IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "A", HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

S. No.	ITA No.	AY	Appellant	Respondent
1.	1733/H/14	2009-10	Ushodaya Enterprises Pvt. Ltd., Hyd. PAN – AAACU 2690p	Dy. Commissioner of Income-tax, Circle – 16(2), Hyderabad
2	1597/H/14	-do-	Dy. Commissioner of Income-tax, Circle – 16(2), Hyderabad	Ushodaya Enterprises Pvt. Ltd., Hyd. PAN – AAACU 2690P
3	1578/H/13	2010-11	Ushodaya Enterprises Pvt. Ltd., Hyd. PAN – AAACU 2690p	Dy. Commissioner of Income-tax, Circle – 16(2), Hyderabad
4	1672/H/13	-do-	Dy Commissioner of Income-tax, Circle – 16(2), Hyderabad	Ushodaya Enterprises Pvt. Ltd., Hyd. PAN – AAACU 2690p

Assessee by : Shri V. Siva Kumar
Revenue by : Shri J. Siri Kumar

Date of hearing 24/07/2018
Date of pronouncement 07/09/2018

O R D E R

PER BENCH.:

These appeals filed by the assessee as well as revenue are directed against the orders of CIT(A) – V, Hyderabad for AYs 2009-10 and 2010-11. As identical issues are involved in these appeals,

they were clubbed and heard together and, therefore, a common order is passed for the sake of convenience.

ITA No. 1733/H/2014 and 1597/H/14 for AY 2009-10 by the assessee and the revenue.

2. Brief facts of the case are, assessee a company, engaged in the business of publishing of newspapers and satellite television broadcasting, filed its original return of income on 30/09/2009 admitting loss of Rs. 260,47,64,091/-. The assessment was completed u/s 143(3) dated 29/12/2011 at income of Rs. 52,90,40,793/- and subsequently the case was reopened u/s 147 of the Act. The reassessment was completed at income of Rs 213,68,71,494/- by making the following disallowances:

i) Cost of production of TV serials and programmes relating to the year under consideration claimed as revenue expenditure – Rs. 143,49,17,000/-
ii) Excess depreciation claimed on 'film software library – Rs. 125,72,32,479/-.

3. When the assessee preferred an appeal before the CIT(A), the CIT(A) confirmed the disallowance on account of excess depreciation of Rs. 143,49,17 000/- and deleted the disallowance of Rs. 125,72,32,479/ on account depreciation on enhanced value of software library.

4. Aggrieved by the order of CIT(A), both the assessee and revenue are in appeal before us.

5. As regards the addition of Rs. 143,49,17,000/-, the AO observed that the assessee debited an amount of Rs. 148,07,48,000/- towards cost of production of TV serials and programmes during the year under consideration. He noted that instead of claiming depreciation, the entire expenditure was claimed as revenue expenditure and debited to P&L account. The AO observed that the

definition of Rule 9A clearly shows that the expenditure of the assessee company on production of TV serials and programmes was not covered, and as per the definition of Rule 9B the expenditure claimed by the assessee is not covered as the assessee is not a film distributor. He, therefore, disallowed the above amount.

6. CIT(A) following his decision in AY 2010-11, confirmed the addition made by the AO.

7. Before us, the ld. AR of the assessee submitted that the issue is squarely covered by the decision of coordinate bench of this Tribunal in the case of Prism TV Pvt. Ltd., in ITA No. 466 & 129/Hyd/2015 vide order dated 24/03/2016.

8. Ld. DR, on the other hand, relied on the orders of revenue authorities.

9. Considered the rival submissions and perused the material on record. In the case of Prism TV Pvt. Ltd. (supra), the coordinate bench, has held as under:

> *6. As regards ground No.2, against the treating of the cost of production of TV serials and programmes as capital expenditure, brief facts are that the assessee company debited an amount of Rs.123,63,94,000 towards cost of production of TV serials and programmes for the year under consideration. Instead of claiming depreciation, the entire expenditure was claimed as revenue expenditure and debited to the P & L account. The A.O. observed that the cost of production of TV serials and programmes is not covered under Rule 9A or 9B of I.T. Rules. As these Rules are applicable only to production of feature films. The A.O. treated the entire expenditure as capital expenditure and allowed the depreciation thereon. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who confirmed the order of the A.O. and the assessee is in second appeal before us.*
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> *7. The Ld. Counsel for the assessee, while reiterating the submissions made by the assessee before the authorities*

below, has relied upon the decision of the Coordinate Bench of this Tribunal at Chennai and Mumbai and also the decision of Hon'ble High Court at Delhi in support of his contention that the expenditure incurred on production of television programmes should be allowed as revenue expenditure under section 37 of the I.T. Act. Copies of the said decisions are also filed before us.

8. The Ld. D.R. on the other hand, supported the orders of the authorities below.

9. Having regard to the rival contentions and the material on record, we find that the 'A' Bench of this Tribunal at Chennai in the case of ACIT, Media Circle-II, Chennai vs. M/s. Sun TV Network Ltd., Chennai in ITA.Nos.1515 to 1520/Mds/2013 by its order dated 31.10.2013 has held as under :

"8. Now, we take up the common issue involved in all the appeals. The assessee is in the business of running satellite television channels. These channels telecast films, serials etc., through satellite channels. The rights over these films are purchased from the producers of the respective films for broadcasting through satellite television. These rights come with an embargo that the ilms shall not be broadcasted or aired for a specified period from the date of release in theatres depending upon the succe s at the box office and other factors. Till the time, such films are broadcasted, they are to be treated as stock in trade. Once the films are broadcasted, the purchase value of the films is written-off. The expenditure on purchase of films is claimed in the first year itself. The assessee has got only satellite telecasting rights and has no universal rights for airing the films or serials. Once the film or the serial is aired, its value is diminished in subsequent telecasts. The assessee earns substantial revenue in the first telecast itself. In repeat telecast, the assessee is able to generate marginal revenue. Whatever income is earned from the subsequent telecasts is offered as income without claiming any expenditure.

The assessee also generates revenue from broadcasting serials through satellite channels. The assessee gets revenue from production and broadcasting serials on the lines of feature films, the rights of broadcasting such serials are also treated as stock in trade till the time they are aired and the expenses are debited to the Profit & Loss account. The assessee treats the films and the serials at par and applied the provisions of Rule 9A and 98 of the Income Tax Rules, as are applicable in case of films on serials as well.

On the other hand, the contention of the Revenue is that the film and serial broadcasting rights acquired by assessee are perpetual in nature. After first telecast, the assessee does not discard the films but carefully store the same in digital library for airing the same again. Therefore, the assessee gets enduring benefit from the rights acquired in films and serials and they do not expire on the date of first telecast as contemplated by the assessee. The rights are intangible assets within the meaning of Explanation (iii) to Section 32 and do not fall within the purview of Section 37(1). The assessee is entitled to claim depreciation on same.

9. The issue of amortization of cost of movie and serial rights, programme production expenses, consumable and media expenses by treating them as intangible assets u/s.32(1)(ii) has been dealt in detail by the CIT (Appeals) in his order dated 23-02-2013 relevant to the A Y. 2006-07 and 2007-08. We fully agree with the detailed findings and the reasoning given by the CIT(Appeals) in his order allowing this ground of appeal of the assessee. For the sake of brevity, we are not reproducing the findings of CIT (Appeals) in accordance with the judgment of the Hon'ble Supreme Court of India in the case of CIT Vs. K. Y. Pillah & Sons reported as 63 ITR 411 subsequently followed by the Hon'ble Delhi High Court in the case of CIT Vs. Global Vantedge (P) Ltd., reported as 354 ITR 21 (Del). The Id. DR has not been able to controvert the well reasoned order of the CIT (Appeals) on the issue. Accordingly, the findings of the CIT (Appeals) on the issue are affirmed and this ground of appeal of the Revenue in respect of all the AYs is dismissed."

9.1. In the case of Zee Media Corporation Ltd., (Formerly known Zee News Limited), Mumbai vs. DCIT, Circle-7(3), Mumbai, the 'G' Bench of Tribunal at Mumbai in ITA.No.1590/Mum/2015 by order dated 12.08.2015 has held as under :

"25. We have heard both the parties and perused the orders of the Revenue Authorities as well as the cited precedents and paper book filed before us. The case of the assessee on the merits is that the assessee has a method of valuation of the news items/non fictional in nature, TV programs and the film rights. The details are given in the aforementioned 'Note No 7' to the financial statements. According to the same, while the news items purchased are debited to the P and L account as they do not have the repeat telecast value, other items like the TV program and the film rights constitutes 'current assets', which are amortised over the years and the period of such amortization is given in the said Note. Per contra, the case of the revenue on these issues is that these items constitute 'intangible depreciable capital assets' and provisions of section

32 of the Act apply. Considering the same, we shall now undertake to discuss the item wise adjudication as follows.

a. On the debits relating to the purchases of the News items: Regarding the nature of the news items purchased by the assessee and debited to the P and L account, we find it is in the common knowledge of every citizen that the news items do not have enduring benefit. Normally, the news items/non fictional items purchased by the assessee lose its value once they are telecast. Therefore, such items do not have repeat telecast value in terms of the revenue generation by way of advertisement from the sponsors. As such, it is a settled issue at the level of Hon'ble Delhi High Court in the case of Television Eighteen India Ltd (supra) that the claims of the assessee relating to news/non-fictional items are allowable. Even otherwise, even if some income generated, that is not criterion for describing the items as 'intangible assets' for the purpose of invoking the provisions of section 32(ii) of the Act. We rely on the above referred Delhi High Court's Judgment in the case of Television Eighteen India Ltd (supra). Further, we find that the assessee has a declared method of accounting relating to accounting of these transactions. He has been consistently following the same without any change. In fact, the Revenue has consistently allowed the claim in the past. This is for the first time, AO disturbed the claim of the assessee and invoked the provisions of section 32 (ii) of the Act, without any sustainable reasoning. Therefore, considering all the points mentioned above, we are of the firm opinion that the decision of the AO/CIT(A) is unsustainable legally. Hence, the assessee is entitled to claim the purchases of news items/non-fictional items as an allowable expenditure. Accordingly, we direct the AO to delete the relevant addition.

b. On the debits relating to the purchases of the TV Programs/Film rights: Assessee amortised the 'inventories' as per the method of accounting consistently followed by him over the years. In fact, the Revenue has consistently allowed the claim in the past. This is for the first time, AO disturbed the claim of the assessee and invoked the provisions of section 32 (ii) of the Act without any sustainable reasoning. We have perused he judgment of Honble High Court of Delhi and the order of the Tribunal of Chennai Bench in the case of M/s Sun TV Networks Ltd (supra). We have also extracted the relevant paragraphs and already placed in this order above. We find similar issue of amortization of the TV Programs/Film rights came up before the Chennai Bench of the Tribunal wherein the issue was decided in favour of the assessee and rejected the AD's proposal to invoke the provisions of section 32(ii) of the Act in respect of the above programs/rights. As such, the Ld DR's argument on the applicability of the AS-26 to the TV

Programs and Film rights is not supported by any precedents and therefore, the arguments raised by the Revenue are not allowed. Thus, considering the covered nature of the issue as well as the consistent method of accounting followed by the assessee in this regard and also in the absence of any contrary material to support the arguments of the Revenue against the assessee's claim, we are of the opinion that the decision taken by the CIT (A) in the impugned order is required to be reversed. Accordingly, Ground nos. 2 and 3 raised by the assessee are allowed.

9.2. In coming to this conclusion, the Tribunal has followed the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Television Eighteen India Limited reported in (2014) 364 ITR 597 (Del.). The relevant portion of the judgment of the Hon'ble Delhi High Court is reproduced as under :

"The revenue has preferred this appeal claiming to be aggrieved by an order of the Income Tax Appellant Tribunal (ITAT) dated 17.03.2006. The question of law framed in this case is:-

(i) Whether the Income Tax Appellate Tribunal was right in holding that the entire expenditure incurred by the assessee on production of programmes which became part of news archives should be allowed as a revenue expense under Section 37 of the Income Tax Act, and should not be treated as incurred for creating a capital asse?

The assessee, at the relevant time, was in the business of television programme production. The assessee reflected Rs.88,83,128/- being 10% of the total expenditure incurred by it as value of "news archives" under the head of fixed assets. In the return filed by the assessee for the Assessment Year 1997, the said amount was claimed as revenue expenditure. According to the assessee this expenditure was allocated for the creation of "news achieves", which comprised of its published or telecasted programmes. The AO capitalised this amount holding that the expenditure led to creation of an asset of enduring advantage. The CIT (Appeals) on appeal, however, reversed the findings of the AO. It was noticed that the news archives were not in the nature of plant or income generating apparatus but part of the product. It was also held that the unavailability of any objective basis, to quantify with any decree of accuracy future revenue that were likely to be generated and the proportionate cost of production that could be deferred, led to the conclusion that the 10% of the total expenditure earmarked for creation of "news archives" could not be treated as a capital expenditure.

On the revenue's appeal, the ITAT held as follows:-

"12. It is admitted that no separate account was maintained wherein any expenditure was debited which could be earmarked towards creation of News Archives library. The assessee felt a part of footage of the news based on programmes produced has repeat value which could be used for the production of programme in future. The assessee, therefore, estimated 10% expenditure incurred as reasonable to be attributable to the News Archives library. The assessee has been engaged in the production of such programmes since assessment year 1994-95 and all along the cost of production of such expenditure has been treated as revenue expenditure and also allowed by the Department. Learned A.R. has referred to judgment of Hon'ble Supreme Court in the case of Alembic Chemical Works Ltd. vs. CIT177 ITR 377 which laid down that what is capital expenditure and what is revenue are not eternal verities but must needs to be flexible so as to respond to the changing economic realities of business. Viewed in that perspective, we are of the opinion that the estimated value assigned to the News Archives cannot be treated to be an expenditure incurred in the capital field. We, therefore, uphold the order of CIT (A) on this ground.

In this case, there is no dispute that the data base of the programmes which are utilised for the creation of "news archives" belonged to the assessee. The future likelihood of these resources being a possible source of revenue, cannot in the opinion of this Court justify its inclusion in the capital stream. Furthermore, this Court notices that the expenditure i.e. 10% Rs.88,83,128/- is a part of the entire total expenditure incurred by the assessee which is concededly treated as revenue, even otherwise.

In view of the above discussions, this Court is of the opinion that the question of law framed is answered in favour of the assessee and against the revenue.

The appeal is dismissed."

9.3. Thus, it is seen that the issue is fairly covered in favour of the assessee by the above decision and the A.O. is directed to treat the expenditure incurred by the assessee on cost of production of TV programmes as revenue expenditure. This ground of appeal of the assessee is accordingly allowed."

As the facts and ground in the case on hand are materially identical to the above, following the conclusions drawn therein, we direct the AO to delete the addition of Rs. 143,49,17,000/- made towards cost of

production of TV serials and programmes. Accordingly, grounds raised in this regard are allowed.

10. As regards the ground No. 2 of revenue, which is effective ground in its appeal, regarding deletion of addition made towards excess depreciation claimed on film software library, the AO observed that the assessee is in business of satellite television broadcasting and claimed depreciation of Rs. 144,70,70,313/- on opening WDV (Rs. 578,82,81,250) of film software library @ 25% stating that the same as intangible asset. The AO observed that since the assessee is in the business of satellite television and the film software library forms an important apparatus of its business which squarely fall within the definition of 'plant and machinery and accordingly allowed depreciation @ 15% and, hence, the excess claim of depreciation of Rs. 125,72,32,479/- was disallowed. On appeal, the CIT(A) confirmed the disallowance.

11. Ld. DR relied on the order of AO, while ld. AR of the assessee submitted that this issue is squarely covered in assessee's own case for AY 2007-08 in ITA No. 1265/hyd/2013, vide order dated 16/02/2016.

12. Considered the rival submissions and perused the material on record. In assessee's own case for AY 2007-08 (supa), the coordinate bench has held as under:

> *"9. Having regard to the rival contentions and the material on record as well as the written submissions filed by the Ld. Counsel for the assessee, we find that the first issue before us is about the nature of the asset the 'film software library' i.e., whether it is an intangible or tangible asset and the rate of depreciation allowable thereon ? The rate of depreciation allowable on an asset would depend on the nature of the asset.*
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> *10. To adjudicate this issue, we need to go into the facts of the case once again. We find that the assessment was initially completed under section 143(3) of the Act on 31.12.2009 allowing the depreciation on the film library*

@ 25% treating the same as an intangible asset. The CIT assumed jurisdiction under section 263 of the Act both on the ground of the valuation of the asset as well as on the ground of depreciation granted @ 25% treating the asset as an intangible asset. Assessee has submitted its detailed explanation as to why the asset 'Film Software Library' should be treated as an intangible asset. It was submitted that in the hands of Shri Ramoji Rao (HUF) also, the asset was treated as an intangible asset and depreciation @ 25% was granted from A.Y. 2006-07. It was also submitted that the software library falls within the definition of "Copyright" under the "Copy Rights Act, 1957" and the depreciation on software library @ 25% was claimed by the assessee and also allowed by the AO in the asst proceedings u/s143(3) of the Act. Thereafter, the Ld. CIT did not discuss anything further about the nature of the asset and the rate of depreciation allowable thereon in the revision order but after discussing at length on the correctness of the valuation of 'Film Software Library', he set aside the assessment order with a direction to the A.O. to re-do the assessment. Now, it is the contention of the Ld. Counsel for the assessee that the CIT was satisfied with assessee's contentions and therefore, has not discussed about the rate of depreciation in the subsequent paras of his order and therefore, has not set aside the assessment order to that extent and A.O. has travelled beyond his mandate in reconsidering the issue. But it is difficult to accept this contention of the assessee for the reason that the CIT has set aside the entire assessment and not only to the extent of valuation of the 'Film Software Library'. We are of the opinion that if the CIT was satisfied with assessee's contention on the nature of the asset and the rate of depreciation allowable thereon, he might not have said so in detail in the revision order, but would have indicated so by setting aside the assessment order only to the extent he did not agree with the assessee. The Hon'ble Gujarat High Court in the case of Addl CIT vs. Mukur Corporation reported in (1978) 111 ITR 312 (Guj) has held that there is nothing in section 263(1) of the Act to justify that before passing the final order under that section, the commissioner must necessarily and in all cases record final conclusions about the points in controversy before him and where the commissioner sets aside the assessment order and directs the AO to make a fresh assessment, the only proper course for the commissioner would be not to express any final opinion as regards the controversial points. Similar view was also expressed by the Hon'ble Madras High Court in the case of CIT Vs Seshasayee Paper and Boards Ltd, reported in (2000) 242 ITR 490 (Mad). In the case before us, the fact that the CIT has set aside the whole of the assessment and directed the A.O. to re-do the assessment makes it clear that he was not satisfied with assessee's contentions even on the nature of the asset and the rate of depreciation allowable thereon. Therefore, we do not agree with the finding of the CIT(A) on this issue.

11. Even with regard to the merits of the issue, i.e., the nature of the asset, we find that undisputedly, before its transfer to the assessee, the asset was treated as an 'intangible asset' in the hands of its previous owner, i.e., Shri. Ramoji Rao (HUF) and depreciation thereon was allowed at 25%. We find

that the CIT(A), while holding that the AO has exceeded his mandate, has also held that even on merits, the films which are copied on disks cannot be treated as plant. However, he has not given any reasons for holding so, while the reasoning given by the AO for treating the films as 'Plant and Machinery' is that the asset 'Film Software Library' is mostly contained in CDs and other storage media and that the assessee would not be in a position to telecast anything without the 'Film Software Library' i.e., the films and TV programmes therein and therefore, they are the vital tools of trade for the assessee company and hence Plant and Machinery. We are not able to agree with this finding of the AO. As observed earlier, the asset was treated as an intangible asset in the hands of the previous owner. The AO has applied the functional test to treat it as plant and machinery. He has relied upon various decisions to hold so. Having gone through the said judgments, we find that all of these decisions are on the functional tests to be applied to determine whether an asset is a 'Plant and Machinery'. 'Ind AS 38' is the Accounting Standard whose objective is to prescribe the accounting treatment for intangible assets that are not specifically dealt with in any other accounting standard. Though, the said accounting standard is not binding on us unless it is notified by the Central Government u/s 145(2) of the Act, we may get some guidance on this issue from para 4 of the said accounting standard which reads as under :

"4. Some intangible assets may be contained in or on a physical substance such as a compact disc (in the case of computer software), legal documentation (in the case of a license or patent) or film. In determining whether an asset that incorporates both intangible and tangible elements should be treated under Ind AS 16, Property, Plant and Equipment, or as an intangible asset under this Standard, an entity uses judgment to assess which element is more significant. For example, computer software for a computer-controlled machine tool that cannot operate computer software for a computer-controlled machine tool that cannot operate computer software for a computer- controlled machine tool that cannot operate without that specific software is an integral part of the related hardware and it is treated as property, plant and equipment. The same applies to the operating system of a computer. When the software is not an integral part of the related hardware, computer software is treated as an intangible asset."

11.1. From a reading of the above accounting standard and also the judgments relied upon by the AO, we find that an intangible asset can also be treated as plant, provided, it becomes an integral part of the tools used by the entity to carry on its business. In the case before us, the films and TV programmes are essential for the assessee company to carry on its business of telecasting of films and other programmes, but there is no caveat that the assessee company has to telecast only these films and programmes and none other for assessee's business. Further, not only the films and programmes in

the 'Film Software Library', but the assessee may also telecast any other programmes or films on its channels. By purchasing the library, the assessee is gaining exclusive right over the asset but this library cannot be held as a tool for carrying on of its business as assessee can carry on its business even without the 'Film Software Library'. The said library only assists in determining the content of the telecast, but does not limit the telecast and is not essential for the operations of the assessee's business and therefore cannot be termed as the tool of the trade. Thus, it fails the functional test adopted by the assessing officer. Therefore, we hold that the asset which consists of 'Copyrighted Films and Programmes' is an 'Intangible Asset' eligible for depreciation at the rate of 25%. Thus, the ground of appeal No.3 of the revenue is rejected."

Following the above, decision, we dismiss the ground raised by the revenue on this issue.

13. In the result, assessee's appeal is allowed and the appeal of the revenue is dismissed.

<u>ITA Nos. 1672/H/2013 and 1578/H/2013 for AY 2010-11 by the assessee and revenue</u>

14. Brief facts of the case are, assessee filed its original return of income for AY 2010-11 on 14/10/2010 admitting income of Rs. 17,50,25,790/- and a revised return was filed on 22/06/2011 declaring income at Nil admi ting loss of Rs. 51,50,20,837/-. AO completed the assessment u/s 43(3) determining the total income of Rs. 350,26,00 870/- by making the following disallowances:

1. Commission paid on sale of space for advertisement in Newspapers and television time slots u/s 40(a)(ia) at Rs. 101,35,38,405/-
2. Restriction of depreciation on computer accessories to 15% to Rs. 17,61,897/-
3. Depreciation on non-compete fee – Rs. 109,92,18,756
4. Cost of production of TV Serials and programmes relating to the year under consideration claimed as revenue expenditure – Rs. 148,07,48,000
5. Excess depreciation claimed on film software library
6) Employees Contribution to PF & ESI u/s 36(1)(va) rws 2(24)(x) – Rs. 2,90,527/-.

15. When the assessee preferred an appeal before the CIT(A), the CIT(A) deleted the disallowances mentioned at Sl.No. 1, 2 & 5 above

and confirmed the remaining disallowances mentioned at Sl.No. 3 & 4 above. However, the assessee has not appealed against Sl. No. 6 on employees contribution to PF/ESI.

16. Aggrieved by the order of CIT(A), both the assessee and revenue are in appeal before us.

First we will take the grounds raised by the revenue.

17. As regards the disallowance of Rs. 1101,35,38,405/- u/s 40(a)(ia), raised as ground No. 2, the AO observed that the assessee received advertisement revenue of Rs. 720,23,68,981/- and this revenue is net off of expenditure of Rs. 101 35,38,405/- incurred towards agents' commission for sale of space for advertisement in newspapers and time slots for television broadcasting. Since the assessee is liable to deduct tax on the said payments and failed to deduct TDS, the AO disallowed the said expenditure of Rs. 101,35,38,405/- u/s 40(a)(ia) of the Act.

18. The CIT(A) deleted the disallowance following the decision of his predecessor in assessee's own case for AY 2006-07.

19. Ld. DR submitted that the CIT(A) was wrong in deleting the addition as the commission amount falls within the ambit of section 194H whether paid directly or indirectly and failure to deduct tax at source calls for disallowance u/s 40(a)(ia) of the Act.

20. Ld. AR besides relying on the decision of CIT(A), relied on the orders of ITAT in its own case.

21. Considered the rival submissions and perused the material on record. Similar issue came for consideration before the coordinate bench of this Tribunal in assessee's own case for AY 2007-08 in ITA

No. 1552/Hyd/2010, order dated 10/05/2013, wherein the bench has held as under:

> *"17. At the outset, it has been brought to our notice that this issue is covered by the decisions of the Tribunal in assessee's own case for the assessment year 2006-07 in ITA No. 426/Hyd/2010 dated 9.7.2012, which in turn has followed the still earlier decision of the Tribunal in assessee's own case for the assessment years 2004-05 to 2006-07, vide order dated 22.3.2012, referred to above. Copies of both the decisions of the Tribunal have been furnished before us. In the absence of any decision to the contrary brought to our notice by the Revenue, following the consistent view taken by the Tribunal in assessee's own cases for the earlier years noted above, we do not find any infirmity in the impugned order of the CIT(A). We accordingly uphold the order of the CIT (A) on this issue and reject the grounds of the Revenue on this issue."*

21.1 In ITA No. 1598/Hyd/2014 for AY 2011-12 in assessee's own case vide order dated 27/07/2016, the coordinate bench, on similar issue, has held as under:

> *"3. This ground pertains to the issue of disallowance of Rs. 56,03,53,091/- u/s. 40(a)(ia) of the Act. Assessee receives advertisement revenue and as part of receipt, commission amount of Rs. 56,03,53,091/- was paid out of the amounts received. Assessee s accounting procedure is that agents deducts the commissions and pays net amount to assessee. It was contended that there was no occasion to deduct tax. AO not satisfied with the reply made and made disallowance of the above amount u/s 40(a)(ia) of the Act.*
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> *3.1. Ld CIT(A) relying on many other cases of ITAT in ITA No. 426/H/2010 dt. 09-07 2012 and also ITA No. 1552/H/2010, in assessee case, the disallowance was deleted. Aggrieved, Revenue raised the present appeal.*
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> *3.2. We do not see any reason to interfere with the order of the Ld. CIT(A) as it is in compliance to the order of ITAT in earlier years. Moreover, CBDT also has recently issued a Circular bearing F.No. 05/2006/2016-IT(B) dt. 29-02-2016 clarifying that TDS is not required to be made on payments made by TV channels/News paper companies to the advertising agency for booking or procuring or canvassing for advertisement. In view of that, we do not see any reason to defer from the findings. This Ground is rejected."*

Following the said decisions, we uphold the order of CIT(A) and dismiss the ground of appeal raised by the revenue.

22. As regards ground No. 3 relating to deletion of disallowance of part of depreciation claim on computers/peripherals of Rs.17,61,897/-, the AO observed that during the year, the assessee had shown additions to fixed assets and claimed depreciation @ 60% under the head 'computers on computer accessories. According to AO, printers, scanners, modems, etc. are not part of computer systems and hence not eligible for depreciation @ 60% and restricted to 15%. Therefore, excess depreciation claim of Rs. 17,61,897/- was disallowed.

23. The CIT(A) following the decision of his predecessor in assessee's own case for earlier years, deleted the disallowance.

24. The ld. DR relied on the order of AO while the ld. AR relied on the decision of coordinate bench in assessee's own case for AY 2002-03 & 2003-04 in ITA Nos. 1241/H/08 & 591/H/10, vide order dated 31/10/2013.

25. Considered the rival submissions and perused the material on record. Similar issue came up for consideration in assessee's own case for AY 2002-03 and 2003-04 (supra), wherein the bench has held as under:

> *"14. The only issue in the aforesaid appeal is with regard to the disallowance of depreciation amounting to Rs.2,30,96,110/- made by the Assessing Officer and confirmed by the CIT (A) on certain equipment and peripherals by treating them as not forming part of computer.*
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> *15. Since we have already dealt with the facts quite exhaustively in assessee's appeal in ITA No.1241/Hyd/2008, it is not necessary to deal with them over again in this appeal. However, suffice it to say that, in the impugned year also during the scrutiny assessment proceedings the Assessing Officer noticed that the assessee has claimed depreciation at 60% on various items like printers, scanners, modems, switches, hubs, cables/cards and software etc., by treating them as computer. Though the assessee argued that all these items being integral part of computer are eligible for depreciation at 60% but the Assessing Officer rejected all the contentions of the assessee*

and allowed depreciation @25% by treating it as plant and machinery. While coming to such conclusion, the Assessing Officer as in case of assessment Year 2002-03 held that only CPU, monitor, key board, mouse can be considered to be computer whereas other peripherals like printers, scanners, modems, switches, photo/edit/equipment,. UPS, net work cables and software cannot be considered as computer. This view of the Assessing Officer was also upheld by the CIT (A).

16. We have heard the submissions of the parties and perused the material on record. We have decided identical issue in assessee's appeal in ITA No.1241/Hyd/2008 for the asst. Year 2002-03. In view of our finding in para-11 and 12 of the order hereinbefore, we also decide this issue in favour of the assessee by holding that depreciation claimed at 60% on printers, scanners, modems, switches, hubs, cables/cards and software etc., should not be disallowed as these devices are used along with the computer and their functions are integrated with the computer. Accordingly, we set aside the order passed by the CIT (A) by allowing the grounds o the assessee."

Following the said decision, we uphold the order of CIT(A) and dismiss the ground raised by the revenue.

26. As regards ground No. 4 regarding deletion of addition towards depreciation on enhance value of software library of Rs. 79,22,51,122.61, similar issue arose in revenue's appeal for AY 2009-10 (supra), therefore, following the conclusions drawn therein vide para No. 12(supra), we delete the ground raised by the revenue.

27. Ground Nos. 1 & 5 are general in nature, hence, need no adjudication.

28. In the result, appeal of the revenue is dismissed.

29. As regards the appeal of the assessee, the assessee has raised four grounds of appeal, out of which ground Nos. 1 & 4 are general in nature and ground No. 2 is regarding disallowance of depreciation of Rs. 109.92 crore on non-compete fee. Ground No. 3 is disallowance

of Rs. 148,07,48,000/- towards cost of production on TV Serials and programmes.

29.1 The assessee also filed an additional ground of appeal seeking an alternate relief for allowance of the amount of non compete fee as deduction u/s 37(1) or as deferred revenue expenditure. However, during the appeal proceedings, the assessee withdrew the additional ground as not pressed.

30. As regards ground No. 2, the assessee acquired sister concerns M/s Usha Kiron Television (UKT) and M/s Usha Kiron Movies (UKM). In the AY 2007-08 the assessee company entered into a non-compete fee agreement on 30/01/2008 with the aforementioned companies for not competing in the business directly or indirectly for a period of 5 years from the date of agreement. Accordingly, the assessee paid Rs. 670 crores towards non-compete fee and claimed depreciation of Rs. 109.92 crores. The AO observe that Shri Ch. RamojiRao as Chairman of the assessee company holds substantial shares in all the related companies and the two entities i.e. Usha Kiron Movies and Usha Kiron Television are only the business units of the HUF concern of Shri Ch. Ramoji Rao. According to AO, both payer and payee are related parties. He, therefore, disallowed the depreciation claimed on non-compete fee relying on the cases of ITAT.

31. Before the CIT(A), the assessee submitted, inter-alia, that non-compete fee rights acquired by it are 'intangible assets' u/s 32(1)(ii) of the Act eligible for depreciation @ 25%.

32. The CIT(A), following the decision of his predecessor in assessee's own case for AY 2008-09 confirmed the depreciation on non-compete fee.

33. Before us, ld. AR of the assessee submitted that the issue is squarely covered by the decision of the coordinate bench of this Tribunal in assessee's own case for AY 2008-09 in ITA Nos. 26/Hyd/2011 and 100/Hyd/2012 vide order dated 22/10/2014.

34. Ld. DR, on the other hand, relied on the orders of revenue authorities.

35. Considered the rival submissions and perused the material on record. In AY 2008-09 (supra), the coordinate bench, on similar issue, has held as under:

> *"25. We have heard the submissions of the parties and perused the orders of revenue authorities as well as other materials on record and also gone hrough the decisions cited. A perusal of the assessment order as well as the order passed by CIT(A) would leave no room for doubt that assessee's claim of depreciation on non-compete fee has been rejected basically for the following two reasons:*
>
> 1. *Genuineness of the payment made and necessity of paying non-compete fee.*
> 2. *Non-compete fee not being in the nature of an intangible asset as defined in section 32(1)(ii), depreciation is not allowable.*
>
> *26. Before examining whether non-compete fee can be considered to be an intangible asset so as to entitle the assessee to claim depreciation on it, it is necessary, at the outset, to address the issue of genuineness of payment of non-compete fee and necessity to make such payment. As can be seen from the assessment order, AO has treated the agreement entered into between assessee for payment of non-compete fee as a sham transaction as Shri Ramoji Rao is not only the owner of UKT and UKM being the karta of HUF to which these concerns belong but he also in his individual capacity is the Chairman of the assessee company. As such, assessee cannot be considered to be competing with himself. As it is an arrangement between related parties, there is no necessity for payment of non-compete fee. AO further observed that the assessee has entered into agreement for payment of non-compete fee to reduce its tax burden by allowing Shri Ramoji Rao HUF to adjust the non-compete fee against the huge brought forward losses suffered by it. AO also raised doubts with regard to the value of non-compete fee at Rs. 670 crores.*

However, the CIT(A) has rejected assessee's claim by holding that as Shri Ramoji Rao, who is the kartha of HUF, which owns UKT and UKM and also in his individual capacity is the Chairman of the assessee company, therefore, there is no question of paying non-compete fee as a person cannot compete with himself. Of course the CIT()A) has also held that as non-compete fee does not provide any asset of enduring nature, deprecation cannot be allowed. In this context, it is to be noted that assessee on 25/01/2008 has entered into subscription agreement and share purchase agreement with a domestic company, Viz.; Equator Trading Enterprises Pvt. Ltd. as per which the said domestic company agreed to make substantial investment in purchase of equity shares of the assessee company. However, as a precondition for making such investment, the said domestic company required the assessee company to enter into a non-compete agreement with UKT and UKM. Though, copies of the share purchase agreement and subscription agreement are not available on record before us, however, on perusal of the closing agreement dated 30/01/08 between assessee and M/s Equator Trading Enterprises Pvt. Ltd. a copy of which is at page 220 of paper book, we find a reference to such precondition in clause 2(a). Further, as it appears from the fact on record and which remains uncontroverted in pursuance to the condition imposed by the domestic investor assessee has entered into the non compete agreement with UKT and UKM for a period of 5 years on payment of non-compete fee of Rs. 670 crores, which is also approved by the domestic investor. It is the contention of assessee that as a result of fulfillment of such condition of non-compete fee thereby excluding UKT and UKM competing with assessee company in future, the domestic company invested substantial amount by acquiring 39% of share in the assessee company.

27. From the aforesaid facts it cannot be denied that Equator Trading Enterprises Pvt. Ltd is a major stakeholder in assessee company. As can be seen from the assessment order as well as order passed by the CIT(A) before coming to their respective conclusion that the transaction entered into by parties for payment of non-compete fee is not genuine or there is no necessity for paying the non-compete fee as the same person is controlling both the assessee company and the two other companies acquired by the assessee, the role of M/s Equator Trading Enterprises Pvt. Ltd. in any decision taken by assessee company has not at all been considered. Neither the AO nor the CIT(A) has examined the effect of acquisition of 39% of equity shares by another entity and whether after such acquisition of shares, it can still be held that Shri Ramoji Rao is the controlling authority of assessee company and it is a transaction between related parties. Unfortunately, the

assessment order and order of CIT(A) is totally silent on this aspect. Though in the remand report, AO has examined the issue of investment made by the domestic investor and has alleged that it as a sham transaction and a collusive agreement entered into between the parties to reduce the tax burden by claiming depreciation on payment of non-compete fee. However, such inference drawn by AO, in our view, is more on presumptions and surmises rather than on the basis of strong evidence. When two independent parties enter into an agreement on certain terms and conditions, it cannot be termed as sham or collusive without bringing sufficient evidence to prove such fact. AO cannot treat the transaction as a colourable device adopted by the parties merely on presumptions and surmises without proving the fact that either the promoters of both the companies are same or M/s Equator Trading Enterprises Pvt. Ltd. is a front company of either the assessee or the Ramoji Rao group. In these circumstances, the inference drawn on mere assumptions and presumptions that the agreement is a colourable device to reduce the tax burden cannot be accepted. Therefore, withou examining the impact of investment made in equity shares to the extent of 39% by the domestic investor and condition imposed by it, the conclusion drawn by the CIT(A) that there is no necessity of payment of non-compete fee as the same person is controlling the assessee company as well as UKT and UKM, in our view, is without proper appreciation of facts and evidences brought on record, hence, cannot be sustained.

28. Even though the AO in the assessment order has also raised the issue of payment of non-compete fee for the purpose of setting off the loss sustained by the HUF and also has questioned the value of non-compete fee but the learned CIT(A) has not at all dealt with these issues. Be that as it may, it needs to be observed that so far as valuation of non-compete fee is concerned, in course of assessment proceeding, assessee has submitted a valuation report of a CA firm in support of the valuation made by it. Therefore, if the AO had any doubt with regard to the valuation made, he should have got it valued through an independent valuer in stead of rejecting the valuation by simply observing that the method adopted is not correct or scientific. It is also alleged by the AO that the payment of non-compete fee was made on the one hand to enable the assessee to reduce its profit and at the same time allowing Shri Ramoji Rao HUF to adjust it against its huge brought forward losses. In this context, it is to be observed that in course of hearing before us the learned AR has submitted certain documents as additional evidence. A perusal of the said documents reveal that Shri Ramoji Rao HUF for the assessment year 2008-09 has not only shown the non compete fee received by it as income but has also adjusted it against the brought

forward losses of earlier years. AO i.e. JCIT, Range -16, while completing assessment in case of Shri Ramoji Rao HUF has accepted not only the income but also its adjustment against brought forward losses in an assessment order passed u/s 143(3) on 24/12/2010. Therefore, when the non-compete fee paid by assessee has been accepted at the hands of Shri Ramoji Rao HUF and allowed to be set off against the brought forward losses, it needs to be examined whether still the payment of non-compete fee made by the assessee to Shri Ramoji Rao HUF can be held to be either non-genuine or not necessary. Therefore, considering the totality of the facts and circumstances we are of the view that as the impact of acquisition of 39% of equity shares by M/s Equator Trading Enterprises Pvt. Ltd. has not at all been examined by AO at the time of assessment proceeding or by the learned CIT(A) while disposing of assessee's appeal and further as the additional evidences produced before us were not examined either by the AO or by CIT(A), which certainly have a crucial bearing on the issue as to whether the payment of non-compete fee is genuine and necessary, we are inclined to remit the matter back to the file of AO for deciding afresh. Only after the issue relating to genuineness of non-compete fee paid and necessity to pay such fee is resolved, AO will decide the allowability of depreciation claimed on such non-compete fee by keeping in view the statutory provision as well as the ratio laid down in the decisions referred to hereinabove and any other decision brought to his notice. It is needless to mention that AO must afford a fair opportunity of hearing to assessee in the matter before deciding the issue. This ground is considered to be allowed for statistical purposes."

As the issue in the current AY is materially identical to AY 2008-09, following the decision of coordinate bench in that AY, we remit the issue to the file of AO for adjudicating the same in line with the direction of the coordinate bench in AY 2008-09. This ground is allowed for statistical purposes.

36. As regards ground No. 3, disallowance of Rs. 148,07,48,000/- towards cost of production on TV serials and programmes, similar issue was decided in AY 2009-10 vide para No. 9 (supra), therefore, following the conclusions drawn therein, we delete the said disallowance and allow the ground of appeal.

37. In the result, appeal of the assessee is allowed for statistical purposes.

38. To sum up, assessee's appeal for AY 2009-10 is allowed and 2010-11 is allowed for statistical purposes and revenue's appeals for both AY 2009-10 and 2010-11 are dismissed.

Pronounced in the open Court on 7th September, 2018.

Sd/-	**Sd/-**
(P. MADHAVI DEVI)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated: 7th September, 2018

kv

Copy to:-

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3) *CIT(A) – V Hyderabad.*
4) *CIT - IV, Hyd.*
5) *The Departmental Representative, I.T.A.T., Hyderabad.*
6) *Guard File*