

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 21st September, 2011
% **Date of decision : 30th March, 2012**

+ **ITA No.315/2010**

AREVA T & D INDIA LTD.Appellant

Through: Mr. Ajay Vohra with Ms. Kavita Jha and
Mr. Somnath Shukla, Advocates.

-versus-

THE DEPUTY COMMISSIONER OF INCOME-TAX
.....Respondent

Through: Mr. N.P. Sahni, Sr. Standing Counsel.

+ **ITA No.1151/2010**

THE COMMISSIONER OF INCOME TAX-IIAppellant

Through: Mr. Sanjeev Sabharwal, Sr. Standing
Counsel.

-versus-

JAI PARABOLIC SPRING LTD.Respondent

Through: Mr. Sandeep Sapra, Advocate.

AND

+ **ITA No.1152/2010**

THE COMMISSIONER OF INCOME TAX-IIAppellant

Through: Mr. Sanjeev Sabharwal, Sr. Standing
Counsel.

-versus-

JAI PARABOLIC SPRING LTD.Respondent

Through: Mr. Sandeep Sapra, Advocate.

**CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL**

SIDDHARTH MRIDUL, J.

1. The three appeals under Section 260A of the Income Tax Act, 1961(hereinafter referred to as 'the Act') raise a common issue of law and are being disposed of by this common order.

2. ITA No.315/2010 was admitted vide order dated 27th January, 2011 with the following substantial question of law:-

“Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that know-how, business contacts, business information, etc. acquired as part of the slump sale described as ‘goodwill’ were not entitled for depreciation under Section 32(1)(ii) of the Income Tax Act?”

3. To appreciate the question of law involved in the present appeal the relevant facts necessary for disposal of ITA No.315/2010 are enumerated as below:-

- (i) The assessee Company is presently engaged in transmission and distribution business of power. The business involves, *inter alia*, designing, manufacturing, supplying, installation, testing, commissioning and servicing transmission and distribution system of power on turnkey basis.
- (ii) The assessee Company earlier was a subsidiary of an Indian Company viz. ALSTOM Projects India Ltd. (hereinafter

referred to as the 'transferor'). Subsequently, the appellant Company became the subsidiary of Areva T & D Holdings SA France (hereinafter referred as the 'transferee') w.e.f. 1st April, 2004 pursuant to transfer under a slump sale agreement dated 30th June, 2004.

- (iii) Under the transfer/slump sale agreement, the business was transferred by the transferor lock, stock and barrel to the assessee Company. However, the transferor retained its 'trademark'.
- (iv) The business of the transferor was acquired by the assessee Company for a total sale consideration of Rs.44.7 Crores. On bifurcation, it is revealed that the tangible assets were transferred for a net value of Rs.28.11 Crores.
- (v) The excess amount of Rs.16,58,76,000/- was claimed as payment made by the assessee Company for acquisition of various business and commercial rights categorized under the separate head, namely, "goodwill" in the books of account of the assessee. These business and commercial rights comprised of the following: Business claims; business information; business records; contracts; skilled employees; knowhow.
- (vi) The assessee Company while filing its return for the relevant assessment year 2005-06 claimed depreciation under Section 32(1)(ii) of the Act with respect to the aforesaid amount of

Rs.16,58,76,000/- as being a price paid for acquisition of above mentioned intangible assets.

- (vii) The Assessing Officer(AO) while completing the assessment under Section 143(3) of the Act disallowed the depreciation on 'goodwill' as claimed in the return vide order dated 28th December, 2007. The AO disallowed the claim of the assessee Company on two grounds, namely, (a) depreciation under Section 32(2)(ii) is not available on goodwill; (b) the assessee Company was unable to demonstrate that the amount of Rs.16,58,76,000/- shown as goodwill in the books of accounts was in fact a payment made towards acquiring of "certain business and commercial rights" and therefore eligible for depreciation in tax as per Section 32(1)(ii) of the Act.
- (viii) After the order of assessment was framed the assessee Company invoked the jurisdiction of Commissioner of Income Tax (Appeals) [CIT(A)] challenging the validity of the assessment order with regard to depreciation.
- (xi) The assessee Company filed its appeal contending, *inter alia*, that the sum of Rs.16,58,76,000/- was in actuality an amount paid by the assessee Company for acquiring intangible assets including valuable knowhow, employees, work orders, business information, business contracts etc., as specified in the slump sale agreement dated 30th June, 2004 which were

compendiously termed as “goodwill” and therefore entitled to depreciation under Section 32(1)(ii) of the Act.

- (x) The CIT(A) repelled the contention of the assessee Company vide order dated 4th April, 2008 thereby reaffirming the stand of the AO on the ground that goodwill has not been specifically included under Section 32(1)(ii) of the Act.
- (xi) Being aggrieved by the order of the CIT(A), the assessee Company preferred an appeal before the Income Tax Appellant Tribunal (ITAT), which deliberated on the rival contentions of the parties. The ITAT dismissed the appeal of the assessee Company by the impugned order dated 24th April, 2009. The impugned order held that the statutory expression of the provision granting depreciation on intangible assets does not include all the intangible assets and that the residual clause, viz., “any other business or commercial rights of similar nature” must be of similar nature to the intangible assets eligible for depreciation enumerated in the said provision prior to the aforesaid expression.
- (xii) Aggrieved by the impugned order, the appellant in ITA No.315/2010 has preferred the present appeal.

4. In so far as ITA No.1151/2010 and ITA No.1152/2010 are concerned though they pertain to different assessment years, namely, assessment year

2002-03 and assessment year 2005-06 respectively, raise and were admitted on the following substantial question of law:

“Whether ITAT erred in deleting the addition of Rs.71,40,000/- made by the assessing officer on account of depreciation on goodwill?”

5. To appreciate the question of law involved in these two appeals the relevant facts necessary for disposal of ITA No.1151/2010 and ITA No.1152/2010 are enumerated as below:-

- (i) The present appeals by Revenue challenge the orders of the ITAT whereby the ITAT held that the assessee was entitled to depreciation for acquiring marketing and territorial rights to sell through dealers and distributors i.e. the network created by the seller for sale in India.
- (ii) The assessee Company is engaged in the business of manufacturing and marketing of Leaf Parabolic Spring.
- (iii) The assessee Company while filing its return for the relevant assessment year 2005-06 declared loss of Rs.3,73,76,902/- and the same was assessed under Section 143(3) of the Act.
- (iv) While conducting the assessment, the AO took note of the following features:-(a) the assessee Company had claimed a sum of Rs.2,97,45,661/- by way of deferred revenue expenditure in its computation of income. (b) the assessee Company was required to clarify the nature of such expenditure

and to file its justification for the sum claimed. (c) the AO further noticed that the assessee Company claimed depreciation to the tune of Rs.14,17,500/- under Section 32(1)(ii) of the Act.

- (v) The AO while completing the assessment under Section 143(3) of the Act disallowed the depreciation, *inter alia*, on the ground that the depreciation under Section 32(2)(ii) is not applicable to “goodwill” as the legislature had specifically excluded “goodwill” as capital assets eligible for benefit of the provisions of Section 32.
- (vi) The assessee Company invoked the jurisdiction of the CIT(A) challenging the validity of the assessment order. The CIT(A) allowed the appeal of the assessee in view of the appellate order passed for the assessment year 2005-06 in respect of the same assessee.
- (vii) The Revenue carried the matter in appeal before the ITAT. The ITAT dismissing the appeal of the Revenue held that “*the assessee has not claimed depreciation on goodwill. It acquired commercial rights to sell products under the trade name and paid consideration in dispute for acquiring marketing and territorial rights to sell through dealers and distributors i.e. the network created by the seller for sale in India. Under the agreement, it became entitled to use infrastructure developed by the seller. Rights were acquired since 1.4.1998 and these rights have all along been treated as an asset entitled to depreciation and depreciation was actually allowed in the past. The learned Assessing Officer, in our view, was not correct in making a*

departure from the past and in holding that payment was made for acquisition of “goodwill”. Payment had been made for acquisition of commercial rights on which depreciation is permissible. The Assessing Officer was further not justified in treating entries in the books of account as conclusive and in taking payment in dispute as consideration for acquisition of goodwill. It is now more or less settled that entries in books cannot be treated as conclusive and true nature of transaction has to be determined with reference to law. The learned CIT (Appeals) in the impugned order examined the issue with reference to agreement and found that payment was made for acquisition of commercial rights. On facts and circumstances of the case, we do not find any error in the approach of the learned CIT(Appeals).”

(viii) Aggrieved by the said impugned order rendered by the ITAT the Revenue has preferred the present appeals under Section 260A of the Act.

6. On behalf of the assessee it was urged that Section 32(1)(ii) of the Act enlist certain intangible assets eligible for depreciation which comprises knowhow, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature. It was urged that the rule of *ejusdem generis* being applied the phrase “any other business or commercial rights of similar nature” would mean rights similar in nature as specified assets, viz., intangible, valuable and capable of being transferred. It was argued that conversely depreciation under the said Section cannot be restricted only to six specified intangible assets. In support of this submission the assessee relied on the decision of the Supreme Court in the case of *Techno Shares and Stocks Ltd. v. CIT*, 327 ITR 323. It was

alternatively argued on behalf of the assessee that goodwill per se is eligible for depreciation under Section 32(1)(ii) of the Act. Counsel for the assessee relied on the decision of this Court in the case of *CIT v. Hindustan Coco Cola Beverages (P) Ltd.*, 331 ITR 192 in this behalf.

7. Per contra, on behalf of the Revenue it was urged that the business or commercial rights acquired by the assessee did not fall within the definition of intangible assets and that none of the business or commercial rights purportedly acquired by the assessee fell within the definition of intangible assets as given in Explanation 3(b) to Section 32(1) of the Act so as to make them eligible for depreciation under Section 32 of the Act.

8. Before proceeding further it would be relevant to consider the relevant provisions of Section 32 of the Act:

“Section 32 - Depreciation

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the Assessee and used for the purposes of the business or profession, the following deductions shall be allowed]

[(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the Assessee as may be prescribed;]

(ii) [in the case of any block of assets, such percentage on the written down value thereof as may be prescribed:]

[***]

Provided that no deduction shall be allowed under this clause in respect of -

(a) any motor car manufactured outside India, where such motor car is acquired by the Assessee after the 28th day of February, 1975 [but before the 1st day of April, 2001], unless it is used-

(i) in a business of running it on hire for tourists; or

(ii) outside India in his business or profession in another country; and

(b) any machinery or plant if the actual cost thereof is allowed as a deduction in one or more years under an agreement entered into by the Central Government under Section 42:]

[Provided further that where an asset referred to in Clause (i) [or Clause (ii) or Clause (iia)], as the case may be, is acquired by the Assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this Sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under Clause (i) [or Clause (ii) or Clause (iia)], as the case may be:]

[Provided also that where an asset being commercial vehicle is acquired by the Assessee on or after the 1st day of October, 1998, but before the 1st day of April, 1999, and is put to use before the 1st day of April, 1999, for the purposes of business or profession, the deduction in respect of such asset shall be allowed on such percentage on the written down value thereof as may be prescribed:

Explanation: For the purposes of this proviso, -

(a) the expression "commercial vehicle" means "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle" and "medium passenger

motor vehicle" but does not include "maxi-cab", "motor-cab", "tractor" and "road-roller";

(b) the expressions "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle", "medium passenger motor vehicle", "maxi-cab", "motor-cab", "tractor" and "road-roller" shall have the meanings respectively as assigned to them in Section 2 of the Motor Vehicles Act, 1988 (59 of 1988):]

[Provided also that in respect of the previous year relevant to the assessment year commencing on the 1st day of April, 1991, the deduction in relation to any block of assets under this clause shall, in the case of a company, be restricted to seventy-five per cent of the amount calculated at the percentage, on the written down value of such assets, prescribed under this Act immediately before the commencement of the Taxation Laws (Amendment) Act, 1991:]

[Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in [clause (xiii), Clause (xiii b) and Clause (xiv)] of Section 47 or Section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them:]

[Explanation 1. Where the business or profession of the Assessee is carried on in a building not owned by him but in

respect of which the Assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the Assessee for the purposes of the business or profession on the construction of any structure or doing of any work, in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure of work is a building owned by the Assessee.]

[Explanation 2 .- [For the purposes of this Sub-section] "written down value of the block of assets" shall have the same meaning as in Clause (c)* of Sub-section (6) of Section 43:]

[Explanation 3.- For the purposes of this Sub-section, [the expressions "assets"] shall mean -

(a) tangible assets, being buildings, machinery, plant or furniture;

(b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature.]

[Explanation 4.- For the purposes of this Sub-section, the expression "know-how" means any industrial information or technique likely to assist in the manufacture or processing of goods or in the working of a mine, oil-well or other sources of mineral deposits (including searching for discovery or testing of deposits for the winning of access thereto);]

[Explanation 5: For the removal of doubts, it is hereby declared that the provisions of this Sub-section shall apply whether or not the Assessee has claimed the deduction in respect of depreciation in computing his total income;]”

9. Before proceeding to consider the rival submissions on behalf of the parties, it would be necessary to consider the decision of the Supreme Court in *Techno Shares and Stocks Ltd.(supra)*. In that case the Supreme Court

was considering the question whether the assessee Company could claim depreciation on the Bombay Stock Exchange membership card held by it on the basis that it was a “licence” or “business or commercial right of a similar nature”. In that case the AO and the CIT(A) held that the assessee could not claim depreciation on the stock exchange membership card; but the Appellate Tribunal held that it was an intangible asset and the assessee was entitled to depreciation thereon under Section 32(1)(ii). The High Court, on appeal held that the BSE membership card was only a personal privilege granted to a member to trade in shares on the floor of the stock exchange and that such a privilege was not a “licence” or “any other business or commercial right of a similar nature” under Section 32(1)(ii). The Supreme Court reversing the decision of the High Court held that the right of membership of BSE was a “business or commercial right”. The Supreme Court held as follows:-

“19. The next question is - whether the membership right could be said to be owned by the assessee and used for the business purpose in terms of Section 32(1)(ii). Our answer is in the affirmative for the reason that the Rules and the Bye-laws analysed hereinabove indicate that the right of membership (including the right of nomination) vests in the Exchange only when a member commits default. Otherwise, he continues to participate in the trading session on the floor of the Exchange; that he continues to deal with other members of the Exchange and even has the right to nominate subject to compliance of the Rules. Moreover, by virtue of Explanation 3 to Section 32(1)(ii) the commercial or business right which is similar to a "licence" or "franchise" is declared to be an intangible asset. Moreover, under Rule 5 membership is a personal permission from the Exchange which is nothing but a "licence" which enables the member to exercise rights and privileges attached thereto. It is this licence which enables the member to trade on the floor of the Exchange and

to participate in the trading session on the floor of the Exchange. It is this licence which enables the member to access the market. therefore, the right of membership, which includes right of nomination, is a "licence" or "akin to a licence" which is one of the items which falls in Section 32(1)(ii) of the 1961 Act. The right to participate in the market has an economic and money value. It is an expense incurred by the assessee which satisfies the test of being a "licence" or "any other business or commercial right of similar nature" in terms of Section 32(1)(ii).”

10. In *Hindustan Coco Cola Beverages (P) Ltd.(supra)* a Division Bench of this Court held as follows:-

“It is worth noting, the scope of Section 32 has been widened by the Finance (No. 2) Act, 1998 whereby depreciation is now allowed on intangible assets acquired on or after 1st April, 1998. As per Section 32(1)(ii), depreciation is allowable in respect of know-how, patent, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature being intangible assets. Scanning the anatomy of the section, it can safely be stated that the provision allows depreciation on both tangible and intangible assets and Clause (ii), as has been indicated hereinbefore, enumerates the intangible assets on which depreciation is allowable. The assets which are included in the definition of "intangible assets" includes, along with other things, any other business or commercial rights of similar nature. The term "similar" has been dealt with by the Apex Court in *Nat Steel Equipment Pvt. Ltd. v. CCE* [1988] 69 STC 58 (SC); AIR 1988 SC 631, wherein the Apex Court has opined that the term "similar" means corresponding to or resembling to in many aspects. In this regard, it would not be out of place to refer to the decision in *CIT v. B.C. Srinivasa Setty* [1981] 128 ITR 294 (SC) wherein the concept of goodwill has been understood in the following terms:

“Goodwill denotes the benefit arising from connection and reputation. The original definition by Lord Eldon in *Cruttwell v. Lye* [1810] 17 Ves 335 that goodwill

was nothing more than "the probability that the old customers would resort to the old places" was expanded by Wood V.C. in *Churton v. Douglas* [1859] John 174 to encompass every positive advantage "that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the old firm, or with any other matter carrying with it the benefit of the business". In *Trego v. Hunt* [1896] AC 7 (HL) Lord Herschell described goodwill as a connection which tended to become permanent because of habit or otherwise. The benefit to the business varies with the nature of the business and also from one business to another. No business commenced for the first time possesses goodwill from the start. It is generated as the business is carried on and may be augmented with the passage of time. Lawson in his Introduction to the Law of Property describes it as property of a highly peculiar kind. In *CIT v. Chunilal Prabhudas & Co.* [1970] 76 ITR 566 the Calcutta High Court reviewed the different approaches to the concept (pp.577, 578):

It has been horticulturally and botanically viewed as "a seed sprouting" or an "acorn growing into the mighty oak of goodwill". It has been geographically described by locality. It has been historically described by locality. It has been historically explained as growing and crystallizing traditions in the business. It has been described in terms of a magnet as the "attracting force". In terms of comparative dynamics, goodwill has been described as the "differential return of profit". Philosophically it has been held to be intangible. Though immaterial, it is materially valued. Physically and psychologically, it is a "habit" and sociologically it is a "custom". Biologically, it has been described by Lord Macnaghten in *Trego v. Hunt* [1896] AC 7 (HL) as the "sap and life" of the business. Architecturally, it has been described as the "cement" binding together

the business and its assets as a whole and a going and developing concern.

A variety of elements goes into its making, and its composition varies in different trades and in different businesses in the same trade, and while one element may preponderate in one business, another may dominate in another business. And yet, because of its intangible nature, it remains insubstantial in form and nebulous in character. Those features prompted Lord Macnaghten to remark in *IRC v. Muller & Co.'s Margarine Limited* [1901] AC 217 (HL) that although goodwill was easy to describe, it was nonetheless difficult to define. In a progressing business goodwill tends to show progressive increase. And in a failing business it may begin to wane. Its value may fluctuate from one moment to another depending on changes in the reputation of the business. It is affected by everything relating to the business, the personality and business rectitude of the owners, the nature and character of the business, its name and reputation, its location, its impact on the contemporary market, the prevailing socio-economic ecology, introduction to old customers and agreed absence of competition. There can be no account in value of the factors producing it. It is also impossible to predicate the moment of its birth. It comes silently into the world, unheralded and unproclaimed and its impact may not be visibly felt for an undefined period. Imperceptible at birth it exists enwrapped in a concept, growing or fluctuating with the numerous imponderables pouring into, and affecting, the business.”

22. Regard being had to the concept of "goodwill" and the statutory scheme, the claim of the Assessee and the delineation thereon by the tribunal are to be scanned and appreciated. The claim of the Assessee-Respondent, as is discernible, is that the assessing officer had treated the transactions keeping in view the concept of business or commercial rights of similar nature and put it in the compartment of intangible assets. To effectively understand

what would constitute an intangible asset, certain aspects, like the nature of goodwill involved, how the goodwill has been generated, how it has been valued, agreement under which it has been acquired, what intangible asset it represents, namely, trademark, right, patent, etc. and further whether it would come within the clause, namely, "any other business or commercial rights which are of similar nature" are to be borne in mind.

23. On a scrutiny of the order passed by the tribunal, it is clear as crystal that the depreciation was claimed on goodwill by the Assessee on account of payment made for the marketing and trading reputation, trade style and name, marketing and distribution, territorial know-how, including information or consumption patterns and habits of consumers in the territory and the difference between the consideration paid for business and value of tangible assets. The tribunal has treated the same to be valuable commercial asset similar to other intangibles mentioned in the definition of the block of assets and, hence, eligible to depreciation. It has also been noted by the tribunal that the said facts were stated by the Assessee in the audit report and the assessing officer had examined the audit report and also made queries and accepted the explanation proffered by the Assessee. The acceptance of the claim of the Assessee by the assessing officer would come in the compartment of taking a plausible view inasmuch as basically intangible assets are identifiable non-monetary assets that cannot be seen or touched or physical measures which are created through time and / or effort and that are identifiable as a separate asset. They can be in the form of copyrights, patents, trademarks, goodwill, trade secrets, customer lists, marketing rights, franchises, etc. which either arise on acquisition or are internally generated.

24. It is worth noting that the meaning of business or commercial rights of similar nature has to be understood in the backdrop of Section 32(1)(ii) of the Act. Commercial rights are such rights which are obtained for effectively carrying on the business and commerce, and commerce, as is understood, is a wider term which encompasses in its fold many a facet. Studied in this background, any right which is

obtained for carrying on the business with effectiveness is likely to fall or come within the sweep of meaning of intangible asset. The dictionary clause clearly stipulates that business or commercial rights should be of similar nature as know-how, patents, copyrights, trademarks, licences, franchises, etc. and all these assets which are not manufactured or produced overnight but are brought into existence by experience and reputation. They gain significance in the commercial world as they represent a particular benefit or advantage or reputation built over a certain span of time and the customers associate with such assets. Goodwill, when appositely understood, does convey a positive reputation built by a person / company / business concern over a period of time. Regard being had to the wider expansion of the definition after the amendment of Section 32 by the Finance Act (2) 1998 and the auditor's report and the explanation offered before the assessing officer, we are of the considered opinion that the tribunal is justified in holding that if two views were possible and when the assessing officer had accepted one view which is a plausible one, it was not appropriate on the part of the Commissioner to exercise his power under Section 263 solely on the ground that in the books of accounts it was mentioned as "goodwill" and nothing else. As has been held by the Apex Court in *Malabar Industrial Co. Ltd.* [2000] 243 ITR 83, *Max India Ltd.* [2007] 295 ITR 282 (SC) and *CIT v. Vimgi Investment P. Ltd.* [2007] 290 ITR 505 (Delhi) once a plausible view is taken, it is not open to the Commissioner to exercise the power under Section 263 of the Act.”

11. It would also be necessary to consider the relevant terms of the slump sale agreement entered into between the transferor and the transferee on 30th June, 2004.

“WHEREAS:

- (i) The Activity Transferor conducts the T & D Activities in and from India.
- (ii) The parties wish to enter into this Agreement for the purposes of the following-

To effect the sale of the Activity on an as is where is basis and the Activity Transferee wishes to purchase and assume as a going concern. The Activity Assets and the Assumed Liabilities of the Activity on the terms more specifically set out in this Agreement.

NOW IT IS AGREED as follows:

DEFINITIONS AND INTERPRETATION

In this Agreement unless the context otherwise requires:-

“**Act**” means the Companies Act 1956;

“**Activity**” means all activities carried out by the Activity Transferor relating to the business of Transmission and Distribution (T & D).

“**Activity Assets**” means all the undertaking and assets of the Activity Transferor at the Completion Date insofar as they relate to the Activity including the investments in ALSTOM T & D Lightning Arresters Pvt. Ltd., but excluding the Excluded Assets,

.....

“**Business Claims**” means the benefit of all rights and claims of the Activity Transferor arising out of or in connection with the Activity or any of the Activity Assets including:-

- (a) all claims against, or rights to make a claim against, any third party in respect of any goods, equipment, services or other items which are or were supplied to the Activity Transferor in respect of the Activity on or before the Completion Date;

- (b) all claims or applications made by the Activity Transferor for a loan, grant or other aid from any governmental or other authority in respect of the Activity or any of the Activity Assets;
- (c) all rights that the Activity Transferor may have in respect of goods supplied by the Activity Transferor in the course of the Activity on terms as to retention of title and to which the Activity Transferor retains title at the Completion Date;
- (d) The proceeds of all claims on any relevant insurance policy in respect of loss of, or damage or injury caused to, the Activity or any of the Activity Assets which occurred prior to the Completion Date, to the extent that such proceeds have been paid to the Activity Transferor prior to Completion but have not been applied in making good such loss, damage or injury;
- (e) all other claims against, or the rights to make a claim against, any third party in respect of loss of or damage or injury caused to, the Activity or any of the Activity Assets which occurred prior to the Completion Date to the extent that such loss, damage or injury has not been made good by and at the cost of the Activity Transferor;
- (f) all rights that the Activity Transferor may have under the agreement(s) under which the Activity Transferor acquired the Activity or any of the Activity Assets;

“Business Information” means all information (whether or not confidential and in whatever form held, including computerised records) which in any way relates to all or any part of the Activity or any of the Activity Assets or any products manufactured and/or sold or services provided by the Activity;

“Business Records” means all records of Business Information and other data (wherever situated) and all books, files, registers, documents, literature, correspondence and other records of the Activity Transferor owned or used or intended for use in connection with the Activity at the Completion Date, in each case whether in writing or in electronic or any other form and including computer programs:

.....

“Contracts” means all contracts, agreements, engagements and obligations of, rights, benefits and licences enjoyed by, and bonds, guarantees and other commitments. (including outstanding bids and tenders) relating to the Activity which have been entered into or undertaken by or on behalf of the Activity Transferor wholly or predominantly in the ordinary course of the Activity, and which have not expired at Completion Date, including contracts with customers, suppliers, agents or distributors, finance and/or equipment leases, and all arrangements relating to the provision of maintenance and support, security, disaster recovery, facilities management, bureau and on-line services to the Activity including assumed contracts listed in Exhibit 5.1. For the avoidance of doubt “Contracts” shall not include contracts of employment under which the Employees are employed by the Transferor;

“Debts” means the trade and other debts (including prepayments) due to the Activity Transferor in connection with the ‘Activity as at the Completion Date, whether or not invoiced;

.....

SALE AND PURCHASE

- 2.1 The Activity Transferor shall sell and the Activity Transferee shall purchase, as on the Completion Date, with effect from the Effective Date, the Activity as on a going concern, alongwith the Activity Assets and Assumed Liabilities including but not limited to those shown in the balance sheet for the Activity as of the Effective Date attached as Exhibit 2.1 hereto and / or listed in Exhibits 2.1.1 and 2.1.2 to this agreement comprising the following:-
- 2.1.1 Leasehold and Freehold Property as per Schedule I;
 - 2.1.2 all moveable fixed assets listed, including but not limited to those in Exhibit 2.1.1 to this Agreement which shall include the Plant and Machinery;
 - 2.1.3 subject to clause 7, the bench (subject to the burden) of all Contracts;
 - 2.1.4 the Business Information and the Business Records;
 - 2.1.5 the Stock;
 - 2.1.6 the Debts-listed in Exhibit 2.1.2;
 - 2.1.7 subject to clause 7, the Business Claims;
 - 2.1.8 825,100 equity shares of Rs.100/- each of ALSTOM T & D Lightning Arresters Pvt.Ltd. (ALA Shares) and
 - 2.1.9 all other assets (if any) of whatsoever nature and wherever located used in the Activity at the Completion Date except the Excluded Assets.
- 2.2 The Activity Transferee shall buy the Activity and the Activity Assets with effect from the Effective Date to the intent that as from the date all profits/losses and receipts/payments, rights and advantages accruing to the Activity and for the Activity Assets shall belong to the Activity Transferee, and that as from the date it

shall be responsible for discharging all of the Assumed Liabilities on the terms and conditions of this Agreement.

3. EXCLUDED ASSETS/EXCLUDED LIABILITIES

3.1 Excluded Assets

The following items are excluded from the sale and purchase of the Activity and nothing in this Agreement shall operate to transfer:-

3.1.1 the trademark or any rights to use the name “ALSTOM” or any name confusingly similar thereto; and

3.1.2 cash in hand, cash in bank, bank deposits and cheques in hand.

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7. ASSUMPTION OF CONTRACTS AND BUSINESS CLAIMS

7.1 With effect from the Completion Date, the Activity Transferee shall become entitled to the Business Claims and to the benefits of the Activity Transferor under the Contracts and the Activity Transferee undertakes to the Activity Transferor to carry out and perform and to complete all the obligations and liabilities of the Activity Transferor created by or arising under the Contracts.

7.2 The Activity Transferor undertakes to transfer, assign, or procure the assignment/transfer of all the Contracts and Business Claims, to the Activity Transferee, with effect from the Completion Date, which are capable of

assignment/transfer without the consent or approval of, or waiver from , other parties.

7.3 Insofar as any of the Contracts or Business Claims or not assignable/ transferable to the Acitivity Transferee without an agreement of novation executed by, or consent to assignment of, or approval or waiver from a third party;

7.3.1 the Activity Transferor, at the Activity Transferee's request, shall use reasonable endeavours, with the co-operation of the Activity Transferee to procure such novation or assignment with any necessary consent, approval, or waiver, as soon as reasonably possible following completion;

7.3.2 unless and until all such Contracts and Business Claims which shall be capable of novation or assignment shall have been novated or assigned with all necessary third party consents, approvals or waivers. The Activity Transferor shall hold such Contracts and Business Claims on trust for the Activity Transferee and its successors in title absolutely and the Activity Transferee shall (if such sub-contracting is permissible and lawful under the Contract in question) as the Activity Transferor's sub-contractor perform all the obligations of the Activity Transferor under such Contracts;

7.3.3 unless and until any such Contract or Business Claim shall be novated or assigned, the Activity Transferor will give all such assistance to the Activity Transferee as the Activity Transferee will reasonably require to enable the Activity Transferee to enforce its rights under such Contracts and Business Claims and will provide access to all relevant books, documents and other Information in relation to such Contracts and

Business Claims as the Activity Transferee may require from time to time.

- 7.4 If such consent or novation is refused or otherwise not obtained within six months after Completion (or such longer period as the parties may agree), the parties shall use all reasonable endeavours to achieve an alternative solution pursuant to which the Activity Transferee shall both receive the full benefits of the relevant Contracts and/or Business Claims and assume the associated obligations.

9. EMPLOYEES

- 9.1 The contracts of employment of each Employee of the Activity who is listed in Exhibit 4.1 (each an ‘Employee’) will (subject to right, if any, of the concerned employee in accordance with mandatory applicable law) have effect as if originally made between the Activity Transferee and the Employee and the Activity Transferee shall assume all rights, power, duties and liabilities under or in connection with the contracts of employment of such Employee. The employment of each Employee by the Activity Transferee shall be treated as a continuous employment without any break of service and such transfer shall be on terms and conditions which are not less favourable than on which they have been engaged as on the day immediately preceding the Completion Date by the Activity Transferor.
- 9.2 The Activity Transferor shall perform and observe all its Obligations (including statutory obligations) under or in connection with the contracts of employment of the Employees up to the Completion date and the Activity Transferee shall perform and observe all such

obligations of such Employees with effect from and after the Completion Date.

- 9.3 Immediately following Completion, the Activity Transferor shall procure that all records, papers, documents and data relating to the Employees (in whatever form they may exist) in the possession, custody or control of or kept or made by or on behalf of the Activity Transferor or any member of the Activity Transferor's Group shall be provided to the Activity Transferee.
- 9.4 It is expressly provided that as far as the ALSTOM Projects India Ltd. – T & D Superannuation Fund, ALSTOM Projects India Ltd. – T&D Gratuity Fund and Provident Fund or any Fund created or existing (or the benefit of the employees pertaining to the Activity, shall after the Completion Date stand substituted in the name of the Activity Transferee in place of the name of the Activity Transferor and the Activity Transferee shall stand substituted for all purpose whatsoever related to the administration, management or operation of such schemes and / or Funds or in relation to the obligation to make contribution to the said funds in accordance to the provisions of such Schemes and/ or Funds as per the terms provided in the respective Trust Deed. It is the end and intent that all the rights, duties, powers and obligations if the Activity Transferor in relation to such funds shall become those of the Activity Transferee. It is clarified that the services of the employees will be treated as having been continued for the purpose of the aforesaid Funds. The name of the aforesaid Funds/ trusts will be decided by the Activity Transferee as it deems fit in accordance with the rules of the Funds/ Trusts.”

12. In the present case, it is seen that the assessee vide slump sale agreement dated 30th June, 2004, acquired, as a going concern, the transmission and distribution business of the transferor Company w.e.f. 1st April, 2004. As a result thereof, the running business of transmission and distribution was acquired by the transferee lock, stock and barrel minus the trademark of the transferor which was retained by the transferor, for lump sum consideration of Rs.44.7 Crores. It is further seen that the book value of the net tangible assets (assets minus liabilities) acquired was recorded in the balance sheet of the transferor as on the date of transfer as Rs.28.11 Crores. The said assets and liabilities were recorded in the books of transferee at the same value as appeared in the books of the transferor. The balance payment of Rs.16,58,76,000/- over and above the book value of net tangible assets, was allocated by the transferee towards acquisition of bundle of business and commercial rights, clearly defined in the slump sale agreement, compendiously termed as “goodwill” in the books of accounts, which comprised, *inter alia*, the following:- (i) Business claims, (ii) Business information, (iii) Business records, (iv) Contracts, (v) Skilled employees, (vi) knowhow. It is also observed that the AO accepted the allocation of the slump consideration of Rs.44.7 Crores paid by the transferee, between tangible assets and intangible assets (described as goodwill) acquired as part of the running business. The AO, however, held that depreciation in terms of Section 32(1)(ii) of the Act was not, in law, available on goodwill. The CIT(A) and the ITAT approved the reasoning of the AO thereby holding disallowance of depreciation on the amount described as goodwill. It was thus argued on behalf of the assessee Company that Section 32(1)(ii) would

mean rights similar in nature as the specified assets, viz., intangible, valuable and capable of being transferred and that such assets were eligible for depreciation. On behalf of the respondent it was argued that applying the doctrine of *noscitur sociis* the expression “any other business or commercial rights of similar nature” used in Explanation 3(b) to Section 32(1) has to take colour from the preceding words “knowhow, patents, copyrights, trademarks, licenses, franchises”. It was urged that the Supreme Court had clearly held in *Techno Shares and Stocks Ltd.(supra)* that “*Our judgment should not be understood to mean that every business or commercial right would constitute a “licence” or a “franchise” in terms of section 32(1)(ii) of 1961 Act*”.

13. In the present case, applying the principle of *ejusdem generis*, which provides that where there are general words following particular and specific words, the meaning of the latter words shall be confined to things of the same kind, as specified for interpreting the expression “business or commercial rights of similar nature” specified in Section 32(1)(ii) of the Act, it is seen that such rights need not answer the description of “knowhow, patents, trademarks, licenses or franchises” but must be of similar nature as the specified assets. On a perusal of the meaning of the categories of specific intangible assets referred in Section 32(1)(ii) of the Act preceding the term “business or commercial rights of similar nature”, it is seen that the aforesaid intangible assets are not of the same kind and are clearly distinct from one another. The fact that after the specified intangible assets the words “business or commercial rights of similar nature” have been additionally used, clearly demonstrates that the Legislature did not intend to provide for

depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. In the circumstances, the nature of “business or commercial rights” cannot be restricted to only the aforesaid six categories of assets, viz., knowhow, patents, trademarks, copyrights, licenses or franchises. The nature of “business or commercial rights” can be of the same genus in which all the aforesaid six assets fall. All the above fall in the genus of intangible assets that form part of the tool of trade of an assessee facilitating smooth carrying on of the business. In the circumstances, it is observed that in case of the assessee, intangible assets, viz., business claims; business information; business records; contracts; employees; and knowhow, are all assets, which are invaluable and result in carrying on the transmission and distribution business by the assessee, which was hitherto being carried out by the transferor, without any interruption. The aforesaid intangible assets are, therefore, comparable to a license to carry out the existing transmission and distribution business of the transferor. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. This view is fortified by the ratio of the decision of the Supreme Court in *Techno Shares and Stocks Ltd.(supra)* wherein it was held that intangible assets owned by the assessee and used for the business purpose which enables the assessee to access the market and has an economic and money value is a “license” or “akin to a license” which is one of the items falling in Section 32(1)(ii) of the Act.

14. In view of the above discussion, we are of the view that the specified intangible assets acquired under slump sale agreement were in the nature of “business or commercial rights of similar nature” specified in Section 32(1)(ii) of the Act and were accordingly eligible for depreciation under that Section.

15. In view of the above, it is not necessary to decide the alternative submission made on behalf of the assessee that goodwill per se is eligible for depreciation under Section 32(1)(ii) of the Act. In the circumstances, the substantial question of law is decided in the affirmative and this appeal is allowed in favour of the assessee and against the Revenue and the impugned order is set aside.

ITA No.1151/2010 and ITA No.1152/2010

16. In these appeals, the ITAT, relying upon the decision in assessee’s own case ITA No.336/Del/08 dated 6th July, 2009 pertaining to assessment year 2005-06, held:-

“5. On careful consideration of rival submission, we are of view that learned CIT(Appeals) has rightly allowed relief to the assessee after considering relevant facts and circumstances of the case. The assessee has not claimed depreciation on goodwill it acquired commercial rights to sell products under the trade name and paid consideration in dispute for acquiring marketing and territorial rights to sell through dealers and distributors i.e. the network created by the seller for sale in India. Under the agreement. It become entitled to use of infrastructure developed by the seller. Rights were acquired since 1.4.1998 and these rights have all along been treated as an asset entitled to depreciation and depreciation was actually allowed in the past. The learned

Assessing Officer, in our view was not correct in making a departure from the past and in holding that payment was made for acquisition of “goodwill”. Payment had been made for acquisition of commercial rights on which depreciation is permissible. The Assessing Officer was further not justified in treating entries in the books of account as conclusive and in taking payment in dispute as consideration for acquisition of goodwill. It is now more or less settled that entries in books cannot be treated as conclusive and true nature of transaction has to be determined with reference to law. The learned CIT(A) in the impugned order examined the issue with reference to agreement and found that payment was made for acquisition of commercial rights. On facts and circumstances of the case, we do not find any error in the approach of the learned CIT(A). His action is hereby confirmed.”

17. In view of the foregoing discussion, it is seen that the assessee in the present appeals had not claimed depreciation on ‘goodwill’ but on the commercial rights acquired to sell products under the trade name and through the network created by the seller for sale in India. It is further observed that the AO was not correct in holding that payment was made for acquisition of ‘goodwill’. Payment had, in fact, been made for acquisition of commercial rights on which depreciation is permissible. In the circumstances, these appeals are dismissed in favour of the assessee and against the Revenue.

No order as to costs.

SIDDHARTH MRIDUL, J.

ACTING CHIEF JUSTICE

MARCH 30, 2012/mk