables (including stores and spare parts) and the maintenance of the items referred to in paragraph (a) above;
(e) loans to employees;
(f) stocks of consumables, stores and spare parts.

42. 'Panki site' meant all the land owned by ICI India Ltd. using the catalysts manufacturing facility at Panki Works, Udyog Nagar, Pank Industrial Area, Kanpur, U.P. The term 'Technical Information' was also defined to mean all technical data, know-how, methodologies, techniques, trade secrets, confidential information, drawings (including design and engineering drawings and plans), formulations, samples and composition of raw materials, of intermediaries and / or products, technical reports, laboratory notebooks, databases, operating and testing procedures, etc. The term 'Transfer Time' means 07.00 a.m. on the date of Completion occurs.

43. Under clause 2, sale and purchase of the Indian business, subject to the provisions of agreement including fulfillment of conditions, ICI India Ltd. shall transfer, sell and / or to assign and the purchaser shall assume, purchase and / or accept as at and from the Transfer Time, free from all liens, charges, equities and other encumbrances (other than Permitted Liens), the Indian Business as a going concern. As per clause 2.2, it was repeated that Excluded Assets shall be excluded from the sale and purchase of Indian business as going concern and retained by ICI India Ltd. Clause 2.4 specified that Indian business was being sold on the terms of agreement as going concern with the intent that the purchaser may carry on the Indian business as going concern from the transferred time. It was further agreed vide clause 2.6 that the purchaser shall procure the incorporation of the Indian purchaser and shall novate this agreement and assign to the Indian Purchaser all of its rights, benefits, interest and obligations under this agreement prior to completion. It was reiterated that each party undertakes to enter into Deed of Novation with Indian purchaser on the novation date. Further, clause 2.6 provided that upon execution of Deed of Novation, the purchaser's obligations under the agreement shall cease and the Indian purchaser shall assume obligations of the purchaser. It may be mentioned that the Novation agreement was entered into between ICI India Ltd. and Johnson Matheys PLC and the assessee on 15.11.2002.

44. Under clause 3, consideration was calculated for sale and purchase of Indian business. The same was equal to business cash consideration as adjusted by net asset adjustment. Various other terms and conditions were agreed upon between ICI India Ltd. and Johnson Matheys PLC for takeover of the business as going concern. Under clause 7, it was agreed that ICI India

Ltd. shall from warranty date comply with and from that date until the transfer time, the non-fulfillment of conditions by the Long Stop Date or termination of this agreement pursuant to clause 6.5, whichever shall be the first to occur, comply with, the provisions of Schedule 1 i.e. Conduct of the Indian Business and the Panki activities until completion and the trading payment. The balance terms and conditions are not relevant for deciding the issue before us. However, clauses 18.5 to 18.7 i.e. relating to allocation of technical information and its transfer needs reference to adjudicate the issues, whether the assessee had received any technical information. The relevant paras read as under:-

*"18.5 **Allocation of Technical Information***

(a) ICI India and the Purchaser shall :

(i) Within one month following completion, ensure that their respective representatives (who shall each be suitably qualified, in the sense of having knowledge of the relevant technologies) enter into discussions in good faith with a view to completing the task of allocating all records (in whatever from or medium, including paper, electronically stored data, magnetic media, film and microfilm) containing Technical Information owned by, or in the possession or control of , ICI India, into the categories set out in Clause 18.5(b) (Allocation of Technical Information) below ; and

(ii) Use their respective best endeavours to ensure that the task of allocating records is completed by their respective representatives no later than 90 days from the Completion Date, failing which the matter may be referred for resolution under Clause 31 (Dispute Resolution).

(b) The categories and the treatment of records containing Technical Information shall be as follows :

Contents of category	***Treatment of records containing Technical Information within category.***
*Records containing Technical Information which is exclusively used in or exclusively relates to the Indian Business (But excluding for the avoidance of doubt any which comprises Excluded IP) (any such Technical Information being "**Business Technical Information**")*	*ICI India shall provide the Purchaser either which each original record (or all relevant parts of each original record) containing Business Technical Information or, where that is not practicable, with a complete and accurate copy of each original record or relevant parts thereof.*

*Records containing Technical Information which is used non-exclusively in the Indian Business (but excluding for the avoidance of doubt any which comprises Excluded IP) (any such Technical Information being "**Business Technical Information**")*	*ICI India shall provide the Purchaser with a complete and accurate copy of each record (or all relevant parts of each record) containing Shared Technical Information. The Purchaser's rights to use this are as set out in the IP Agreement in relation to the " Shared Unregistered IP".*
*Records containing Technical Information which is neither Business Technical Information nor Shared Technical Information, and which ICI India is either unable to make available to the Purchaser for legal reasons or which it regards as proprietary and so is not willing to make available (any such Technical Information being "**Excluded Technical Information**")*	*ICI India may retain all records containing Excluded Technical Information and the Purchaser shall have no right to use or have access to the same.*
*Records containing Technical Information which is not used in the Indian Business but which relates to catalysts and has been identified by the Business prior to the Warranty Date as being of interest to it, but does not constitute Excluded Technical Information, and which ICI India is therefore willing to make available to the Purchaser (any such Technical Information being "**Excluded Technical Information**")*	*If the purchaser so request in writing, ICI India shall provide it with a complete and accurate copy of each record (or all relevant parts of the record) containing Available Technical Information at the Purchaser's reasonable cost. The Purchaser's rights to use this will then be as set out in the IP Agreement in relation to the "Shared Unregistered IP").*

(c) *Where ICI India is obliged under this Clause 18.5 (Allocation of Technical Information) to provide the original or a copy of any record or part of any record to the Purchaser, it shall provide the same to the Purchaser, or to any member of the Purchaser's Group, as directed by the Purchaser, within 15 Business Days of the parties' agreement upon the allocation of that record into a category set out in Clause 18.5(b).*

18.6 ***Uncategorised Technical Information***

Where, at any time and from time to time during the period expiring 12 months after Completion, the Purchaser notifies ICI India in writing that the parties neither addressed nor agreed upon under Clause 18.5 (Allocation of Technical Information) a particular record containing Technical Information which the Purchaser reasonably considers constitutes Business Technical Information or Shared Technical Information, ICI India and the Purchaser shall comply with the procedure set out in Clause 18.5 (Allocation of Technical Information) in relation to any such record, except that the reference to Clause

18.5(a)(i) (Allocation of Technical Information) to "one month following the Completion Date" shall be read as "one month following the giving of notice under this Clause 18.6 and the reference in Clause 18.5(a)(ii) (Allocation of Technical Information) to "90 days from the Completion Date" shall be read as "90 days from the giving of notice under Clause 18.6" (Uncategorised Technical Information).

18.7 ***ICI India's access to verify Technical Information***

(a) During the period expiring 12 months after completion, the Purchaser shall and shall procure that each other member of the Purchaser's Group shall, within a reasonable time after being given written notice by ICI India (which notice may be given by ICI India only once during such period), provide ICI India with access to any records (in whatever form or medium) containing Technical Information and which are in the possession or control of the Purchaser's Group as a result of the transactions contemplated by this Agreement. The access provided to ICI India under this Clause shall :

(i) take place at reasonable times stipulated by the Purchaser
(ii) not disrupt the Indian Business or any business of the Purchaser's Group
(iii) be at the cost of ICI India (but the Purchaser shall not charge for access);
(iv) be subject to Clause-21 (Confidentiality) ; and
(v) be subject to ICI India complying with all reasonable directions of and having regard to the Purchaser's, or any member of the Purchaser's Group's , security and safety policies.

(b) ICI India may have access under Clause 18.7 (a) (ICI India's access to verify Technical Information) for the following purposes only;

(i) to verify that no record which contains Excluded Technical Information is in the possession or control of the Purchaser's Group;
(ii) to extract and retain any record to the extent that it contains Excluded Technical Information ; and
(iii) to obtain copies of any record to the extent that it contains Shared Technical Information."

45. Schedule I to the agreement enlists conduct of Indian business and the Panki activity until completion and the trading payments, wherein ICI India Ltd. agreed with the purchaser that, from the warranty date until the transfer time, it has and will continue to carry on the Indian business and the Panki activities in the same manner that Indian business has been carried on prior to the warranty date. Various other terms were agreed upon between ICI India Ltd. and the purchaser i.e. Johnson Matheys PLC for various acts to be undertaken in relation to the Indian business and Panki activities or any part thereof. It was also agreed that risk in Indian business shall pass to the

purchaser with effect from completion. As per Schedule 2, the completion condition was the occurrence of ROW completion and ICI India Ltd. shareholders' approval of the transactions contemplated by transaction documents. On such completion i.e. on ROW completion date, the net asset statements, it was agreed to be prepared by the purchaser as soon as practicable following the completion of the said formality as set out in part 2. The said basis of preparation of net assets statement is enlisted under Schedule III to the agreement. The general conditions of business property are provided under part I of property matter and under part 2, special conditions are provided.

46. Clause 12 under part 2 defines Leave and License Novation agreement i.e. Leave and License Novation agreement in the agreed form in respect of Taloja site, since the same is referred in part I of Schedule 12. Taloja site further means the property located at Taloja India Industrial area, Village, Navade and Padhga, Maharashtra. Further, warehouse site means property located at Panki Industrial Area, Kanpur. It was agreed that at completion, ICI India Ltd. and the purchaser shall enter into Leave and License Novation Agreement in accordance with their respective obligations pursuant to Schedule 5. Further, residential properties were listed along with list of landlords. Under Schedule 5, ICI India Ltd.'s obligations at completion and purchasers obligations at completion were again provided. Schedule 6 deals with list of intellectual properties, wherein under part I, business IP and the patents are listed. Under part 2, ICI Roundel is provided and under part 3, ICI Group standards are provided. Further, under part 4, Uniqema Excluded Technology is provided. Under Schedule 8, warranties are listed along with list of business IP contracts. The business properties are provided under

clause 13. The next schedule which is connected to the issue raised is Schedule 10 i.e. list of Excluded Assets and Excluded Contracts. We are concerned with part 1 which talks of Excluded Assets, copy of which is placed at page 255 of the Paper Book and the same includes under-mentioned assets:-

1. the Excluded IP;
2. the Shared Assets;
3. the Shared Contracts;
4. the Excluded Contracts;
5. the Panki site;
6. the Panki Employees;
7. the Panki Assets; and
8. the servers located at the Gurgaon site.

47. The Toll Conversion Agreement between ICI India Ltd. and the assessee company was entered into on 02.12.2002 and the copy of the same is placed at pages 282 to 331 of the Paper Book. Under the said Toll agreement, the assessee has agreed with ICI India Ltd. to manufacture the products for it on the agreed terms and conditions. During the contract term and in consideration for the assessee complying with its obligations under the agreement including paying operating cost and capital expenditure cost, ICI India Ltd. undertook to manufacture products upto agreed capacity exclusively for JM India i.e. assessee. It was also agreed that the manufacture of products would be in accordance with relevant specifications. Further, ICI India Ltd. shall not use plant and equipment for any purpose other than manufacturing and supplying the products for and to JM India and further, it was also agreed that ICI India Ltd. shall not use technical information, assessees' branding or any other intellectual property licensed to it under the agreement for any purpose other than manufacturing the products for assessee. As per clause 3.2, it was agreed upon that ICI India Ltd. shall manufacture the products using technical information licensed to it pursuant to

clause 4.2. As per clause 5, enlisting the obligations of assessee in addition to other obligations to be fulfilled, it was agreed that the assessee would provide ICI India Ltd. with proper and precise specifications, operating process and instructions required by ICI India Ltd. to manufacture the products. The payment was to be made at the end of calendar month, wherein ICI India Ltd. had calculated operating cost incurred, analysed by category of cost and on itemized basis as per clause 11.1. Under clause 14, the assessee grants to ICI India Ltd. non-exclusively, non-transferable royalty free license to use technical information solely for the manufacture, receipts, storage, handling, packaging, distribution as applicable, of the products or raw materials at or from site for and to assessee and to meet its other obligations. As per clause 14.2, ICI India Ltd. shall have no right to grant sub-license of technical information or part of it. Further, the said license granted would cease immediately on termination or expiry of agreement. Clause 16 provides the option i.e. provision of Schedule 8 option shall have effect as set out in clause 26. Further, ICI India Ltd. undertook that at completion of transfer of site pursuant to site option or put option, ICI India Ltd. shall transfer all its rights, title and interest, which it has in the site and site assets as on the date of BTA. The agreement as per clause 27.8 shall terminate automatically on completion of sale of plant assets and site assets (as the case may be) pursuant to any of the site option, the plant option or put option (as applicable). In the definition clause, the plant option, put option and site option are defined in Schedule 8. Another aspect is that plant price means Rs.1 lakh. Schedule 8 under site option, ICI India Ltd. grants to assessee the right to purchase ICI India Ltd.'s leasehold interest in the site and all plant and equipment and subject to employees prior consent transfer all or any of the employees for the site price on giving the site option notice. Under the plant option, ICI India Ltd. grants to

the assessee the right to purchase from ICI India Ltd. and / or part of plant and equipment for the plant price on giving the plant option notice. The third option was the put option, under which the assessee grants to ICI India Ltd. the right to sell the site assets, subject to employees prior consent to transfer any or all of the employees to assessee, for the site price on giving the put option. The time to exercise the said options is also provided under Schedule 8. The perusal of the same, thus reflect that under site option and the put option, there is transfer of leasehold interest in site and all the plant and machinery. However, under plant option, option was with assessee to purchase all or part of the plant and machinery.

48. Reading the terms of BTA as agreed upon between the parties, ICI India Ltd. agreed to transfer, sell and / or to assign its Indian business as a going concern. As referred to in paras hereinabove, Indian business was defined and understood between the parties, was catalyst business carried on by ICI India Ltd. under the name and style Synetix. The same included business plant & machinery, business properties, employees, debtors, all the rights and liabilities of ICI India Ltd. in or to the business IP, the business goodwill and primary and secondary books and records. However, the term 'Indian business' did not talk about Panki activities and also excluding the 'Excluded assets'. We have already referred to the list of 'Excluded assets', which clearly excludes among others Panki sites, employees and Panki assets along with excluded IP. All these excluded assets are enlisted in Part I of Schedule 10 to the BTA. The Panki activities were the manufacture of items of products which were covered as per Toll Conversion Agreement i.e. in respect of manufacturing activities carried on at Panki site. Another important term which needs to be taken note of is that Panki assets which

clearly have not been taken over and it is part of excluded assets i.e. assets which were not been taken over and the terms of BTA talks of leasehold and licensed properties comprising Panki sites together with building thereon. It also talks of plant & machinery, equipment, computer and other assets at Panki. In order to understand the intention of the parties, it is necessary to refer to Toll Conversion Agreement, which was also entered into between ICI India Ltd. and the assessee company on 02.12.2002, wherein it was agreed upon that ICI India Ltd. would manufacture the products on behalf of assessee for the stipulated term. The said production was to be undertaken exclusively for the assessee in accordance with relevant specifications. It was also agreed upon that the aforesaid plant & machinery, equipment, assets at Panki site were to be exclusively used for manufacturing the said products for and on behalf of the assessee, by ICI India Ltd. Another relevant clause was that ICI India Ltd. shall manufacture the products using technical information licensed to it pursuant to clause 4.2. In other words, as per the terms of BTA, ICI India Ltd. had already transferred business carried on under the name of Synetix including the business IP to the assessee but since Panki activities and Panki assets were excluded from the said takeover of business by the assessee from ICI India Ltd., the said assets i.e. land and building including the plant & machinery remained to be transferred. However, under the Toll Agreement, the said assets and site were to be used by ICI India Ltd. in order to manufacture the products for and on behalf of the assessee i.e. till the date Panki site and the assets were transferred, the manufacturing activities had to be carried on by ICI India Ltd. for and on behalf of assessee. Though under the Toll Agreement, it was decided that the said Panki site would be transferred at the value of Rs.1 lakh, which we shall consider in the paras hereinafter; but the parties did agree to understanding to carry on the

business in a particular manner. On analysis of the terms of BTA and Toll agreements, it transpires that the value of land at Panki was not part of slump price since the same was not transferred on the date of signing of BTA and TCA. ICI India Ltd. owned 279.30 acres of land, out of which catalyst business was being carried on part of it i.e. 27.53 acres, which admittedly, was to be transferred to the assessee. The said land was under lease with Kanpur Development Authority, for which necessary permission was required before the land could be transferred. Hence, the conclusion of CIT(A) in this regard that the land at Panki was transferred and its value as per valuation done by KDA works out to Rs.174.36 crores is without any basis. In the absence of any land at Panki being transferred under the BTA, there is no merit in findings of CIT(A) in this regard.

49. Now, coming to the second piece of land on which catalyst business of ICI India Ltd. was being carried on i.e. at Taloja. As per understanding between the parties with special reference to Schedule 4, which defined the business property in Part II, clause 12, it is provided that at completion, ICI India Ltd. and the purchaser i.e. assessee shall enter into Leave and License Novation Agreement in accordance with their respective obligations pursuant to Schedule 5. In part III, while enlisting the business properties in respect of said property at Taloja, the tenure is mentioned to be license – ICI India Ltd. In other words, the business at Taloja site was run by ICI India Ltd. on land which was leased from HLL, ICI India Ltd. was not the owner of said piece of land and hence, was not in position to pass on the ownership of the land. In Schedule 12, the list of agreements and deeds are enlisted. Under Part I, which in addition to the Deed of Restricted Covenants and Toll Conversion Agreement also talks of Novation of Leave and License Agreement in respect

of Taloja Manufacturing site between HLL, ICI India Ltd. and Indian purchaser i.e. assessee and it is mentioned 'it is completed'. The copy of said agreement is placed at pages 393 to 397 of the Paper Book, Vol-II. In view of above said facts and circumstances, we hold that the CIT(A) has erred in concluding that the said properties i.e. lands at Taloja and Panki sites had been transferred to the assessee under BTA. There is no merit in the said findings of the CIT(A), in view of the above said facts and circumstances. The land at Taloja was leasehold land, wherein ICI India Ltd. had taken the same on leave and license basis from HLL and was not the owner of said land and has no authority to transfer to the assessee under BTA agreement.

50. Before parting, we may also refer to Leave and License Agreement between HLL and ICI India Ltd., which is placed at pages 382 to 392 of the Paper Book Vol-2. This is with regard to land at Taloja, under which ICI India Ltd. was given the right to use the said land. On 02.12.2002 Leave and License Novation Agreement was signed between HLL, ICI India Ltd. and the assessee for use of land at Taloja, copy of which is placed at pages 393 to 397 of the Paper Book, Vol-II.

51. Another point to be noted in respect of Taloja land is that HLL sold its business to ICI India Ltd. in 2001 and Leave and License was given to ICI India Ltd. for the said land. However, ICI India Ltd. sold its business to the assessee in 2002 and hence, the Novation between HLL, ICI India Ltd. and the assessee. Another document which needs reference is the Memorandum of Understanding dated 02.04.2008, copy of which is placed at pages 332 onwards of the Paper Book between HLL and the assessee, wherein the said land was agreed to be sold by HLL to the assessee for Rs.6.93 crores. The

Deed of Assignment is placed at page 399 of the Paper Book, the said Deed of Assignment which was entered after approval from MIDC on 19.01.2009. In view thereof, there is no merit in the stand of CIT(A) that the land at Taloja was transferred by ICI India Ltd. to the assessee under BTA and hence, the value of slump price is first to be attributed to the cost of said land.

52. Before parting, we may also refer to Deed of Novation dated 15.11.2002, which is executed between ICI India Ltd. and Johnson Matheys PLC and the assessee before us, under which it is very clearly provided that by the Business Transfer Agreement dated 02.10.2002, ICI India Ltd. had agreed with the purchaser i.e. Johnson Matheys PLC to sell and transfer its catalyst business as going concern on the terms and conditions contained therein. By Sale and Purchase Agreement (MSPA) (Global Agreement) dated 23.09.2002, ICI India Ltd. had agreed that purchaser to sell or transfer certain assets comprising its Synetix business to the purchaser. Pursuant to clause 2.6 of BTA, purchaser had procured the incorporation of Indian purchaser as a company in India i.e. the assessee and obtained requisite approvals to enable the assessee to assume the business together with all benefits, rights, obligations, duties and consequences arising under the BTA. Consequently, Johnson Matheys PLC by virtue of said Deed, sought to novate all the benefits, rights, obligations, duties and consequences under BTA to the Indian purchaser i.e. assessee, subject to the terms and conditions of the said Deed. The assessee assured to undertake and conform to ICI India Ltd. the due performance of it in full of BTA in accordance with provisions contained therein. As per Novation Agreement, Johnson Matheys PLC was released by ICI India Ltd. from BTA and from the performance thereto and was also released and discharged from all liabilities, duties and obligations whatsoever

in connection with BTA which would be taken over by Indian purchaser i.e. the assessee. All the other terms and conditions contained in BTA shall remain unchanged and were held to be fully valid and binding on ICI India Ltd. and the assessee, in accordance with terms thereto. Novation Agreement between ICI India Ltd., Johnson Matheys PLC and the assessee has been filed during the course of hearing. Valuation report of tangible assets by M/s. Mehta and Padamsey Surveyors Pvt. Ltd., dated 11.02.2003 is placed at pages 110, 112 and 113 of the Paper Book. Further, valuation report of Ernst & Young Pvt. Ltd. i.e. valuation of intangible assets, dated 25.04.2003 is placed at pages 231 to 280 of Paper Book, Vol-2.

53. Now, coming to the terms and conditions of BTA, which the parties have agreed upon, under which the catalyst business of ICI India Ltd. has been taken over by the assessee, then the next step to be deliberated upon is spreading over of the value of slump price over the fixed assets acquired and balance over the goodwill and also know-how, patents and trademarks. The assessee had obtained valuation report/s from an independent Valuer under which it had identified the cost of fixed assets acquired and also the value of know-how, patents and trademarks and the balance was attributed to goodwill. The CIT(A) had disallowed the claim of assessee on the ground that the most important asset acquired by the assessee was the land at Panki and Taloja sites and since the Valuer had not attributed any cost to the same, working of the Valuer was not correct. We have already in the paras hereinabove held that no cost was to be attributed to the Panki site and Taloja site out of slump price, since both the sites have not been acquired by the assessee as owner on the date of BTA. For the sake of repetition, it may be pointed out that the site at Taloja is leasehold right held by ICI India Ltd. and

though ICI India Ltd. was the owner of Panki site, but necessary permission was required from KDA before it could be so transferred and in the absence of the same, nothing was transferred to assessee. Another aspect of non-transfer of site and plant & machinery is the Toll Agreement, which was entered into between the parties. ICI India Ltd. in the first instance, transferred all the rights to carry on the business including Business IP, trademarks, rights and intellectuals as is clear from the terms of said Toll Agreement entered into between ICI India Ltd. and assessee. Till the receipt of permission from requisite authority for transfer of land, though the catalyst business has been transferred by ICI India Ltd. but it undertook to carry on said business for and on behalf of assessee. The Panki assets and Panki activities were to be carried on by ICI India Ltd. using trademarks and intellectual property rights, which it had originally assigned to the assessee, who in turn, as per the terms of Toll Agreement allowed ICI India Ltd. to use the same. In case we read the terms of BTA and the Toll Agreement, then it becomes very clear that as per BTA, the assessee had acquired the aforesaid rights including intellectual rights in the catalyst business carried on by ICI India Ltd. However, for the limited purpose of carrying on the manufacturing activity at Panki site, the said trademarks and intellectual property rights were being used by ICI India Ltd., since the assessee permitted them to so use it. The CIT(A) however, had concluded that since the business at Panki site was being carried on by ICI India Ltd., then there is no merit in the claim of assessee that trademarks, know-how and other intellectual property rights had been transferred to the assessee and hence, no value is to be attributed to the same. Again, we make reference to BTA, under which the business goodwill is defined to be goodwill of ICI India Ltd. in relation to business including exclusive rights by the purchaser to trade under this name of business.

'Business IP' means all intellectual properties which at the ROW transfer time was owned by ICI India Ltd. and which has been used exclusively in, or exclusively relates to, the business excluding the 'Excluded IP' and all intellectual property licensed to the purchaser under the IP Agreement. Then, even 'business technical information' has been defined; in addition the disclosed information and environmental terms were also handed over to the assessee. However, all these were with benchmark that the 'Excluded IP' as defined would not be transferred. Similarly, 'Excluded assets' would not be transferred on the transfer of Indian business. The 'Excluded assets' also talked about Excluded IP, Excluded Contracts along with Panki site, Panki employees and Panki assets. In case, we look at the definition of the term 'Indian Business', it also talked about in addition to the business plant & machinery, business properties, employees and debtors, benefits of business contracts, all right & title of ICI India Ltd. in or to the business IP and business goodwill. In other words, it was not only the business but the right to carry on business along with intellectual rights being business IP, goodwill of business were also acquired by the assessee under BTA. Once the same has been so acquired, then the slump price is to be spread over, not only, over the value of tangible assets i.e. plant & machinery and other assets, but balance over the value of trademarks, know-how and patents and if any balance is so left, then over the goodwill.

54. The assessee during the course of hearing has furnished additional evidence of documents in connection with acquisition of technical know-how by the assessee which are placed at pages 1 to 21 of the Paper Book. The assessee has also furnished Novation of Agency Agreement, Customer Contracts and Distribution of Customer list which are placed at pages 22 to 42

of the Paper Book. We have already considered the claim of assessee in this regard and in view of additional evidence which is in continuation with terms of BTA entered into, we find merit in the plea of assessee and hold that the assessee has acquired the said know-how, trademarks and patents from ICI India Ltd.

55. The learned Departmental Representative for the Revenue again and again stressed that Business IP was not transferred as per BTA. He tried to place reliance on different agreements by way of additional evidence. However, while in the final arguments, he stated that the said additional evidence may not be admitted.

56. The learned Authorized Representative for the assessee on the other hand, admitted that the Business IP of international business of ICI India Ltd. was not acquired by the assessee and it was only the Business IP of Indian business, ICI India Ltd., which was first acquired by Johnson Matheys PLC, which again was novated in favour of assessee on its formation. After going through the terms of BTA, Novation Agreement, the Toll Agreement, we find no merit in the stand of Revenue in this regard. The learned Departmental Representative for the Revenue also was of the view that no part of slump price is to be attributed to the know-how, patents and trademarks, since the same has not been acquired by the assessee. Even if we accept the said stand of learned Departmental Representative for the Revenue, ultimately after the slump price has been attributed first to the value of tangible assets, then the balance is to be attributed to intangible assets and once the same is done and whether it is under the umbrella of know-how, trademarks, patents or goodwill, it makes no difference since all these are covered under the

umbrella of intangible assets, which are eligible for claim of depreciation under section 32(1)(ii) of the Act. The goodwill is also an intangible asset eligible for said depreciation as held by the Hon'ble Supreme Court in CIT Vs. Smifs Securities Ltd. (supra). In view thereof, we find no merit in the stand of learned Departmental Representative for the Revenue and the same is rejected.

57. The next issue is whether slump price can be bifurcated between value of tangible and intangible assets. The Hon'ble Punjab & Haryana High Court in Shreyans Industries Ltd. Vs. JCIT (2005) 277 ITR 443 (P&H) has laid down the proposition that in case slump payments have been received for all the rights transferred including the assets transferred, then consideration has to be allocated amongst the said assets. The relevant findings are as under:-

> *"9. We are in agreement with the finding recorded by the Tribunal. Admittedly, the amount of Rs. 14.75 crores was the consideration for the entire unit as a going concern. The assessee has placed no material to give bifurcation of costs towards various assets. Under such circumstances, the same had to be estimated. The Tribunal has adopted the best available evidence in the form of report of the expert M/s. S. R. Baltiboi and Consultants (P) Ltd. It is a well established principle of law that while exercising the jurisdiction under section 260A of the Act, this court shall not substitute its own estimate for that of the Tribunal unless it is shown that the estimate of the Tribunal is based on no material or is totally perverse and irrational. Such is not the case in the present appeal."*

58. Similar proposition has been laid down by the Pune Bench of Tribunal in Drilbits International (P) Ltd. Vs. DCIT (2011) 142 TTJ 0086 (Pune-Trib).

59. The Hon'ble High Court of Delhi in DE Nora India Ltd. Vs. CIT (2015) 370 ITR 391 (Del) on similar facts as in the case of assessee, where the assets and liabilities and obligations were taken from as going concern with no value specified in the agreement for the assets i.e. tangible and intangible assets after considering reliance placed on the judgment of the Hon'ble

Supreme Court in Challapalli Sugars Ltd. Vs. CIT (1975) 98 ITR 167 (SC) held as under:-

> *"12. It is evident that what was purchased by the appellant-assessee was an undertaking there being slump sale and the entire business including assets and liabilities were transferred for a lump sum amount. There was no break-up or division of the said amount in the agreement itself. The amount paid would be the sale consideration paid after taking into account the value of the plant, machinery, dead stock as well as work-in-progress, stock-in-trade, etc., and intangible items like goodwill, manpower, values of different licences, etc. This cost paid would be for both depreciable and non-depreciable assets. In such cases, difficulties do arise in computing the actual cost of the assets on which depreciation is to be allowed to the purchaser, i.e., the appellant-assessee. There are decisions which hold that the lump sum price cannot be attributed for different items if no bifurcation or division being made by the assessee or by the purchaser. But, in the facts of the present case, there is evidence that the appellant assessee and the seller had evaluated the plant and machinery on the date of the sale. Therefore, the authorities and the Tribunal deemed it appropriate to rely upon the surveyor's report for computing actual cost and we agree with the said conclusion.*
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> *13…….*
>
> *14……*
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> *15. In Challapalli Sugars Ltd. (supra), the Supreme Court has held that the expression "cost" is not synonyms with "price" and would include the actual cost paid by the assessee, to acquire the asset in question and other expenses such as freight, warehouse charges or insurance and interest to bring the asset into existence and put them into working condition. Interest on monies borrowed for purchase of fixed asset prior to asset coming into production, i.e., till the erection stage should be capitalised. It was held as under (page 175 of 98 ITR) :*
>
> > *"It would appear from the above that the accepted accountancy rule for determining the cost of fixed assets is to include all expen diture necessary to bring such assets into existence and to put them in working condition. In case money is borrowed by a newly started company which is in the process of constructing and erecting its plant, the interest incurred before the commencement of production on such borrowed money can be capitalised and added to the cost of the fixed assets which have been created as a result of such expen diture. The above rule of accountancy should, in our view, be adopted for determining the actual cost of the assets in the absence of any statutory definition or other indication to the contrary."*
>
> *16. The aforesaid decision does not help or assist the assessee in the present case, for we are not concerned with what should be capitalised but we have to answer what was the actual cost of the fixed assets on which depreciation should be claimed and allowed, i.e., the actual cost paid by the assessee for the depreciable assets acquired from Wimco Ltd. For computing the value of the said assets, the appellant-assessee and Wimco Ltd. had both relied upon the surveyor's report dated January 16, 1990, and March 6, 1990. The said surveyor had valued all buildings, boundary wall and other plant and equipment. The aforesaid valuation report is detailed and elaborates and is also the basis on which Wimco Ltd. had paid tax on the resultant transfer."*

60. The Hon'ble High Court thus, held that in the case of slump sale wherein both the parties had relied on Surveyor's report in determining the consideration paid in lump sum, then depreciation was to be allowed on cost of fixed assets as per Surveyor's report.

61. Further, the Hon'ble High Court of Delhi in Triune Energy Services (P.) Ltd. Vs. DCIT (supra) while considering the case of slump sale referred to the AS-10 and upheld the bifurcation of value of slump price over cost of tangibles and intangibles. The relevant findings are as under:-

> *"15. From an accounting perspective, it is well established that 'goodwill' is an intangible asset, which is required to be accounted for when a purchaser acquires a business as a going concern by paying more than the fair market value of the net tangible assets, that is, assets less liabilities. The difference in the purchase consideration and the net value of assets and liabilities is attributable to the commercial benefit that is acquired by the purchaser. Such goodwill is also commonly understood as the value of the whole undertaking less the sum total of its parts. The 'Financial Reporting Standard 10' issued by Accounting Standard Board which is applicable in United Kingdom and by Institute of Chartered Accountants of Ireland in respect of its application in the Republic of Ireland, explains that "the accounting requirements for goodwill reflect the view that goodwill arising on an acquisition is neither an asset like other assets nor an immediate loss in value. Rather, it forms the bridge between the cost of an investment shown as an asset in the acquirer's own financial statements and the values attributed to the acquired assets and liabilities in the consolidated financial statements".*
>
> *16. The abovementioned Financial Reporting Standard 10 also provides for accounting of purchased goodwill as "the difference between the cost of an acquired entity and the aggregate of the fair values of that entity's identifiable assets and liabilities. Positive goodwill arises when the acquisition cost exceeds the aggregate fair values of the identifiable assets and liabilities. Negative goodwill arises when the aggregate fair values of the identifiable assets and liabilities of the entity exceed the acquisition cost."*
>
> *17. At this stage, it is also relevant to refer to Accounting Standard 10 as issued by the Institute of Chartered Accountants of India. The relevant extract of which reads as under:-*
>
> > *"16.1 Goodwill, in general, is recorded in the books only when some consideration in money or money's worth has been paid for it. Whenever a business id acquired for a price (payable either in cash or in shares or otherwise) which is in excess of the value of the net assets of the business taken over, the excess id termed as 'goodwill'. Goodwill arises from business connections, trade name or reputation of an enterprise or from other intangible benefits enjoyed by an enterprise."*

*18. It is also relevant to note that **Smifs Securities Ltd.** (supra) was a case where assets of company – YSN shares and Securities (P.) Ltd. were transferred to Smifs Securities Ltd. under a scheme of amalgamation. And, the excess consideration paid by the Assessee therein over the value of net assets of YSN Shares and Securities (P.) Ltd. acquired by the Assessee, was accounted as goodwill.*

19. In view of the above, we are inclined to accept the contention advanced on behalf of the Assessee that the consideration paid by the Assessee in excess of its value of tangible assets was rightly classified as goodwill.

20. In the facts of the present case, the ITAT has rejected the view that the slump sale agreement was a colourable device. Once having held so, the agreement between the parties must be accepted in its totality. The Agreement itself does not provide for splitting up of the intangibles into separate components. Indisputably, the transaction in question is a slump sale which does not contemplate separate values to be ascribed to various assets (tangible and intangible) that constitute the business undertaking, which is sold and purchased. The Agreement itself indicates that slump sale included sale of goodwill and the balance sheet drawn up on 22nd September, 2006 specifically recorded goodwill at Rs.40,58,75,529.40/-. As indicated hereinbefore Goodwill includes a host of intangible assets, which a person acquires, on acquiring a business as a going concern and valuing the same at the excess consideration paid over and above the value of net tangible assets is an acceptable accounting practice. Thus, a further exercise to value the goodwill is not warranted."

62. The Hon'ble High Court in CIT Vs. Pepsico India Holdings P. Ltd. (supra) had held that the valuation undertaken by an independent Valuer was in respect of slump price, was well accepted method and hence, we find no merit in the order of CIT(A) in rejecting the same.

63. The CIT(A) while denying the claim of assessee had placed reliance on the ratio laid down by the Hon'ble Supreme Court in Saharanpur Electric Co. Ltd. Vs. CIT (supra), wherein the proposition was laid down in case of seller of business and it was held that there was no merit in allocating slump price over the value of assets. First of all, the said ratio is in respect of assessment year prior to amendment and in the case of seller of business. Further, AS-10 of Accounting Principles also provide for the working of value of tangible and intangible assets and once the same is so allocated, the assessee is entitled to the claim of depreciation on such assets. The total consideration

exchanged between the parties was Rs.153.18 crores. The assessee has allocated sum of Rs.27.49 crores to the value of assets including plant & machinery which has been taken over by the assessee. Further, the assessee had allocated sum of Rs.125.68 crores to the value of know-how, patents and trademarks, and goodwill. The said exercise was carried out in a systematic manner by the Valuer and in the absence of findings of any fallacy in the said distribution, there is no merit in rejecting the values adopted by the assessee. So, sum of Rs.153.18 crores in the first instance is to be allocated to cost of tangible assets, further to the value of trademarks, patents and know-how and the balance to the goodwill. The assessee had undertaken the allocation in assessment year 2003-04, which has been accepted in the hands of assessee. Further, it may be pointed out herein itself that the assessee has been allowed depreciation on the value of know-how, patents and trademarks by the Assessing Officer, which has not been disturbed in the preceding year. However, the depreciation claimed on goodwill was not allowed to the assessee, which was allowed by the Tribunal in turn, following the ratio laid down by the Hon'ble Supreme Court in CIT Vs. Smifs Securities Ltd. (supra).

64. The learned Departmental Representative for the Revenue placed heavy reliance on the ratio laid down by the Delhi Bench of Tribunal in Osram India (P) Ltd. Vs. DCIT (supra), wherein the issue decided was on depreciation on goodwill. The Tribunal held that the said depreciation would not be allowed unless and until it is shown that the value of such goodwill is in fact value of intangible assets such as know-how, patents, copyrights, trademarks or any other business or commercial rights of similar nature being intangible assets. However, the said proposition now stands reversed by the Hon'ble Supreme Court in CIT Vs. Smifs Securities Ltd. (supra). The second

aspect of the said decision was that wherein it has been held that the view taken by the Assessing Officer i.e. allowing depreciation on the whole amount of goodwill without any bifurcation if it was in accordance with law could not be disturbed, but if the same mistake had been committed by the Assessing Officer, which is not in accordance with law, then the said mistake cannot be perpetuated on the basis of rule of consistency. We have already decided the issue at length vis-à-vis claim of assessee on the value of tangible assets and intangible assets and in the absence of any mistake being pointed out by the Department in the bifurcation of amounts, then the said proposition cannot be allowed. In any case, the basis for bifurcation is the valuation report of an independent Valuer and the same cannot be tinkered.

65. The learned Departmental Representative for the Revenue has referred to the first and second additional evidence filed in Paper Book Vol-2 which is ICI India Ltd.'s annual report for financial years 2001-02 and 2002-03, which had been obtained from public domain. However, the learned Departmental Representative for the Revenue has not referred to any of the aspects of the said and the same is thus, not admitted.

66. In respect of third additional evidence i.e. Copy of Company News service – London Stock Exchange, the learned Departmental Representative for the Revenue fairly pointed out that the same may be ignored and hence, the same is ignored. In respect of fourth additional evidence i.e. valuation report of tangible assets of the assessee, which has been filed by the assessee also and already considered by the CIT(A) and hence, there is no merit in the claim of learned Departmental Representative for the Revenue that the same being additional evidence.

67. Further, the learned Departmental Representative for the Revenue filed Paper Book Vol-3, which is again additional evidence. However, the learned Departmental Representative for the Revenue after going through the said documents at serial No.1 to 3 pointed out that the same are to be ignored for deciding the issue and hence, the same are dismissed.

68. Another additional evidence by way of Paper Book Vol-4 filed, in which the Revenue had filed the relevant portions of notes in respect of disinvestment of assets of Synetix in the annual report of ICI India Ltd. However, the learned Departmental Representative for the Revenue only referred to pages 35 and 47. However, the learned Departmental Representative for the Revenue has failed to submit the reasons favouring for its admission and in the absence of the same, we find no merit in the plea of learned Departmental Representative for the Revenue. Further, the learned Authorized Representative for the assessee has also objected to its admission. However, we are rejecting the same. In any case, the treatment of receipt in the books of account of seller would not decide the issue vis-à-vis the treatment of said assets in the hands of assessee.

69. Before parting, we may also point out that as per the Toll Conversion Agreement, the value of Panki assets was taken at Rs.1 lakh. However, the CIT(A) had worked out the cost of 279.30 acres i.e. total landholding of ICI India Ltd. at Rs.174 crores; in case the same rate is applied to 27.52 acres, which was the portion of land on which catalyst business was carried on, then the same would work to Rs.17.37 crores. The learned Authorized Representative for the assessee fairly admitted that the value of Rs.17.37 crores be attributed to Panki assets. However, revised allocation value of land

at Panki would be Rs.13 crores, out of total slump price of Rs.153 crores. Accordingly, we direct the Assessing Officer to re-compute the value of both tangible and intangible assets, accordingly. Following the same proposition, we hold that the assessee is entitled to claim the depreciation on the value of tangible assets and further on know-how, trademarks and patents and also on the goodwill. The assessee has also claimed depreciation on non-compete fees. The Assessing Officer is also directed to allow depreciation on non-compete fees of Rs.3.51 crores.

70. The next aspect of the issue is that where the assessee had already bifurcated slump price over the cost of tangible assets, value of know-how, trademarks, patents and balance to the goodwill in the preceding year i.e. assessment year 2003-04 and depreciation having been allowed to the assessee in the preceding year, consequent to which the said assets were part of block of assets and during the year under consideration, depreciation is claimed on the WDV of the said assets as on the start of financial year, then can the authorities disturb the same?. The claim of assessee vis-à-vis depreciation on tangible assets, know-how, patents and trademarks, goodwill and non-compete fee have either been allowed by the Assessing Officer or by the Tribunal in assessee's own case in assessment year 2003-04. The value of the said assets and allocation of price amongst tangible and intangible assets had been accepted in preceding year and depreciation has been claimed and allowed in the hands of assessee. Once the assets had entered into block of assets and have already been allowed, the depreciation and the WDV of the said assets had been determined in the preceding year, which is brought forward at the start of financial year, then the assessee is entitled to

claim the depreciation on the said WDV or not, was the next issue which was elaborately argued before us.

71. Both the learned Authorized Representatives referred to different parts of section 43(6) of the Act. The learned Authorized Representative for the assessee referred to clause (c) of section 43(6) of the Act, which talks of 'block of assets'. However, the learned Departmental Representative for the Revenue placed reliance on clause (b) of section 43(6) of the Act. The learned Departmental Representative for the Revenue was of the view that in case depreciation has not been allowed correctly in the preceding assessment years, then the same can be looked into by the Assessing Officer in succeeding year. He thus, emphasized that when an error had been made by Assessing Officer while working the value of assets under clause (b), then the same can be looked into afresh while deciding the case of allowability of depreciation in succeeding year. We find no merit in the stand of Revenue since after insertion by the Taxation Law (Amendment and Miscellaneous Provisions) Act, 1986 w.e.f. 01.04.1988, the concept of 'block of assets' had been brought on Statute. The said section very clearly provides that aggregate of WDV of all assets falling within the 'block of assets' at the beginning of previous year and adjusted, could be increased by the cost of any asset acquired during the previous year and could be reduced by the money payable in respect of any asset, which is falling under 'block of assets', which has been sold or discarded, and on the balance, the assessee is entitled to claim depreciation. In view of the amendment to the Act and in view of the concept of 'block of assets' what has to be seen is the aggregate WDV of assets which are falling within the same block at the beginning of previous year, that is the first step. Thereafter, in case any new asset is

acquired, then the value of such asset is to be included; and in case any such asset from the 'block of assets' is sold, then the value of same is to be excluded. However, none of the authorities can tinker with the WDV of the assets for any reason whatsoever. Once the asset has entered into 'block of assets' and thereafter, depreciation has been allowed and in the succeeding year, the WDV of such asset is to be accepted as sacrosanct and depreciation has to be allowed on the same. Such is the proposition laid down by the Hon'ble Bombay High Court in Director of Income Tax (IT) Vs. HSBC Asset Management (I) (P.) Ltd. (supra), wherein the Hon'ble High Court held as under:-

> *"9. Having perused this Appeal Memo including the impugned orders, we are of the opinion that the Delhi High Court judgment has been delivered on 5rh November 2012 and the impugned order was passed on 15th June, 2011. The Tribunal has essentially based its conclusion on the consistent stand of the assessee and that of the Assessing Officer. In dealing with the shift in stand for the subject assessment year, the Tribunal found that this claim of depreciation was raised in the assessment year 2003-04. The assessee claimed that it is allowable as per the provisions of Income Tax Act on block of assets under the head "intangible assets". The Assessing Officer allowed the claim for that assessment year by an order under section 143(3) dated 28.03.2006. The Tribunal then, proceeds to hold that when the Assessing Officer had to allow depreciation on the written down value of the block of assets, then, it cannot in the present assessment year dispute the opening written down value of the block of assets nor can he examine the correctness or otherwise of the opening written down value brought forward from the earlier year. The order under section 143(3) for assessment year 2003-04 continues to operate and no proceedings under the Act were initiated to disturb the same.*
>
> *10. In these circumstances and without any material being placed on record to substantiate the shift in stand for the subject assessment year that the Tribunal emphasizing rule of consistency allowed Assessee's appeal. We do not think that such a view which has been taken in the given facts and circumstances and peculiar to the Assessee's case gives rise to any substantial question of law. Reliance placed on the Delhi High Court judgment therefore, cannot carry the case of the revenue in this matter any further. What comes within the purview of Section 32(1)(ii) of the Income Tax Act, 1961 and whether the department was right when it allowed the depreciation on the basis or foundation for the earlier assessment years need not be gone into in this Appeal. Question as posed and termed as substantial question of law can be determined and decided in an appropriate case. Leaving open all contentions in that behalf, we dismiss this appeal."*

72. Further, the Hon'ble Bombay High Court in the case of CIT Vs. G.R. Shipping Ltd. in Income Tax Appeal No.598 of 2009, vide judgment dated

28.07.2009 had dismissed the appeal of Revenue on the question of depreciation to be allowed under section 32 of the Act. The Tribunal while deciding the said issue in ITA No.822/Mum/2005, relating to assessment year 2001-02, vide order dated 17.07.2008 had placed reliance on the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. G.N. Agrawal (1996) 217 ITR 250 (Bom) for the proposition that after the amended scheme of depreciation of 'block of assets', the individual assets lose its identity and the depreciation should be allowed in respect of whole of the block. The Tribunal held that after amendment w.e.f. 01.04.1988, the individual assets have lost its identity and for the purpose of allowing depreciation only the 'block of assets' had to be considered and if the 'block of assets' was owned by the assessee and used for the purpose of business, depreciation will be allowed. Thus, the test of user had to be applied upon the 'block' as a whole instead of upon the individual asset. The Tribunal further held that except for the first year when the issue has to be seen whether the same was put to use, however, where the assessee has already used the asset for the purpose of business and had entered the 'block of assets', then the assessee was entitled to claim depreciation. The said proposition of the Tribunal was upheld by the Hon'ble Bombay High Court in judgment dated 28.07.2009 (supra). We find support from the aforesaid ratio laid down by the Hon'ble Bombay High Court.

73. The learned Departmental Representative for the Revenue in this regard placed reliance on the decision of Hon'ble High Court of Kerala in B. Raveendran Pillai Vs. CIT (supra). However, in view of the decision of the jurisdictional High Court on the issue in hand, we find no merit in the reliance placed upon by the learned Departmental Representative for the Revenue.

The stand of learned Departmental Representative for the Revenue that there could be instances where WDV can be changed and since in the present case there was allocation which was different from the actual cost, then harmonious construction was to be given to the provisions of said section does not stand. We find no merit in the stand of learned Departmental Representative for the Revenue that actual cost for entire block could be examined in the succeeding year if there were circumstances necessitating such change. We find no merit on the same and the same is rejected. Since we have decided the issue both on merits and also on preliminary issue of whether the WDV of assets could be disturbed in the succeeding year, we hold that the issue of enhancement whether can be made by the CIT(A) or not becomes academic in nature and the same is not adjudicated. Accordingly, we direct Assessing Officer to allow claim of depreciation on tangible assets; know-how, trademark and patents; goodwill and non-compete fee. However, the value of intangible assets would be reduced by Rs.13 crores on account of value of Panki land. The grounds of appeal raised by the assessee are thus, partly allowed.

74. Now, the only issue left in the present appeal is the corporate issue raised i.e. expenses pertaining to increase in share capital.

75. We find no merit in the said claim of assessee since the cost on share capital has been held by the Courts to be capital cost, then any expenditure incurred on increase in share capital is also capital expenditure and not to be allowed in the hands of assessee. Consequently, ground of appeal No.5 raised by the assessee is dismissed.

76. The facts and issues in ITA No.2036/PUN/2012 are similar to the facts and issues in ITA No.1507/PUN/2012 and our decision in ITA No.1507/PUN/2012 shall apply *mutatis and mutandis* to ITA No.2036/PUN/2012.

77. In the result, both the appeals of assessee are partly allowed.

Order pronounced on this 12th day of December, 2017.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 12th December, 2017.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-I, Thane;
4. The CIT-II, Thane;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune