IN INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "G" MUMBAI.

BEFORE SH. A.D. JAIN, JUDICIAL MEMBER
AND SH. RAJENDRA, ACCOUNTANT MEMBER

ITA No.5335/M/2014
Assessment Year: 2007-08
PAN : AABCA8679F

Dy. Commr. of Income-tax, Circle 1(1), Mumbai.	vs.	M/s. Alstom Projects India Ltd., The International, 5th floor, 16, Marine Lines Cross Road No.1, Off Maharshi Karve Road, Mumbai-400020.
(Appellant)		(Respondent)

ITA No.5487/M/2014
Assessment Year: 2007-08
PAN : AABCA8679F

M/s. Alstom India Ltd. (earlier known as Alstom Projects India Limited), Mumbai	vs.	Addl. Commr. of Income Tax, Range 1(1), Mumbai.
(Appellant)		(Respondent)

ITA No.2143/M/2014
Assessment Year: 2009-10
PAN : AABCA8679F

Dy. Commr. of Income-tax, Circle 1(1), Mumbai.	vs.	M/s. Alstom India Ltd., (Formerly kown as Alstom Projects sIndia Ltd.,)The International, 5th floor, 16, Marine Lines Cross Road No.1, Off Maharshi Karve Road, Mumbai-400020.
(Appellant)		(Respondent)

ITA No. 2095/M/2014
Assessment Year: 2009-10
PAN : AABCA8679F

M/s. Alstom India Ltd. Mumbai (Appellant)	vs.	Addl. Commr. of Income Tax, Range 1(1), Mumbai. (Respondent)

Department by: Sh. N.K. Chand, CIT(DR)
Assessee by:S/Sh. Sunil M. Lala & Dharan Gandhi

Date of hearing : 05/08/2015
Date of pronouncement: 28/10/2015

ORDER

Per A.D. Jain, JM:

These four appeals – two by the Department and two by the assessee are directed against the two separate orders of CIT(A)-10, Mumbai and the Dispute Resolution Panel-1, Mumbai, dated 25.02.2014 & 24.12.2013 relating to assessment years 2007-08 & 2009-10.

2. **ITA No.5335(Asr)/2014 for the A.Y. 2007-08**

This is Department's appeal for the assessment year 2007-08, taking the following grounds:

"1. Whether in the facts and circumstances of the case and in law, the ld. CIT(A) erred in holding that M/s. UB Engineering Ltd. is a comparable, in the light of admitted facts that the company in the year under the proceeding and for 5 consecutive earlier

years, had incurred losses and its net worth had been completely wiped out ?

2. Whether in the facts and circumstances of the case and in law, the ld. CIT(A) erred in holding that M/s. UB Engineering Ltd. is a comparable, relying upon the submission of the assessee stating that the net profit margin had turned positive in the years subsequent to the year under the proceeding ?

3. Whether in the facts and circumstances of the case and in law, the ld. CIT(A) erred in holding that Nicco Corporation Ltd. is a comparable, by relying upon the comparability of the TPO for a subsequent asstt. Year 2008-09 ?

4. Whether in the facts and circumstances of the case and in law, the ld. CIT(A) erred in holding that Nicco Corporation Ltd. is a comparable,, ignoring the admitted fact that the assessee, in its TP study report prepared by an expert, had rejected the company as a comparable, stating that it is sick company making persistent losses ?

5. Whether in the facts and circumstances of the case and in law, the ld. CIT(A) erred in holding that the adjustment should be restricted to the AE transactions only, ignoring the fact that the assessee itself had failed to benchmark the transactions with the AE separately, and had itself carried out the benchmarking to the entire power segment as a whole?

6. Whether in the facts and circumstances of the case and in law, the DRP erred in failing to appreciate that the AE transaction of the power segment, not being at the arm's length, impacted the non-AE transaction also adversely, and thus the TPO's act of proposing the adjustment at the entity level was appropriate?"

2. Apropos Ground Nos. 1 to 4, at the outset, the ld. Counsel for the assessee contended that these grounds are misconceived, as the issues contained therein have not been decided by the ld. CIT(A).

3. Here, it is seen that by way of Ground Nos.1.1 to 1.3 before the ld. CIT(A), the assessee had challenged the TPO's action in rejecting UB Engineering Limited and Nicco Corporation Limited as comparables. The ld. CIT(A), however, did not decide these grounds in the order under appeal. Vide para-13 of the impugned order, it has been held as follows:

> "*The submission of the appellant is considered. It is trite by now that International transactions undertaken with AE only needs to be benchmarked. Further, adjustment if any, should be restricted only to the International transactions with AEs. Further, the issue is fairly covered by the ITAT's decisions in assessee's own case (supra) for AY 2006-07. Further, even the Hon'le DRP for AY 2009-10, has after considering the facts of the case, have held that since assessee's adjustment in within +/-5% of the appellant's turnover, no adjustment would be warranted. For the year under consideration, it is verified that the assessee's adjustment of Rs.46.86 crore is less than 5% of the transaction benchmarked by the TPO with that of turnover Rs.12,08,87,30,000. Therefore, no adjustment is warranted in the instant year also.*"

4. Therefore, the assessee's contention is correct. Ground Nos. 1 to 4 are rejected as misconceived.

5. As regards Grounds No. 5 & 6, these grounds also emanate from the ld. CIT(A) findings in para 13 of the impugned order, as reproduced hereinabove. In this regard, it is seen that the ld. CIT(A) has based his findings, inter-alia, on the order of the ITAT in assessee's own case for the assessment year 2006-07. The Tribunal, in assessee's case for the assessment year 2006-07, has observed as follows:

> "*6. We have carefully considered the rival submissions in the light of material placed before us. So far as it relates to contention that TP adjustment is permissible only on AE transactions the same is required to be accepted as it is supported by aforementioned decisions. Therefore, we have no hesitation in holding that Ld. TPO was wrong in making TP adjustment on non-AE transactions. The adjustment, if any, should be limited to the AE transactions. Now the question will arise that whether the adjustment will fall within the safe harbour of +/-5%. The copy of chart submitted by Ld. AR was also given to Ld. DR who could not dispute the fact that even applying the mean margin taken by Ld. TPO, the difference in the ALP would be much less than 5% of the AE transactions. In this view of the situation, we hold that no TP adjustment was required to be made and addition in this regard is deleted. Ground No.5 is allowed."*

6. These findings of the Tribunal, as reproduced at page 7 of the impugned order, have not been stated to have been cancelled or set aside or quashed.

7. The ld. CIT(A) also followed the DRP's observations in the assessee's case for the assessment year 2009-10. These observations, as reproduced at pages 7 & 8 of the ld. CIT(A)'s order read as follows:

> "*Directions: We have perused the TPO's order and the assessee's submissions. We find that the TPO had applied the ALP PLI at the entity level on the Power Segment. On perusal of the order, we find that the assessee's sale transactions with AE were Rs.342.92 Cr., and purchase transactions were 203.37 Cr. The TPO benchmarked the sales transaction as the same were higher in value considering that purchases from AE had already been factored in the sales. We find that in the Power segment, income from AE's is 342.9 Cr. On a turnover of Rs.2259 Cr. As against this, the AE cost is only Rs.203.37 Cr. On total expenses of Rs.2078.66 Cr. The TPO's case is that the AE transactions which are approximately 15% of the total turnover impacted the profitability of the rest 85% non-AE transactions*

adversely so as to bring the entity level margins to 7.99% as against the ALP margin of 8.98%. In our view, considering the series of ITAT decisions on the issue, only the AE transactions need to be benchmarked and not the non-AE transactions. In this case, we find that by applying ALP PLI at the entity level, the TPO has determined the quantum of adjustment to be made on the entire turnover of the power segment, which is high. If the benchmarking of the transaction at entity level of Rs.2259 crore is done, then the amount of adjustment proposed of Rs.22.31 crore is only 1%, which would be within +/-5% of the transaction which has been benchmarked by the TPO, and hence, no adjustment would be required. As per the details submitted before us, we find that if only the International Transaction is benchmarked, it falls within the safe harbour range of +/-5% as prescribed under the 2nd proviso to section 92C(2). Accordingly, we direct the TPO to verify the working by applying ALP PLI only on the International transaction and if found within the limits of range of+/-5% as prescribed under the 2nd proviso to section 92C(2), no adjustment be made to this account. The other grounds of objections are not been discussed as they would become academic in nature."

8. Even the above findings of the DRP's in the assessee's case for the assessment year 2009-10 have not been shown to have been upset on appeal or otherwise.

9. Hence, finding no force therein, grounds no. 5 & 6 are also rejected.

10. In the result, the appeal is dismissed.

ITA No.5487/M/2014 for the A.Y. 2007-08

11. This is assessee's appeal for the assessment year 2007-08. The effective Grounds No. 11 & 2.1 are reproduced hereunder:

"1.1 The ld. CIT(A) has erred in law & on facts in confirming an adjustment of Rs.3,34,75,448/- u/s 43B in respect of Unpaid Service Tax remaining outstanding as of 31stMarch, 2007.

2.1 The ld. CIT(A) has erred in law & on facts by confirming the decision of the A.O. in not allowing the set off of accumulated losses pertaining to an amalgamating company, Alstom Transport Ltd. (ATL) amounting to Rs.3,96,48,586/- by merely relying on the order of the Dispute Resolution Panel (DRP) for AY 2006-07."

12. Against the ld. CIT(A)'s action of confirming adjustment of a sum of Rs.3,34,75,448/- u/s 43B of the Income Tax Act, 1961 regarding unpaid service tax remaining outstanding as on 31.03.2007, Ground No. 1.1 has been raised.

13. The AO made the disallowance on the ground that the assessee had failed to produce any evidence that collection against the relevant invoices had not been made. It was held that the contention that service tax was not payable, as it had not been collected, was incorrect. It was observed that unpaid service tax is not an admissible deduction in accordance with the provisions of section 43B of the Act.

14. The ld. CIT(A) confirmed the disallowance, holding that the assessee had not produced any evidence to prove that amount of Rs.3,34,75,448/- was paid to the Government account, as the assessee had raised this service tax

liability against the invoices, but had not made the payment thereof to the Government account.

14. Before us, the ld. counsel for the assessee contended that the ld. CIT(A) erred in not considering the submission that since the amount would not be debited to the profit & loss account & not allowed as a deduction, it could not be disallowed u/s 43B of the Act. Reliance has been placed on "CIT vs. Noble & Hewitt Pvt. Ltd.", 305 ITR 324 (Del), as followed i.e. in "CIT vs. Calibre Personnel Services Pvt. Ltd.", ITAs 158 and 160 of 2013 by the Hon'ble Bombay High Court, vide order dated 02.02.2015 (copy filed). The Ld. counsel for the assessee further contended that this stand of assessee has been accepted by Ld. DRP in its order for the assessment year 2009-10.

15. It has been contended that this fact, though mentioned by the assessee in its written submissions, as noted at page 10, para 14 of the impugned order, has erroneously not been considered by the ld. CIT(A).

16. The ld. counsel for the assessee further contended that the ld. CIT(A) has further erred in rejecting the assessee's argument that it had not incurred any liability to pay the service tax to the Govt. during the relevant financial year, as the amount had not been realized by the assessee from its customers and hence, it was not a subject matter of disallowance u/s 43B of the Act.

17. The ld. counsel for the assessee has raised an alternative contention that the service tax, though billed and not received, not having become payable to the Govt. by virtue of section 68 of the Finance Act, 1994, read with Rule 6 of the service-tax Rules, 1994, it could not be disallowed u/s 43B of the Act. In this regard, reliance has been placed on following case laws:

i) "Technimont ICBP Ltd. vs. ACIT", 1931/M/2008 order dated 4.4.2012.
ii) "Elcome Surveys Private Limite vs. ACIT", 2924/M/2010 dated 4.4.2012
iii) "Kalu Karman Budhelia vs. ACIT", 7305/M/2010 dated 28.09.2012.
iv) "Knight Frank (India) Pvt. Ltd. vs. Addl. CIT", ITA No.2021/M/2011
v) "ACIT vs. Real Image Media Technologies (P) Ltd." 114 ITD 573 (Chennai ITAT).

18. The ld. counsel for the assessee has raised a further alternate argument that th ld. CIT(A) erred in not admitting the assessee's plea that the disallowance of Rs.1,32,18,728/- needs be deleted under the proviso to section 43B of the Act, as it was paid before filing of return of income for the year. It is pointed out that this alternate contention has been noted by the ld. CIT(A) as follows:

> *"1.5. Without prejudice to above, the appellant prays that the amount of service tax collected and paid of Rs.1,32,18,728/- (Refer page no.29 of the APB should be allowed as the same was paid before filling its return of income for the captioned assessment year."*

19. Another alternate plea has been raised, i.e., if the deduction is not made at all in the assessment year 2007-08, it would amount to a double disallowance, since every year, the closing balance is again offered for disallowance.

20. On the other hand, the ld. DR strongly relied on the impugned order.

21. Since the assessee has not debited the amount of service tax to its profit & loss account and has not claimed it as a deduction, "CIT vs. Noble & Hewitt Pvt. Ltd." (supra), as followed by the jurisdictional High Court in "CIT vs. Calibre Personnel Services Pvt. Ltd." (supra), is squarely applicable. However, the issue as to whether or not the assessee has in fact collected the amount from its customers, needs verification. As fairly contended by ld. counsel for the assessee, this matter was required to be referred to the AO for verification. It is so ordered. After such verification, the AO will redecide the matter in accordance with law, particularly in the light of "CIT vs. Noble & Hewitt Pvt. Ltd." (supra), and "CIT vs. Calibre Personnel Services Pvt. Ltd." (supra). All the alternate pleas of the assessee, as above shall also be considered by the AO, if need be.

22. Apropos Ground No.2, the assessee is aggrieved of the ld. CIT(A)'s action in confirming the AO's decision of not allowing the set off of

accumulated losses of Rs.3,96,48,586/- pertaining to the amalgamating company, Alstom Transport Ltd. ('ATL').

23. The AO, while taking the aforesaid decision, had relied on the order of the DRP for the assessment year 2006-07 in the assessee's case. The ld. CIT(A) confirmed the order of the AO, holding thus:

> *"15. I have considered the AO's order as well as the appellant AR's submissions. Having considered both, I am in complete agreement with the AO's reasoning given for such disallowance as the appellant could not furnish the certification in Form 62 alongwith return of income as per conditions laid down in Rule 9C read with Rule 72 of the Income-tax Act. Hence, the AO has disallowed the claim of the appellant for set off of unabsorbed loss of ATL. I am in complete agreement with the AO's finding and also taking note of the decision of the DRP's decision in A.T.2006-07 in the appellant's own case, I consider it proper and appropriate to hold that the AO was completely justified in his action while denying the claim of the appellant. Accordingly, the AO's action is confirmed. The appellant's this ground of appeal is dismissed."*

24. The ld. counsel for the assessee has contended that the ld. CIT(A) has erred in rejecting the submission of assessee that the assessee is not required under law to furnish Form 62 alongwith the return of income for the AY 2006-07 as per Rule 9C of the Income Tax Rules. It has further been contended by the ld. counsel for the assessee that the ld. CIT(A) has erred in law by ignoring juridical precedents where courts have held that filing of forms alongwith return is directory in nature and not mandatory and it cannot be the reason for granting a legitimately due relief. The ld. CIT(A)

has also failed to appreciate that the assessee has submitted Form 62 during the course of assessment proceedings for AY 2006-07, which confirms fulfillment of conditions u/s 72A. It was further pleaded by the ld. counsel for the assessee that the ld. CIT(A) has erred in ignoring the order of the Tribunal for AY 2006-07, giving directions to the AO to grant deduction as per law.

25. The ld. DR, on the other hand, relied on the impugned order.

26. For the assessment year 2006-07, as per the AO (page 5, para 6), the DRP disallowed the brought forward and unabsorbed depreciation of AYL, holding as follows:

> *"During the assessment proceedings, it was also noticed that in respect of Alstom Transport Ltd. ("Amalgamating company") which had amalgamated with the assessee company w.e.f. A.T. 2001-02, the accountant's certificate as prescribed under Rule 9C r.w.s. 72A(2) had not been furnished. Accordingly, the same was called for, vide the letter dt. 07.10.2099. Vide the letter dt. 16.12.2009, the assessee furnished the photocopy of the accountant's certificate in Form No.62 which was dated 16.12.2009. The certificates certifies achievement of the prescribed level of production before the end of the fourth year from the date of amalgamation (31.03.2001) and continuance of such level of production in subsequent years, i.e. financial year ending 31.3.2005 and financial year ending 31.03.2006 respectively. However, Rule 9C lays down that such certificate has to be furnished with the return of income. With the introduction of E-filing of returns, this condition may not be valid, but it cannot be said that such a certificate should not be ready before the fling of return of income. The assessee has not made any submission to establish a reasonable cause for not obtaining or furnishing the required statutory certificate in time. In the case of CIT vs. Shivanand Electronics 209*

ITR 63 the Hon'ble jurisdictional High Court held that such later furnishing of Audit Report may be condoned only if reasonable cause is shown to the Assessing Officer. Thus, the conditions of Rule 9C have not been complied with and carry forward and set off of accumulated losses of Rs.6,51,53,017/- and unabsorbed depreciation of Rs.1,21,44,325/- of Alstom Transport Ltd. Is not allowed in the hands of the assessee."

27. On appeal, the ITAT, vide order dated 23.7.2013, reported at [2013] 36 Taxman. Com.130 (Mumbai-Trib.), restored the matter to the AO, observing as follows:

"*In the course of appellate proceedings, the appellant's AR has filed detailed written submissions in support of its contentions. The relevant portion of the appellant AR's submissions is extracted herein below:*

"…….

1.1 The appellant submits that the AO is not allowing the claim of the appellant to set off of the accumulated losses has mechanically relied on the order of the Hon'ble Dispute Resolution Panel ("DRP") for AY 2006-07. The DRP in the AY 2006-07 had disallowed the claim of the set off of the accumulated losses on the ground that the accountant's certificate as prescribed under Rule 9C r.w.s. 72A(2) of the Act had not been furnished.

1.2 The said order of the DRP had been challenged by the appellant before the Hon'ble ITAT, wherein the Tribunal has restored the matter back to the file of the AO with a direction to re-adjudicate the same as per law after giving the assessee a reasonable opportunity of hearing.

1.3 Your Honour's attention is invited the Rule 9C of the Income Tax Rules, 1962 ("the Rules") which reads as under:

"The conditions referred to in clause (iii) of sub-section (2) of section 72A shall be the following, namely:

a) the amalgamated company, owning an industrial undertaking of the amalgamating company by way of amalgamation, shall achieve the level of production of at least fifty per cent of the installed capacity of the said undertaking before the end of four years from the date of amalgamation and continue to maintain the said minimum level of production till the end of five yeas from the date of amalgamation:

Provided that……..

b) the amalgamated company shall furnished to the AO a certificate in Form No.62, duly verified by an accountant, with reference to the books of account and other documents showing particulars of production, along with the return of income for the assessment year relevant to the previous and for subsequent assessment years relevant to the previous years failing within five years from the date of amalgamation.
(Underlined for emphasis)

1.4. On plain reading of the above said section, it can be understood that the conditions attached for claiming the set off of the accumulated loss and unabsorbed depreciation are as under:

i) To achieve the prescribed level of production, it can be understood that the conditions attached for claiming the set off of the accumulated loss and unabsorbed depreciation are as under:
ii) To file the prescribed form along with the return of income for the assessment year relevant to the previous year during which the prescribed level of production is achieve and for subsequent assessment years relevant to the previous years falling within five years from the date of amalgamation.

1.5. The appellant submits that the date of amalgamation of the ATL with the appellant company was 31.03.2011. Therefore, the appellant had to achieve the prescribed level of production before the end of fourth year from the date of amalgamation and maintain the same

level of production till the end of the fifth year i.e. financial year ending 31.03.20105 and 31.03.2006 respectively.

1.6. Accordingly, it is submitted that the appellant filed the form in the AY 2005-06 and AY 2006-07 and in the captioned year there is no liability on the part of the appellant to submit such prescribed form.

1.7. Nonetheless, the AO has not allowed the claim of the set off of the accumulated losses and unabsorbed depreciation of Rs.3,96,48,586/- claimed by the appellant.

1.8. In view of the above the appellant prays that AO be directed to allow set off of brought forward losses and unabsorbed depreciation, as claimed by the appellant.

"Your honour has asked us to submit the status of allowability of brought forward losses of Alstom Transport Ltd. (the amalgamating company) ('ATL') in the hands of the appellant (the amalgamated company) prior to the captioned assessment year complying with the conditions prescribed u/s 72A(2) r.w.s. 9C.
In this regard, the appellant submits that the appointed date of amalgamation of the ATL with itself was 31.03.2001. Therefore, as per the provisions of Rule 9C, the appellant was required to furnish a certificate in Form No.62 duly verified by the accountant, alongwith the return of income for the assessment year relevant to the previous year during which the prescribed level of production is achieved and for subsequent years relevant to the previous years falling within five years from the date the appellant has achieved the prescribed level of production in the financial year ending 31.03.2005 and thus was required to furnish the certificate in Form No.62 along with the return of income for AY 2005-06 and AY 2006-07.
Certificate in Form no.62 for AY 2005-06 dated October 25, 2005 was duly submitted by the appellant alongwith its return of income and the AO has not disputed the fact of filing of the said Form.
Further, for AY 2006-07, the Hon'ble Dispute Resolution Panel ("the DRP") disallowed brought forward losses and unabsorbed depreciation pertaining to ATL on the alleged ground that appellant failed to produce the certificate in Form No.62 at the time of filing its return of income, as per the conditions of Rule 9C. In the appellant's

further appeal the Hon'ble ITAT has restored the issue to the file of the AO for re-adjudication [para 17 of the order dated July 23, 2013].

15. I have considered the AO's order as well as the appellant AR's submissions. Having considered both, I am in complete agreement with the AO's reasoning given for such disallowance as the appellant could not furnish the certification in F.No.62 alongwith return of income as per conditions laid down in Rule 9C read with Rule 72 of the I.T. Act. Hence, the AO has disallowed the claim of the appellant for set off of unabsorbed loss of ATL. I am in complete agreement with the AO's finding and also taking note of the decision of the DRP's decision in AY 2006-07 in the appellant's own case. I consider it proper and appropriate to hold that the AO was completely justified in his action while denying the claim of the appellant. Accordingly, the AO's action is confirmed. The appellant's this ground of appeal is dismissed.

16. Through Ground No.5, the appellant has agitated the AO's action of restricting the set off of business loss and unabsorbed depreciation of Rs.67,36,96,537/- as against Rs.93,5864,284/- as claimed by the appellant. The appellant requests that the AO should be directed to allow set off of loss and unabsorbed depreciation as claimed by the appellant. I find that the AI has discussed this issue in detail in para 7 of the assessment order wherein he has worked out the allowance for set off after assigning his reasons in details. The relevant portion of the AO's order is extracted hereinbelow:

"The assessee was required to furnish a statement of unabsorbed depreciation / losses after taking into account income as finally assessed for earlier years and after reminders the same was only examined in relation to the earlier assessment years as the amounts sought to be brought forward mentioned therein are different from the figures mentioned above. Hence, the position of losses/depreciation brought forward as per the asstt. Order for the AY 2006-07 is adopted, subject to rectification . Out of the aforesaid brought forward losses/unabsorbed depreciation of Rs.1,38,53,14,031/- on account of Rs.71,16,17,494/- was set off against the business income for the AY 2006-07.The balance of Rs.67,36,96,537/- is allowed to be set off against the business income

for the year under assessment, subject to rectification of the orders for earlier years as aforesaid."

17. In the course of appellant proceedings, the appellant's AR has filed detailed written submissions in support of its contentions. The relevant portion of the appellant AR's submissions is extracted herein below:

Reconciliation of Brought forward losses

Particulars	*Amount in Rs.*	*Remark*
Business loss available for set off for AY 07-08 as per the AO	*67,36,96,537*	
CIT(A) order dated 05.04.2010 for AY 05-06	*6,46,488*	*Amount not considered by the AO*
CIT(A) order dated 05.04.2010 for AY 05-06	*(96,972)*	*Amount not considered by the AO*
	67,42,46,053	
Order dated 29.12.06 u/s 143(3) r.w.s. 148 of the Act of Alstom Transport Ltd.	*4,13,42,697*	*The amount is off setted against unabsorbed depreciation in assessee's workings while the AO has taken this amount as an offset against brought forward business losses.*
Order u/s 143(3) for the AY 2001-02 dated 22.03.2004 of Alstom Transport Ltd. ('ATL')	*(43,14,150)*	*Alstom Project (I) Ltd. ("APIL") has taken over the losses of ATL for AY 2001-02 as per its return of income. However, subsequent to its amalgamation, after assessment of ATL, due to certain additions loss was reduced to the extent of additions so made by the AO. In the captioned assessment*

		loss from AY 2001-02 therefore, disallowance made as per the order dated 22.03.2004 is not considered.
Order u/s 143 r.w.s. 148 dated 29.12.2006 for the AY 201-02 of Alstom Power Boiler Ltd.	*(58,98,000)*	*AO has taken the base year of AY 2001-02 for determination of loss to be carried forward in AY 2007-08, based on the CIT(A) Order giving effect for AY 2001-02 u/s 143(3). However, subsequent to that the case was reopened u/s 148. Hence, since the AO has taken the base loss of AY 2001-02 of original assessment, disallowance made as per the assessment order u/s 148 dated 29.12.2006 is not considered.*
Alstom Project India Ltd. losses for AY 00-01	*16,22,22,951*	*Assessee's own loss not considered for the AO*
	86,75,99,651	
Alstom Transport Ltd. unabsorbed depreciation disallowed by the AO considering the same as brought forward losses	*1,21,44,325*	*Alleged disallowance made in AY 2006-07. Now restored back to the AO as stated earlier.*
	87,97,43,976	
Alstom Transport Ltd. Business loss disallowed by the AO	*6,51,53,017*	*Alleged disallowance made in AY 206-07. Now restored back to the AO as stated earlier.*
Alstom Power Boilers Ltd. business losses c/f by assessee	*(90,32,709)*	*As per clause 25 of Tax Audit Report for AY 2007-08*
Set off claimed as per ROI	*93,58,64,284*	

Therefore, the appellant prays that AO be given necessary directions to allow the set off of business losses and unabsorbed depreciation as computed by the appellant."

28. The Ld. counsel for the assessee says that in the first instance, the matter should be allowed in view of the submissions made by the Counsel of the assessee, as reproduced at pages 17 to 19 of the impugned order . In the writ petition, it has been contended that since for AY 2006-07, ITAT has issued direction to AO to grant deduction as per law, similarly, the AO should consider the similar directions for the year under consideration also.

29. Here, it is seen that the ld. CIT(A) upheld the disallowance for the reason that the assessee did not furnish certificate in Form 52 alongwith return of income as per Rule 9C of the I.T.Rules, 1962 read with section 72 of the I.T.Act.

30. Now, as per Rule 9C of the Rules, the conditions required to be fulfilled for claiming set off of accumulated loss and unabsorbed depreciation are as follows:

i) "*To achieve the prescribed level of production, it can be understood that the conditions attached for claiming the set off of the accumulated loss and unabsorbed depreciation are as under:*

ii) *To file the prescribed form along with the return of income for the assessment year relevant to the previous year during which the prescribed level of production is achieve and for subsequent assessment years relevant to*

the previous years falling within five years from the date of amalgamation."

31. The admitted date of amalgamation of ATL with the assessee company is 31.03.2001. So, in accordance with Rule 9C of the Rules, the prescribed level of production was to be achieved by 31.03.2005 and it was to be maintained upto 31.3.2006. According to the assessee, it has filed the prescribed form in assessment years 2005-06 & 2006-07, respectively. The Ld. counsel for the assessee has not considered the assessee's these contentions. He has confirmed the disallowance merely on the basis of the findings of the DRP for assessment year 2006-07 (supra). The matter for AY 2006-07, as observed, has been remitted to the AO by the ITAT.

32. Accordingly, this matter is also required to be restored to the file of the AO. Subject to the findings arrived at/ to be arrived at therein, the AO shall adjudicate the issue of set off of accumulated losses of Rs.3,96,48,586/-, pertaining to ATL, for the year under consideration, in accordance with Rule 9C of the Rules read with section 72A of the Act, as discussed hereinabove. The assessee's stand is that in keeping with Rule 9C of the Rules, the conditions laid down therein stand fulfilled, as the assessee has duly filed the requisite forms certifying the factum of the assessee having achieved the prescribed minimum level of production before

the end of four years from the date of amalgamation and of the assessee having continued to maintain the said minimum level of production till the end of five years from the date of amalgamation. According to the assessee, the undisputed date of amalgamation is 31.3.2011 and so, the fourth and fifth years therefrom ended on 31.03.2005 and 31.03.2006, respectively. As per the assessee, these forms have been filed in Assessment years 2005-06 & 2006-07. The AO shall make necessary verification and then decide the matter. If the forms have been submitted by the assessee as stated and the conditions laid down by Rule 9C of the Rules are found to be fulfilled, the claim of set off of accumulated losses of Rs.3,96,48,586/-, pertaining to ATL shall be allowed in accordance with law.

33. In the result, for statistical purposes, the appeal is treated as allowed.

ITA No. 2143/M/2014 for the AY 2009-10

34. This is Revenue's appeal for the assessment year 2009-10 against the order dated 24.12.2013 passed by the Dispute Resolution Panel-1, Mumbai. The Revenue has raised the following effective grounds:

> *"1. Whether in the facts and circumstances of the case and in law, the DRP erred in failing to appreciate that the AE transactions of the power segment not being at the arm's length, impacted the non-AE transactions also adversely, and thus the TPO's act of proposing the adjustment at the entity level was appropriate?*

2. *Whether in the facts and circumstances of the case and in law, the DRP erred in failing to appreciate that when the assessee itself had benchmarked its transactions at entity level, the TPO's act of proposing the adjustment at the entity level was appropriate?*

3. *Whether in the facts and circumstances of the case and in law, the DRP erred to appreciate that the adjustment of atleast Rs.69.71 lacs as mentioned in para 5.2 of the DRP order, should have been sustained at entity level when the assessee itself had benchmarked its transactions at entity level?*

4. *Whether in the facts and circumstances of the case and in law, the DRP erred in admitting or accepting the additional evidence furnished by the assessee before them without appreciating the fact that the same were not produced before the AO at the time of draft assessment proceedings and hence was in violation of Rule 46A of the I.T. Rules?*

35. As per Grounds No. 1 & 2, the Ld. DRP has erred in not appreciating that the AE transactions of the assessee's power segment not being at arm's length, they impacted the non-AE transactions adversely, and thus, the TPO's act of proposing the adjustment at the entity level was appropriate.

36. A similar issue came up before us, while deciding the appeal of the Revenue in ITA No.5335/M/2014 for the AY 2007-08 hereinabove, wherein we have dismissed the ground raised by the Revenue in paras 5 to 10. Since the facts involved in the present ground of the Department are identical to the facts decided by us hereinabove, in ITA No.5335/M/2014, this ground of the Revenue is also dismissed.

37. So far as Ground No.3, it states that the ld. DRP erred not to appreciate that the adjustment of at least Rs.69.71 lacs, as mentioned in para 5.2 of the DRP order, should have been sustained at entity level, when the assessee itself had benchmarked its transactions at entity level.

38. Briefly stated, the facts are that the TPO observed that while working out the PLI at 13.68% in the transport segment, the assessee had wrongly added to operating profits, two items, viz (i) extraordinary overheads – production Rs.2.1 crore, and (ii) extraordinary overheads – selling and admin Rs.3.65 crore. However, after considering the assessee's explanation, the TPO allowed the claim of adjustment to the overheads under the selling and admin head. The TPO also observed that the assessee had relied on CUP as the correct method to benchmark the transaction, whereby it was submitted that the assessee was charging its AE @ Euro 20 per hour for services rendered, and the same AE had paid in the range of Euro 17 to 21 to a third party for similar services. The TPO rejected the CUP on the ground that the assessee had failed to established the comparability , the nature of services rendered, and the quantity of work done and other parameters had to be similar for CUP to be applied. Accordingly, the TPO,

rejected the claim of the assessee for adjustment of Rs.2,10,23,000/- on account of extra ordinary production overheads.

39. Aggrieved with the order of the TPO, the assessee went in appeal before the ld. DRP. The ld. DRP, vide para 5.2 of his order, directed that the adjustment of the entire amount of Rs.2,10,23,000/- cannot be made and the same would only impact the computation of PLI of the Transport segment. Accordingly, the ld. DRP computed Rs.69.71 lacs as the adjustment amount at the entity level, which has been accepted by the department. However, after considering various decisions of the ITAT on the issue, the ld. DRP held that the said adjustment should be restricted to International Transactions and since the consequent adjustment fell within the range of +/-5% as prescribed under the second proviso to section 92C(2), it directed the AO to delete the adjustment after verifying the working by applying ALP only on the International Transactions. The findings given by the ld. DRP in para 5.2. are as follows:

> *" 5.2. Direction: We have perused the TPO's order and the assessee's submissions. We find that the TPO has not allowed the claim of Rs.2.1 crore towards under recovery of production overheads and has proposed entire amount of Rs.2.1 crore as adjustment for the transport segment. We find that the rejection of exclusion of the adjustment for under recovery of production overheads would only have an impact on working out the PLI of the assessee for the transport segment. The entire impact cannot be proposed for an adjustment for the international transaction. We therefore find that*

this proposal is completely erroneous . We find that in this segment the total turnover was Rs.45.23 crore, with AE transactions of receipts of Rs.7.53 crores. Similarly in this segment the assessee had made payment of Rs.70.44 lakh as expenses. It is seen that, even if this adjustment as proposed by the TPO is accepted, then NPM would work out to 9.03% as against 13.68% claimed initially. We find that the NPM of the comparables on single year basis of 10.57% has not been disputed by the TPO. Thus, if the revised rate of PLI of the assessee of 9.03% is compared to the PLI of the comparables of 10.57% , it would result in an adjustment of RS.69.71 lakh, but, at the entity level. However, considering the series of ITAT decisions on the issue, we are of the view that the benchmarking needs to be done only at the international transactions level and not at the entity level. As per the details submitted before us, we find that if only the international transaction is benchmarked, it falls within the safe harbour range of +/-5% as prescribed under the 2nd proviso to section 92C(2). Accordingly, we direct the TPO to verify the working by applying ALP PLI only on the international transaction and if found within the limits of +/-5% as prescribed under the 2nd proviso to section 92C(2), no adjustment be made on this account."

40. The Ld. counsel for the assessee has placed reliance on the order of the ITAT, Mumabi Bench in the assessee's own case for the assessment year 2006-07 reported in (2013) 36 Taxman.com 130 (Mum. Trib.) .

41. The Ld. DR, on the other hand, relied on the order of the TPO.

42. Having heard both the parties and considering the material available on record, we are of the view that the ld. DRP has passed a well reasoned and detailed order on the issue, which does not require any interference. Accordingly, the order of the ld. DRP on the issue is upheld and this ground of the Revenue is dismissed.

43. In Ground No.4, the Revenue has contended that the ld. DRP erred in admitting the additional evidence furnished by the assessee without appreciating the fact that the same was not produced before the AO at the time of assessment proceedings and hence, it was in violation of Rule 46A of the I.T. Rules.

44. We are of the view that this ground is misconceived, as Rule 46A is not applicable to the proceedings before the ld. DRP. Hence, Ground No.4, is dismissed, as such.

ITA No.2095/M/2014 for the AY 2009-10

45. This is the assessee's appeal for the assessment year 2009-10 against the order dated 24.12.2013 passed by the Ld. DRP-1, Mumbai. The only effective ground taken by the assessee reads as under:

> "1. The Ld. Assessing Officer has erred and the DRP has further erred in law and on facts is disallowing a sum of Rs.91,72,333/- being service tax payable on the receivables not collected by the assessee as on March 31, 2009."

46. Since the issue in dispute stands already adjudicated by us hereinabove, while deciding the appeal of the assessee in ITA No.5487/Mum/2014, for the assessment year 2007-08, the findings given therein, will apply, mutatis-mutandis, to this issue also. Accordingly, this Ground of the assessee is restored to the file of the AO to decide the issue

afresh, as per directions given in para 21 hereinabove, after affording reasonable opportunity of being heard to the assessee. This appeal is treated as allowed for statistical purposes.

47. In the result:

ITA No.5335/Mum/2014 is dismissed.

ITA No.5487/Mum/2014 is treated as allowed for statistical purposes.

ITA No.2143/Mum/2014 is partly allowed for statistical purpose

ITA No.2095/Mum/2014 is treated as allowed for statistical purposes.

Order pronounced in the open court on 28th October, 2015

Sd/- Sd/-

(RAJENDRA) (A.D. JAIN)
ACCOUNTANT MEMBER JUDICIAL MEMBER
/skr/
Dated: 28/10/2015
Copy of the order forwarded to:

1. The Assessee:M/s. Alston India Limited., Mumbai
2. The DCIT, Circle 1(1)/Addl. CIT, R-1(1), Mumbai.
3. The CIT(A)/DRP-1, Mumbai.
4. The CIT, Mumbai
5. The SR DR , ITAT, Mumbai.

True copy

By Order
(Assistant Registrar)