IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I' NEW DELHI

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
&
SHRI K.N. CHARRY, JUDICIAL MEMBER

ITA No.-6021/Del/2012
(Assessment Year: 2008-09)

Maruti Suzuki India Ltd. Plot No. 1, Nelson Mandela Road, Vasant Kunj, New Delhi. **PAN-AAACM0829Q** **(APPELLANT)**	vs	Addl. CIT Range-6, C.R. Building, New Delhi. **(RESPONDENT)**
Assessee by	**Sh. Ajay Vohra**	
Revenue by	**Sh. Aprender Kumar**	

Date of Hearing	21.08.2017
Date of Pronouncement	09.11.2017

ORDER

PER SHRI K.N. CHARY, JUDICIAL MEMBER

This is an appeal challenging the order dated 29.10.2012 passed by the Assessing Officer u/s 143(3) read with section 144C of the Income Tax Act, 1961 (for short hereinafter called the 'Act') pursuant to the directions given by the Ld. Dispute Resolution Panel-1, New Delhi, vide order dated 24.09.2012 passed u/s 144C(5) of the Act.

2. Briefly stated facts relevant for the disposal of this appeal are that the assessee company i.e. Maruti Suzuki India Ltd. was incorporated on 24.02.1981 as a fully owned Government Company for the modernization of Indian Automobile Industry and production of fuel-efficient vehicles in large volumes primarily for sale in the Indian market, besides also for export of vehicles to various countries and is

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in the process of establishing itself in the international markets of South & Central America, Africa, Asia, etc. They have various models currently plying on the Indian roads which shall include Maruti 800, Omni, Esteem, Alto, Gypsy, Zen, Verna, Wagon-R, Vitara and Swift etc. For the AY 2008-09 they have filed their return of income on 29.09.2008 declaring a total income of Rs. 20,92,03,70,320/- and also disclosing long term capital loss of Rs. 15,39,21,183/-. Revised return was filed on 27.03.2010 at an income of Rs. 20,96,66,30,740/- and in that revised return assessee claimed credit of additional TDS of Rs. 25,66,500/- excluding income from the sales tax subsidy being capital receipt and expenditure/loss on Mark-to-market of derivative contracts and including expenditure on lumpsum royalty paid during the year.

2.1. In respect of royalty for use of brand name and AMP services, reference was made to the Transfer Pricing Officer u/s 92CA(1) of the Act and the TPO made the adjustment on account of royalty for use of brand name to a tune of Rs. 2,37,24,42,202/- and in respect of AMP service to a tune of Rs. 1,95,16,00,000/-, thus, totaling to Rs. 4,32,40,42,202/-. Draft assessment order u/s 144C was forwarded to the assessee, vide letter dated 30.12.2011 proposing an addition of Rs. 9,19,89,85,227/-. Assessee filed objections against the draft assessment order with the Dispute Resolution Panel and pursuant to the directions dated 24.09.2012 passed by the Dispute Resolution Panel AO passed the impugned order making the additions in the following manner:

Sl. No.	Particulars of Income	Amount (In Rs.)
i.	Business Income as per return of income (as per revised return)	20,25,23,96,841
ii.	Disallowance of deduction u/s 43B	66,23,77,487

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iii.	Disallowance on account of excess consumption claimed	1,70,45,000
iv.	Disallowance on account of claim u/s 35DDA	23,91,54,836
v.	Disallowance u/s 14A of the Act	7,43,27,349
vi.	Disallowance on account of Club membership	10,06,470
vii.	Disallowance on account of Sales Tax concession treated as Capital Subsidy in revised return	13,55,68,826
viii.	Disallowance on account of Royalty payment to SMC	1,92,77,00,000
ix.	Disallowance on account of Cess on Royalty to be capitalized	16,93,68,741
x.	Disallowance on account of Arm's Length Price as per TPO's order	4,32,40,42,202
xi.	Disallowance on account of Expenditure on Excise Duty paid	58,61,136
xii.	Disallowance on account of Provisional liability	32,11,63,153
xiii.	Non deduction of tax on royalty for purchase of software	NIL
xiv.	Depreciation on software capitalized	(-) 1,48,228
xv.	Depreciation on Royalty and R&D Cess	(-) 55,33,16,812
xvi.	Disallowance on account of sharing of resources	12,87,88,243
xvii.	**Total Assessed Business Income**	**27,70,53,35,244**
xviii.	Income from Short Term Capital Gain	6,88,30,877
xix.	Income from Other Sources	64,54,03,021
xx.	**Total Income**	**28,41,95,69,142**

2.2. Challenging the same, assessee is before us on as many as 19 grounds of appeal. Ground nos. 1, 2, 3.9 and 16 are general in nature, which do not require any specific adjudication. Ld. AR

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submitted that while enumerating the grounds, by inadvertence, numbering of ground No 19 missed their attention.

GROUND NO 3 DISALLOWANCE OF DEDUCTION OF THE STATUTORY DUTIES

3. Issue involved in grounds No 3 to 3.0.2 relates to the allowability or disallowability of deduction of the statutory duties on payment basis under section 43B of the Income-tax Act, 1961('the Act'). According to the Assessment order, the following are such statutory duties claimed by the assessee for deduction, but disallowed by the Assessing Officer:

Item No.	Item Particulars	Amount (Rs.)
1(a)	PLA Balance of Excise Duty on Vehicles	28,21,616
1(b)	PLA Balance R&D Cess on Vehicles	23,02,815
1(c)	PLA Balance Excise Duty on Spare parts	90,04,752
2	Customs Duty paid on import of components for Exports for purposes for which export had not been made by year end	42,961
3	Customs Duty paid on import of components for Exports purposes for which export had been made by year end	12,64,98,615
4	Excise duty on Inputs balance in RG 23A Part-II	18,47,40,688
5a	CVD (Modvat) paid on goods in transit to be adjusted against excise duty payable on finished products components	10,73,21,757
5b	CVD (Modvat) paid on goods in transit to be adjusted against excise duty payable on finished products Steel Coils	2,78,71,332
6	Customs Duty on Goods in Transit/under inspection	1,93,27,627
7	Customs Duty on Inventory in Closing Stock	18,23,52,893
8	Customs duty paid under protest	92,431
	Total	66,23,77,487

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3.1. According to the assessee, the assessee, in the return of their income, has claimed deduction of Rs.66,23,77,487 in respect of the above statutory duties paid during the year under consideration under section 43B of the Act and simultaneously offered for tax Rs.117,72,92,005 claimed as deduction in earlier years. The duties so paid include excise duty, custom duty on import/ purchase of inputs/components and also amount of duty paid in PLA account. However, the assessing officer, following the assessment order for the earlier years, disallowed Rs.66,23,77,487 on the ground that deduction under section 43B of the Act is allowable only where the amount claimed as deduction on actual payment basis is charged to the P&L Account. It is primarily the case of the assessing officer that the amount paid by the assessee is in the nature of advance payment of duty, liability in respect of which has not accrued/ crystallized and consequently, such advance payment is not allowable as deduction. Dispute Resolution Panel ("DRP"), also approved the findings of the assessing officer on the ground that similar issues arising in the preceding years is pending before the ITAT as well as the Hon'ble High Court.

3.2. It is the submission of the Ld. AR that the assessing officer/ DRP, failed to appreciate that as per the mandate of section 43B of the Act any amount of duty paid by the assessee is allowable as deduction on the basis of payment itself irrespective of the method of accounting followed by the assessee and such a duty can only be claimed in the year of payment but not in any other year, and therefore, irrespective of the treatment given by the assessee to the various amount of duties paid during the year under consideration, the duties paid were allowable as deduction under section 43B of the Act.

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3.3. While placing reliance on the decisions reported in Berger Paints India Ltd. v. CIT (2004) 266 ITR 99 (SC), CIT v. Shri Ram Honda Power Equipment Corporation : 258 CTR 329 / 352 ITR 481 (SC), CIT v. Modipon Ltd.:334 ITR 106 (Del), Lakhanpal National Ltd. v. ITO : 162 ITR 240 (Guj), Bharat Petroleum Corporation Ltd.: 252 ITR 43 (Bom), CIT v. NCR Corporation India (P) Ltd. : 240 Taxman 598 (Kar.), Chemicals and Plastics India Ltd. v. CIT : 260 ITR 193 (Mad), CIT v. C.L. Gupta: 259 ITR513 (All.), CIT v. Raj and Sans Deep Ltd: 293 ITR 12 (P&H), Indian Communication Network 206 ITR 96 (ITAT – SB), DCIT v. Glaxo SmithKline Consumer Healthcare Ltd: 107 ITD 343 (SB) (Chd.), Hind Lamps Ltd. DCIT: ITA No. 283/D/92 (Agra), Euro RSCG Advertising (P) Ltd v. ACIT : 154 TTJ 389 (Mum), he submitted that the aggregate amount of Rs.66,23,77,487 was allowable as deduction to the assessee under section 43B of the Act. Ld. AR further submitted that this issue is, in principle, also covered by the order of the Delhi High Court in assessee's own case for the assessment years 1994-95, 1995-96 and 1996-97, reported in 255 CTR 140.

3.4. In the light of these submissions and detailed explanation offered by both the parties now we shall proceed to deal with the item wise submissions under Ground No.3.

3.5. Adverting to Grounds No 3.1 and 3.1.1, we find in the return of income, the assessee claimed deduction of duty paid amounting to Rs. 1,41,29,183 being closing balance in the PLA, under section 43B of the Act, as under:

Item No.	Item Particulars	Amount (Rs.)
1(a)	PLA Balance of Excise Duty on Vehicles	28,21,616
1(b)	PLA Balance R&D Cess on Vehicles	23,02,815
1(c)	PLA Balance Excise Duty on Spare parts	90,04,752

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3.5.1. Ld. AR submitted that the aforesaid amount was paid by the assessee under Rule 4 of the Excise Rules, 2002 in order to cover the duty required to be paid on the goods to be removed from bonded warehouse. At the time of removal of the goods, excise duty/R&D Cess payable on the goods is debited to the PLA, and the amount was claimed as deduction in the return of income as per the mandate of section 43B of the Act. However, the assessing officer disallowed the same following the assessment order for the assessment year 2005-06 ignoring the fact that in the assessee's own case for the assessment year 1999-2000, the ITAT allowed the claim subject to incurring of liability on manufactured goods. According to the Assessee, the liability incurred by the assessee as on 31.3.2008 was Rs. 97.81 Crores, which was much more than the amount deposited in PLA, and consequently, the balance in PLA was allowable deduction under section 43B of the Act. In support of his contention that that PLA balance is an allowable deduction, he placed reliance is placed on the decision of Special Bench of the Tribunal in the case of DCIT v Glaxo Smith Kline Consumer Health Care Ltd reported in 107 ITD 343 (SB) (Chd.). Ld. AR submitted that similar view has been taken by the Delhi Bench of the Tribunal in the assessee's own case for the assessment years 1994-95, 1995-96, 1996-97, 1999-00, 2000-01, 2002-03, 2004-05, 2005-06, 2006-07 and 2007-08, and also that the issue stands covered in favour of the assessee, in view of decision of the Hon'ble Delhi High Court in the case of CIT vs Modipon Ltd. (No. 2) (334 ITR 106). He further submitted that the findings of the Tribunal on this aspect have been confirmed by Delhi High Court for the assessment years 1994-95, 1995-96 and 1996-97, reported in 255 CTR 140.

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3.5.2. Per contra, it is the argument of Ld. DR that the coordinate Bench of this Tribunal has interpreted the use of the words 'irrespective of the previous year in which the liability to pay such sum was incurred by the assessee occurring in Section 43B to mean that whether or not the liability to pay such sum was incurred is immaterial and that if an amount of tax or duty is paid in the first year as advance, then the deduction is to be allowed in that year itself, but one of the primary conditions for the operation of section 43B is that the liability to pay tax or duty must necessarily have been incurred. He submitted that this has also been observed by the Hon'ble Supreme Court in Allied Motors (P) Ltd. v. CIT (1997) 224 ITR 677 (SC), which is reproduced below:

> *"As is evident from the Budget Speech of the Finance Minister for the year 1983-84 and the Memorandum explaining the provisions in the Finance Bill, 1983 that section 43B was clearly aimed at curbing the activities of those taxpayers, who did not discharge their statutory liability of payment of excise duty, employer's contribution to Provident Fund, etc. for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant Previous Year. It was to stop this mischief that section 43B was inserted... "*

3.5.3. According to him, vide para 4.1 on page 3 of its order for A.Y. 2006-07, the coordinate Bench of this Tribunal has, itself agreed that the amounts paid under PLA are nothing but excise duty paid as advance inasmuch as in Indian Molasses Co. (P.) Ltd. 37 ITR 66, the Hon'ble Supreme Court stated that "Spending" in the sense of "paying out or away" of money is the primary meaning of "expenditure and "Expenditure " is what is paid out or away and is gone irretrievably. Basing on this, he argued that the expenditure, which is deductible for income tax purposes is one which is towards a liability existing at the time, but the putting aside of money which may become expenditure on the happening of an event is not an expenditure and on this analogy, he submitted that any advance

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payment of tax or duty cannot be considered as expenditure since it is neither irretrievably gone nor does it relate to any existing liability. In reply to the submission on behalf of the assessee that the issue was covered in the assessee's own case for the assessment years 1994-95, 1995-96, 1996-97, 1999-00, 2000-01, 2002-03, 2004-05, 2005-06, 2006-07 and 2007-08, Ld. DR submits that these are continuous issues forming part of the assessment order for AY 2005-06 and 2006-07 also, and are at present pending adjudication before Hon'ble Delhi High Court.

3.5.4. On this issue, for A.Y. 2006-07 a coordinate Bench of this Tribunal, vide 4.13 of its order:

> *"4.13 Under the 'Inclusive method', the figure of purchase, sale and inventories are required to be taken with the element of tax or duty etc. Since the amount of unutilized balance of excise duty under PLA does not form part of purchase, this amount will be eligible for separate deduction u/s. 43 B. At the same time, the last year's unutilized PLA getting deduction in that year due to the application of section 43B, would be required to be added back to the income of the current year as determined above. We, therefore, set aside the impugned order and direct the A.O. to firstly recast the assessee's profit and loss account on inclusive basis and then make suitable deduction in respect of the amount of unutilized PLA at the end of the current year and also the preceding year. "*

3.5.5. While reproducing the above paragraph for AY 2007-08, while reproducing the above observations for the earlier year, has held as under:

> *"8.5 We find that the ITAT under similar set of facts has decided an identical issue after discussing in detail and following the decision cited before it including the decision of special Bench of the ITAT in the case of DCIT vs. Glaxo Smith Klin Consumer Health Care Ltd. (supra) holding that the excess amount of excise duty reflected in the account-current is nothing but actual payment of excise duty even though mentioned as advance payment and hence allowable as deduction under sec. 43B of the Act in the year of payment. The special bench has further clarified that the allowing of deduction on payment basis could not result in double deduction under any circumstance. We*

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> *thus respectfully following the above decision set aside the matter to the file of the Assessing Officer to decide the issue afresh after affording opportunity of being heard to the assessee as per the decision cited above in the case of assessee itself for the assessment year 2006-07 (supra). Ground Nos. 3, 3.0.1 to 3.1.1 are accordingly allowed for statistical purposes."*

3.5.6. There is no change in the circumstances that are discussed in para No 8.5 of the above order so as to enable us to take any contra view. Plea of the Revenue that these are continuous issues forming part of the assessment order for AY 2005-06 and 2006-07 also, and are at present pending adjudication before Hon'ble Delhi High Court is not a ground for us to deviate from the consistent view taken by this Tribunal in assessee's own case for the earlier years. We, therefore, while respectfully following the view taken for the earlier years, set aside the impugned order and direct the A.O. to firstly recast the assessee's profit and loss account on inclusive basis and then make suitable deduction in respect of the amount of unutilized PLA at the end of the current year and also the preceding year. Grounds No 3.1 and 3.1.1 are accordingly allowed for statistical purpose.

3.5.7. Grounds No. 3.2 and 3.3 deal with the Customs Duty of Rs 42,961/- and Rs. 12,64,98,615/- paid on import of components for export purposes for which exports have not and have been made. Case of the assessee is that the assessee has been consistently following exclusive method of accounting in respect of custom duty paid on import of components for export purpose, and accordingly, duties paid on purchases are not included in the cost of purchases and the value of closing stock in the profit and loss account. Addition of the duty, both in the purchases as well as the closing stock as per the requirement of section 145A, is tax neutral inasmuch as the same amount is both debited as well as credited to the profit and loss account. But to give effect to the provisions of section 43B, which

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mandates that duties paid by the assessee are allowable only on payment basis, custom duty paid by the assessee on import of components for export purposes, whether or not export against the same had actually taken place during the relevant year, is claimed as deduction in the return of income. The assessing officer, however, disallowed the same following the assessment for the assessment year 2005-06. On this aspect, a coordinate Bench of the Tribunal in assessee's own case for the assessment years 1999-00, 2000-01, 2005-06, 2006-07 and 2007-08 has held that, since the duty is paid, deduction claimed u/s 43B of the Act has to be allowed. Ld. AR submitted that Section 145A provides for uniformity in the method of valuation of inventory, purchases and sales, thereby, mandating the inclusion of duties actually paid in the inventory and only operates notwithstanding anything to the contrary contained in Section 145, which relates to the method of accounting followed by the assessee. He further submitted that the introduction of the provisions of Section 145A does not in any way affect the claims of the assessee under Section 43B as there is no conflict between the provisions of Section 145A and Section 43B of the Act. Though the provisions of Section 145A mandate the assessee to include the value of tax, duty, cess or fee in the value of its closing stock, nowhere it requires the assessee to go a step further and curtail the operation of Section 43B by not claiming the deduction of such duties, etc. in the year of payment but in the year in which such stocks are consumed by the assessee. He submits that even if the said amount has to be added to purchases and closing stock by virtue of Section 145A, thereby being income neutral in so far as the P&L Account is concerned, the said amount will be separately deductible while computing the taxable income u/s 43B of the Act.

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3.5.8. He placed reliance on the decision of the Hon'ble Supreme Court, in the case of Berger Paints ltd. v. CIT: 266 ITR 99(SC) in support of his contention that customs and excise duties are allowable in the year of payment u/s 43B, and even if such duties are included in the value of closing stock, they would be separately allowable. He submitted that in that case, the question before the Hon'ble Calcutta High Court for the AY 1984-85 was that,

> *"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in rejecting the assessee's claim for deduction of the excise and customs duties of Rs.98,25,833/- paid in the year of account and debited in the Profit & Loss Account, on the ground that the crediting of the Profit & Loss Account by the value of the closing stock which included the aforesaid duties, did not have the effect of wiping out the debit to the Profit & Loss Account?"*

and the Hon'ble Supreme Court decided the question in favour of the assessee and held that by merely debiting the duties to the P&L Account and crediting them to the P&L account as part of the value of the closing stock, they could not be said to have been allowed as deduction and would be separately allowable u/s 43B, and hence in view of the aforesaid judgment of the Hon'ble Supreme Court, the matter has been laid to rest and it can no longer be disputed, the assessee ought to be allowed deduction of duties and taxes in the year of payment and in case such duties and taxes have been credited to the P&L account as part of the value of the closing stock, they ought to be separately allowed as deduction in such year while determining the taxable income of the assessee under the Act.

3.5.9. Ld. AR further submitted that the provisions of Section 43B, while overriding all the other provisions of the Act, also override Section 145A. Section 145A does not in any manner prevail over or in any way limit the operation of Section 43B of the Act, and that in the Berger Paints case, the closing stock valuation of the assessee

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included the amount of duties. In other words the position was as if the provisions of Section 145A had been given effect to and implemented. Therefore provisions of Section 145A do not adversely affect the judgment in the case of Berger Paints.

3.6. Further reliance is placed on a decision in the case of Sona Steering Systems Ltd. vs. DCIT ITA Nos. 103/Del and 948/Del of 1996, wherein wherein while allowing the claim of the assessee under Section 43B of the amount of customs duty paid by the assessee which was included in the closing stock and credited to the P&L account a coordinate Bench of this Tribunal observed that,

> *"According to the accounting principles whenever the raw material purchased is shown in the closing stock and carried forward to the next year in the form of opening stock, it cannot be said that the cost of purchase has been allowed. For the similar reason the custom duty paid by the assessee has been added to the cost of raw material and the same has been shown in the closing stock and carried forward to the next year in the form of opening stock. Therefore it cannot be said that the expenditure on account of customs duty stands allowed to the assessee in the year under consideration....Therefore following the decision of the Special Bench, the assessee is entitled to deduction of the aforesaid amount u/s 43B in the year under consideration."*

3.7. He brought to our notice that a coordinate Bench of Delhi Tribunal in the case of Purolator India Ltd. v. DCIT: ITA No. 1441/Del/2003 decided similar issue in favour of assessee by accepting the valuation of closing stock on net of MODVAT basis by following the decision of the Supreme Court in the case of CIT v. Indo Nippon Chemicals Ltd.: 261 ITR 275 (SC) wherein the non inclusive method of accounting for MODVAT followed by the assessee was approved by the Apex Court with the observations that,

> *"As agreed by the learned representatives of both sides this issue is squarely covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of CIT v. Indo Nippon Chemicals Co. Ltd.: 261 ITR 275 (SC) wherein the non inclusive method of accounting for MODVAT followed by the assessee was approved by the Hon'ble Apex Court. Further as held by the Delhi Bench of ITAT in the case of*

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DCIT v. HCL Info system Ltd. (ITA No. 1314(D)/2003) the insertion of section 145A in the statute by the Finance Act 1998 w.e.f 01.04.1999 has also not made any difference to this proposition laid down by the Hon'ble Supreme Court. As such respectfully following the decision of Hon'ble Supreme Court in the case of Indo Nippon Chemicals Co. Ltd. (supra) we decide this issue in favour of the assessee and allow ground No. 2."

and the decision of the Tribunal has been affirmed by the Delhi High Court in ITA No. 999/2007 wherein the High Court, taking into account the provisions of section 145A of the Act, has observed that the aforesaid issue will not affect the income of the assessee and matter was tax neutral in as much as whether the assessee follows inclusive or exclusive method of accounting the same would not make any impact on the profit and loss. Apart from that, he submits that recently the Karnataka High Court in the case of CIT v. NCR Corporation India (P) Ltd. 240 Taxman 598, reiterated the principle laid down by the Apex Court in the case of Berger Paints (supra) and held that the entire amount of excise duty and customs duty paid by the assessee in a particular year are allowable as deduction irrespective of the fact that such duties are included in the value of closing stock. It was further held that provisions of Section 43B, while overriding all the other provisions of the Act, also override Section 145A and further that provisions of section 145A does not in any manner dilute or nullify the effect of provisions of Section 43B of the Act.

3.8. Insofar as custom duty paid on import of components in respect of which exports were made during the year under consideration, the assessing officer further held that since the assessee is entitled for duty drawback, which becomes immediately due on the date of export, the amount of custom duty on import as revenue neutral, as a result of which, no deduction is allowable to the assessee in respect of the same. According to the assessee, The assessing officer failed to

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appreciate that the Duty drawback does not accrue automatically on export of goods since the exporter is required to fulfill various addition/requirements in order to claim the same, but it accrues only when the claim of the exporter-assessee is sanctioned by the custom authorities and also that Duty drawback receivable is separately chargeable to tax as income of the assessee under section 28 of the Act. He explained that the receipt of duty drawback is altogether different from allowability of deduction in respect of which duty paid by the assessee on payment basis under section 43B of the Act. Without prejudice to this contention, he argued that in case the assessing officer's contention were to be accepted, then duty drawback income amounting to Rs. 12,12,31,609/-declared by the assessee for the year under consideration should be directed to be excluded.

3.9. He submitted that apart from a coordinate Bench of this Tribunal deciding the aforesaid issue in favour of assessee in the assessment years 1999-00, 2000-01, 2001-02, 2002-03, 2004-05, 2005-06, AY 2006-07 and 2007-08, the issue stands covered in favour of the assessee, in view of Punjab and Haryana High Court in the cases of CIT v. Manav Tools (India) P. Ltd: 336 ITR 237 (P&H) and CIT v. Sriyansh Knitters P. Ltd. 336 ITR 235 wherein the High Court while affirming the finding of the Tribunal held that duty drawback accrues in the year in which rate is fixed by the competent authority after verification of claim of the assessee and amount is quantified and not in the year of export.

3.10. Per contra, it is the contention of the Ld. Dr that it is pertinent to note that in case of Customs duty paid on imports of components for which exports had been made by the year end, the assessee receives duty drawback on accrual basis i.e., the assessee is entitled

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to receive duty drawback the moment exports are made and certified to have been made. Therefore, the amount under this head will be revenue neutral, and hence no deduction would be allowable to the assessee whereas as regards the amount of Rs. 42,961/- being customs duty paid on import of components for which exports had not been made by the year end, even the ITAT has noted that under the 'Inclusive Method', this amount would be included in the cost of purchases in the P & L account and would also be reflected in the closing stock in the Balance Sheet. This amount would also, therefore, be revenue neutral and hence no deduction would be allowable on it and this proposition was accepted by the Hon'bie Supreme Court in Chainrup Sampat Ram (1953) 24 ITR 481 (SC) wherein it has observed that "Closing stock, shown to the credit side of the trading account, has the effect of cancelling purchases to that extent debited to such trading account." Further, these are continuous issues forming part of the assessment order for AY 2005-06, 2006-07 and 2007-08 also, and are at present pending adjudication before Hon'ble Delhi High Court.

3.11. On the customs duty paid on import of components for which exports had and had not been made, a coordinate Bench of this Tribunal in the order for A.Y. 2006-07, vide para 5.1 and 5.2 held that,-

> *"5.1. Now, we take up the disallowances u/s 43B on items of customs duty. First is customs duty of Rs.8,65,07,635/- paid on import of components for which exports had been made by the year end and Rs.1,47,142/- for which exports had not been made by the year end. These amounts claimed by the assessee as allowable u/s 43B of the Act, were disallowed by the AO. It is common submission that the tribunal has allowed deduction in respect of these amounts in the preceding years.*
>
> *5.2. Here again it is noticed that the assessee has also followed `Exclusive method'. In such circumstances, this method needs to be substituted with `Inclusive method' as mandatorily required u/s 145A. We, therefore, direct the AO to recast Profit and loss account as per*

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> *`Inclusive method' as discussed above and then allow deduction in respect of the customs duty paid in accordance with section 43B, if not getting deducted in such recast. Customs duty paid on import of components for which exports had/had not been made by the year end under the inclusive method would now stand included in the value of imports and accordingly get deducted. Customs duty of Rs.8,65,07,635/- paid on import of components for which exports had been made by the year end would not require any separate deduction as the same will be debited to the Profit and loss account and also get exhausted. As regards the other amount of customs duty for which exports had not been made by the year end would represent the amount though debited to the Profit and loss account by means of increased input cost but not getting exhausted as the same also appearing in the balance sheet through the enhanced value of closing stock. Separate deduction is required to this extent u/s 43B of the Act. At the same time, we also direct the AO to make sure that such amount separately getting deducted in this year does not get deduction once again in the next year. In the like manner, the last year's similar deduction separately allowed should be taxed in the computation of income of the current year."*

3.12. While following the above reasoning given for the AY 2006-07 and set aside the matter to the file of the Assessing Officer to decide the issue afresh as per the directions given above, after affording opportunity of being heard to the assessee. Facts are similar for this assessment year also, and except stating that an appeal is filed and pending against the above orders, nothing new is brought to our notice to deviate from this consistent view. We, therefore, respectfully following the above decision set aside grounds 3.2 and 3.3 to the file of the Assessing Officer with a direction to decide the issue afresh in view of the above findings on these grounds after affording opportunity of being to the assessee.

3.13. Now, adverting to the disallowance of a sum of Rs 18,47,40,688/- representing the amount of excise duty actually paid on purchased inputs included in RG 23A Part II, challenged under grounds No 3.4 to 3.4.1, it is the case of the assessee that they had claimed deduction u/s 43B of the Act amounting to Rs.18,47,40,688/- representing balance in RG23A as on 31.03.2008, and such amount represents excise duty paid on raw material and inputs purchased by the assessee for use in the manufacture of automobiles. Under the central excise law, the assessee is entitled to claim

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MODVAT Credit in respect of the amount of central excise duty so paid on raw material and inputs purchased for manufacture of excisable goods. The said amount of duty paid to the supplier of raw material and inputs is regarded as amount of central excise duty actually paid by the assessee under the Excise Laws. Since the aforesaid amount of excise duty was actually paid by the assessee as part of purchase price of raw material and inputs, the same has been claimed as deduction under section 43B of the Act. The assessing officer, however, disallowed the aforesaid amount following the assessment order for the assessment year 2005-06.

3.14. It is the submission of the Ld. AR that the Special Bench of the Tribunal in the case of DCIT v Glaxo SmithKline Consumer Healthcare Ltd: 107 ITD 343/ 299 ITR (AT) 1 (Chd.) (SB), has held that, unutilized MODAT credit is not an allowable deduction, since such credit does not amount to payment of duty, and following this order of the Special Bench, the ITAT in assessee's own case had decided the issue against the assessee till AY 2005-06. However, Supreme Court has allowed the deduction u/s 43B for the amount lying credited in the Modvat account at the end of the accounting year thereby dismissing the SLP (No. 23461/2012) filed by the department against the order of HC in the case of Shri Ram Honda Power Equipment Ltd. : 352 ITR 481 (SC) and while following the this judgment in Shri Ram Honda Power Equipment case, the ITAT in AY 2006-07 and AY 2007-08 decided the aforesaid issue in favour of assessee.

3.15. Per contra, Ld. DR submitted that the coordinate Bench of this Tribunal, vide para 4.16 (reproduced on page 49) of its order for A.Y. 2006-07, has acknowledged that the Special Bench of the Chandigarh Tribunal in Glaxo Smithkline Consumer Healthcare Ltd. (2007) 107 ITD 343 (SB) (Chd.) has held that Modvat credit available to the assessee as on the last date of the previous year does not amount to payment of excise duty and is, hence, not allowable u/s. 43B. However, it has then proceeded to allow the unutilized Modvat credit to the assessee by relying on the judgement of the Hon'ble Supreme Court in Shri Ram Honda Power Equipment Ltd. (2013) 352 ITR 481 (SC)wherein it has been held that 'the Authorities below are right in coming to the

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conclusion that MODVAT Credit is excise duty paid'. In this regard, he placed reliance on the following portion of the judgement of the Special Bench in Glaxo Smithkline (supra):

> *"56. In fact, the unexpired Modvat credit available to an assessee is in the nature of a future entitlement which cannot be considered as equivalent to advance payment of duty.*
>
> *57. ...in the scheme of Modvat, there is no such payment of excise duty. The credit is available to an assessee under the scheme of Modvat in order to minimise the escalation effect of payment to excise duty by successive manufacturers. Therefore, the excise duty paid at the earlier point is set off against the central excise liability at the next point. Till the set off is availed at the next point, the duty available for set off by the assessees, is nothing but part of the cost of the materials purchased by him. That is not a payment per se made towards excise duty but it was in fact a payment made towards purchase cost.*
>
> *59. "Paid" means money actually paid by an assessee or incurred by the assessee and not anything else. In s. 43B, the deduction is given only for those sums "actually paid" by the assessee ...unexpired Modvat Credit does not amount to actual payment of central excise duty.*
>
> *60. The credit balance as such does not amount to payment. The credit balance becomes equivalent to payment only at the point of time the assessee exercises his option to set off the credit balance against the central excise liability and not before.*
>
> *61. Therefore, we hold that the Modvat credit available to the assessee as on the last day of the previous year does not amount to the payment of Central excise duty under s. 43B...* "

3.16. He further submitted that in Shri Ram Honda Power Equipment Ltd.(supra), the Hon'ble Apex Courthas merely relied on the judgement of Hon'ble Bombay Court in CIT v. Indo Nippon Chemical Co. Ltd.(2000) 245 ITR 384 (Bom.), which was subsequently upheld by it. However, the facts of the matter in Indo Nippon (supra) are distinguishable inasmuch as the issue therein dealt with the method of valuation of stock of inputs, work in progress and finished goods with respect to the inclusion of Modvat credit, the Hon'ble Bombay High Court as well as the Hon'ble Supreme Court made no comments as to the nature allowability of

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unutilised Modvat credit in Indo Nippon (supra), as such**,** in view of this situation, unutilised Modvat credit does not amount to actual payment of central excise duty and therefore, cannot attract the provisions of Section 43B. Lastly he submitted that these are continuous issues forming part of the assessment order for AY 2005-06, 2006-07 and 2007-08 also, and are at present pending adjudication before Hon'ble Delhi High Court.

3.17. In the order for the AY 2006-07, this issue was considered and was set aside to the file of the Assessing Officer to decide the issue afresh after affording opportunity of being heard to the assessee and for the AY 2007-08, a coordinate Bench of this Tribunal relied upon the following findings recorded in respect of the AY 2006-07.

"4.14. Now, we come to the next item of disallowance, being a sum of Rs. 48.53 crore towards Excise duty on inputs balance in RG 23A. This amount is unutilized Modvat credit available to the assessee at the end of the year. Under the Central Excise law, a manufacturer is entitled to claim Modvat credit of the amount of excise duty paid by him on raw materials and inputs purchased for consumption in the manufacture of excisable goods. The amount of duty paid to the supplier of raw material is considered as the amount of central excise duty actually paid by the assessee. Thus, a manufacturer of final product under Modvat/Cenvat Scheme is allowed to get adjustment of excise duty paid by him on any inputs received in the factory to be used in the manufacture of final product. In the year under consideration, the assessee purchased excise duty paid raw material and other inputs and as per the excise rules became entitled to Modvat credit of the excise duty paid on raw material eligible for set off against liability of excise duty on the finished goods at the time of removal of goods from bonded warehouse.

4.15. We have noticed above that the assessee is also following `Exclusive method'. Under the `Exclusive method', the total amount of excise duty paid by the assessee on purchase of inputs does not get added to their purchase price, but appears as an asset with the nomenclature of Modvat credit. When goods using the excise duty paid raw material are manufactured, the manufacturer becomes entitled to use Modvat credit against his liability of excise duty on finished products. This utilized part of the Modvat credit goes to the Excise duty account in the same manner as utilized PLA discussed above. Suppose, an assessee has Modvat credit of Rs. 10 and has utilized duty paid raw material in its production during the year for corresponding sum of

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Rs.9, out of which finished goods corresponding to Modvat utilized of Rs.7 are sold and the finished goods corresponding to Modvat utilized of Rs.2 are in stock. The assessee will get deduction for Rs.9 under the exclusive method. Simultaneously the assessee will offer income of Rs.7 embedded in the sale price. It is the remaining amount of Re.1 which is unutilized Modvat credit appearing as an asset in the balance sheet at the end of the year, for which the assesse is now seeking deduction.

4.16. At the outset, we want to mention that the Special Bench of the Tribunal in Glaxo Smithkline Consumer Healthcare (supra) has held that unexpired Modvat credit before it is set off, cannot be treated as tax paid. Accordingly the Special Bench held that the Modvat credit available to the assessee as on the last date of the previous year does not amount to payment of excise duty and is, hence, not allowable u/s 43B. In earlier years, the Tribunal has followed the dictum of this Special Bench verdict and upheld the disallowance. The ld. AR submitted that there has been further articulation of law on this point. Referring to the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Shri Ram Honda Power Equipment Ltd. (2013) 352 ITR 481 (SC), the ld. AR submitted that the amount lying credited in the Modvat account at the end of the accounting year has now become deductible u/s 43B as per its ratio. We find that the Hon'ble Apex Court in Shriram Honda Power Equipment Ltd. (supra) has held that : `The Authorities below are right in coming to the conclusion that MODVAT Credit is excise duty paid'. The Hon'ble jurisdictional High Court in the assessee's own case in CIT vs. Maruti Suzuki India Ltd. (2013) 255 CTR 140 (Del), after taking note of the judgment of the Hon'ble Supreme Court in the case of Shri Ram Honda Power Equipment Corporation (supra) has held that : `This court also notices that the Supreme Court has upheld the view which allows assesses to claim credits, such as Modvat, etc, falling within the description of liability paid, to escape the mischief of Section 43-B.' In view of this later development of law, the earlier contrary view taken by the Special Bench in Glaxo (supra) on the question of unutilized Modvat credit now needs to be properly aligned with the ratio decidendi of the judgment in Shri Ram Honda (supra).

4.17. Armed with the above legal position, now the remaining amount of Re.1 in our above example under the `Exclusive method', which is unutilized Modvat credit in the balance sheet at the end of the year, needs to be treated at `excise duty paid'. Since this amount is considered as excise duty paid, the same has to be allowed as deduction during the year of payment as per section 43B. Caveat remains that deduction for a sum of Re.1 in the current year, being the Modvat credit unutilized at the end of the year under the exclusive method, also requires enhancement of income of the succeeding year to this extent. In the like manner, the corresponding amount allowed as deduction u/s 43B in the preceding year, if any, also requires separate add back to the income of the current year. It is so because deduction for payment of tax or duty etc. can be allowed only once, and that too, at the time of payment. We, therefore, hold that the amount of

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unutilized Modvat credit is deductible in the computation of income for the current year under the exclusive method. But such amount also requires add back in the computation of income of the immediately next year and also the corresponding amount of unutilized Modvat credit of the preceding year, if allowed as deduction in such earlier year, requires a separate addition to the income of the current year. It is the treatment of Modvat credit under the `Exclusive method'.

4.18. We have noticed supra that the use of `Exclusive method' is no more permissible in the year under consideration. As such, there is a need to give effect to section 145A read with section 43B under the `Inclusive method'.

4.19. Before taking up this aspect, we would like to deal with the judgment of the Hon'ble Supreme Court in Shri Ram Honda (supra), relied by the ld. AR for supporting the claim of per se deduction without any further adjustments as per section 145A. It is relevant to note that the Hon'ble Supreme Court in Shri Ram Honda (supra) was dealing with A.Y. 1995-96. While granting deduction for Modvat credit, the Hon'ble Summit Court followed the judgment of the Hon'ble Bombay High Court in CIT vs. Indo Nippon Chemical Co. Ltd., (2000) 245 ITR 384 (Bom), as affirmed by the Hon'ble Apex Court in (2003) 261 ITR 275, in holding that the same was squarely applicable and hence the amount was deductible. The assessment year involved in the case of Indo Nippon (supra) was 1989-90, which is again before the insertion of section 145A. It is interesting to note that during the course of arguments before the Hon'ble Bombay High Court, the ld. counsel for the Department brought to the notice of Their Lordships that section 145A stood inserted and, hence, the exclusive (net) method followed by the assessee was impermissible. The Hon'ble High Court considered this aspect in the last para of its judgment and observed that the insertion of section 145A w.e.f. the AY 1999-2000 had no bearing as the assessment year under their consideration was 1989-90. In the light of this position, it becomes imperative to give effect to the provisions of section 145A of the Act, which are applicable to the year under consideration and are binding without any exception.

4.20. Now we come to giving effect to sections 145A and 43B under the `Inclusive method'. In line with our discussion made above while dealing with PLA component of excise duty, we direct the AO to first recast Profit and loss account of the assessee by taking the figures of purchase, sale and opening and closing stocks at the value inclusive of tax or duty etc., so as to give effect to the mandate of section 145A. Once this is done, then it will be the turn of giving effect to the mandate of section 43B, which requires the granting of deduction of tax or duty etc. on payment basis. This can be done by allowing deduction for that part of the Modvat credit separately u/s 43B of the Act, which has not been finally deducted.

4.21. We have understood Modvat credit in three parts in the example given above while discussing it under the exclusive method, viz., Rs.7

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which is utilized Modvat and finished goods sold; Rs. 2 which is utilized Modvat but finished goods in stock at the end of the year; and Re.1 which is unutilized Modvat at the end of the year. Now under the `Inclusive method', the price of duty paid input/raw material will be taken at full price inclusive of Rs.10. In that view of the matter, the assessee can be said to have initially claimed deduction for Rs.10. Out of total Modvat credit of Rs.10 received during the year, a sum of Rs.3 has two components, viz., Rs. 2 as a part of purchases of raw materials and also simultaneously a part of the corresponding finished goods in closing stock; and Re. 1 as a part of purchases of raw materials and also simultaneously a part of the corresponding raw materials in closing stock. Though apparently it appears that the assessee gets deduction of Rs.3 also by way of higher value of purchase of raw material, but the reality is different. When the figures of closing stock of finished goods and raw material also include Rs.3, then in fact, there is no deduction of Rs.3, because debit to the Profit and loss account through increased purchase value gets neutralized with the credit to the Profit and loss account with increased value of closing stock. This enhanced value of closing stock inclusive of Rs.3 will become opening stock of the succeeding year, thereby obliterating the effect of deduction of Rs.3. When such goods are sold or utilized and sold in the next year, the sale price will be realized which will be inclusive of Rs.3 excise duty component also. So in fact, there is no actual deduction of Rs.3 during the year under consideration because of the increased purchase price getting counterbalanced with the equal amount of loading in the value of closing stock. After having increased the value of purchase and closing stock in terms of section 145A with the amount of Modvat credit, now there is a separate requirement of giving effect to the mandate of section 43B, which requires the granting of deduction of Rs.10 in the year of payment. A sum of Rs.7 included in purchase value as a part of Rs.10, gets eventual deduction because it is exhausted as the same is not taken as an asset to the balance sheet, either directly as Unutilized Modvat, or indirectly as part of closing stock. But in so far as the amount of Rs.3 is concerned, it does not get final deduction because of the same being a part of assets in balance sheet. Deduction for Modvat credit by means of its inclusion in Purchase value of raw materials can be treated as allowed by way of debit to the Profit and loss account only when it also gets exhausted. If, even after a debit to the Profit and loss account, the amount appears in balance sheet, in one form or the other, the deduction cannot be said to have been actually allowed on payment, till it is exhausted and gets removed from the balance sheet also. In such circumstances, the amount of unexhausted (not necessarily only unutilized) Modvat credit - i.e. which appears in balance sheet either in the form of increased value of closing stock (Rs.2 in our example) and increased value of raw material representing unutilized Modvat credit (Re.1 in our example) - calls for separate deduction in terms of section 43B. We, therefore, set aside the impugned order and direct the AO to first recast the assessee's Profit and loss account on inclusive basis, then allow deduction for the

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equivalent amount of Modvat credit as represented by Rs.3 in our example. The AO should also make sure that the equivalent of Rs.3 allowed as deduction on payment basis u/s 43B in this year should not get deducted in the next year and further, the corresponding amount of deduction allowed u/s 43B in the preceding year, should also be separately added to the income of the current year. "

3.18. Facts being remained the same, we are not left with any clue as to why should we deviate from this consistent view taken for successive years, as such, we, therefore, respectfully following the same line of reason we set aside the matter to the file of the Assessing Officer to decide the issue afresh in view of the above decisions in the case of assessee itself in the appeal for the assessment year 2006-07 and 2007-08 after affording opportunity of being heard to the assessee. These grounds No 3.4 to 3.4.1are thus allowed for statistical purposes.

Ground No 3.5: Customs duty included in closing inventory

3.19. In respect of disallowance of custom duty paid on import of raw material/inputs, challenged under Ground No 3.5, case of the assessee is that they have followed inclusive method of accounting, and accordingly, the amount of custom duty paid on imported inputs/ raw material is included in the purchase price, which is debited to the Profit & Loss Account. According to them, the said duty is also included and considered as part of the value of closing stock, which is shown in the credit side of the Profit & Loss Account. Assessee submits that the Custom duty of Rs.18,23,52,893/- represents custom duty on import of raw material/inputs, which is included in the value of closing stock as per the aforesaid inclusive method of accounting followed by the assessee and such a method is in line with the provisions of section 145A of the Act. Inclusion of custom duty, both in the value of purchase as well as in the value of closing stock, is tax neutral inasmuch as the very same amount is both debited and

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credited to the Profit & Loss Account, but as per the mandate under section 43B of the Act, the custom duty so actually paid by the assessee is separately claimed as deduction on payment basis in the return of income. It is brought to our notice that in the earlier years, the assessing officer disallowed the aforesaid amount holding the same to merely advance payment, liability in respect of which has not crystallized and therefore, not allowable as deduction under section 43B of the Act.

3.20. While placing reliance on the decision of the Hon'ble Supreme Court, in the case of Berger Paints India Limited v CIT (2004) 266 ITR 99, Ld. AR argued that customs and excise duties are allowable in the year of payment u/s 43B of the Act, and even if such duties are included in the value of closing stock, they would be separately allowable; and the aforesaid issue is covered by the decision of the Supreme Court in the case of Samtel Color Ltd wherein the Court dismissed the SLP filed by department against the order of Delhi High Court(Civil appeal No 6449/2012)holding that Custom duty paid is allowable deduction u/s 43B of the Act. He further submitted that the Karnataka High Court in the case of CIT v. NCR Corporation India (P) Ltd. : 240 Taxman 598, reiterated the principle laid down by the Apex Court in the case of Berger Paints (supra) and held that the entire amount of excise duty and customs duty paid by the assessee in a particular year are allowable as deduction irrespective of the fact that such duties are included in the value of closing stock. It was further held that provisions of Section 43B, while overriding all the other provisions of the Act, also override Section 145A and further that provisions of section 145A does not in any manner dilute or nullify the effect of provisions of Section 43B of the Act.

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3.21. He further submitted that the issue stands covered by the orders of the Tribunal in assessee's own case for the assessment years 1999-00 to 2002-03, 2004-05, 2005-06, 2006-07 and 2007-08 wherein Tribunal has held that, since the duty is paid, deduction claimed u/s 43B of the Act has to be allowed.

3.22. Per contra, it is the submission of the Ld. DR that since the assessee has included customs duty on inventory in closing stock, it has already received deduction on these items which are also debited to the P&L account. Further, according to him the computation of income starts from the net figure of P&L account which means that the deduction is automatically allowed to the assessee, as such, no independent deduction can be allowable to the assessee under this head. On this premise, he submits that the decision of ITAT was not acceptable for AY 2006- 07 and 2007-08 on this issue. However, these are continuous issues forming part of the assessment order for AY 2005-06, 2006-07 and 2007-08 also, and are at present pending adjudication before Hon'ble Delhi High Court.

3.23. Vide para 5.6 and 5.7 of the order dated 24.8.2015 for A.Y. 2006-07 in assessees own case, a coordinate Bench of this Tribunal dealt with this aspect in the following manner:-

> *"5.6. The last aspect of disallowance u/s 43B is customs duty included in closing stock amounting to Rs. 22,52,46,693/-. The assessee claimed deduction for this sum, which was denied by the AO. The ld. AR stated that the assessee followed `Inclusive method' of accounting on this issue. The claim of the assessee is that the amount of Rs.22.52 crore, being the amount of customs duty paid on the import of raw material/inputs, was included in the cost of material and also as a part of closing stock, thereby levelling both the debit and the credit sides of the Profit & Loss Account. The ld. AR contended that such amount of customs duty is separately deductible in terms of section 43B of the Act. He also submitted that this issue is settled in the assessee's favour in earlier years.*
>
> *5.7. We have elaborately discussed this aspect supra in the context of excise duty included in the value of closing stock. In principle, we hold*

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> *that the amount of customs duty of Rs.22.52 crore is allowable in the year in question, but, the AO is directed to first verify the argument of following the `Inclusive method' and then allow deduction u/s 43B in the manner discussed above, if the same did not get eventually allowed. The AO should further make it is sure that no double deduction is allowed on this score, either in the current year with the last year's amount getting separately deducted u/s 43B or in the next year with the current year's amount getting separate deduction."*

3.24. To set aside the matter to the file of the Assessing Officer to decide the issue afresh as directed above after affording opportunity of being heard to the assessee, and vide para 13.5 in the order for AY 2007-08, the above direction was followed. In view of no change in the facts and circumstances of the case, we adopt the same view and set aside the matter to the file of the Assessing Officer to decide the issue afresh as directed above after affording opportunity of being heard to the assessee. Ground No 3.5 is, therefore, allowed for statistical purpose.

Ground No 3.6 to 3.7 disallowance of deduction under section 43B of the Act the payment representing custom duty

3.25. Insofar as the disallowance of deduction under section 43B of the Act for a sum of Rs 13,51,93,089/- representing custom duty (CVD) paid to be adjusted against excise duty payable on finished products, and a sum of Rs 1,93,27,627/- representing custom duty in respect of the goods in transit/under inspection is concerned, the case of the assessee is that these amounts represent custom duty/CVD paid by the assessee during the financial year 2007-08, and since the aforesaid amount represents actual custom duty/ CVD paid by the assessee during the year under consideration, the same was claimed as deduction under section 43B of the Act. But the assessing officer disallowed the aforesaid following assessment order for the assessment year 2005-06. Ld. AR submitted that this issue

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was also decided in favour of assessee by the Supreme Court in Civil Appeal No. 6449/2012 wherein the SLP filed by the department against the order of the Delhi High Court in the case of CIT vs. Samtel Color Ltd : 184 Taxman 120 was dismissed holding that Custom duty paid is allowable deduction u/s 43B of the Act. He further submits that apart from this, the issue stands covered in favour of the assessee by the order of a coordinate Bench of this Tribunal for the assessment years 1999-00, 2000-01, AY 2002-03, AY 2005-06, AY 2006-07 and 2007-08 wherein it was held that since the duty is paid, deduction claimed u/s 43B of the Act has to be allowed.

3.26. Per Contra, on these Grounds 3.6 and 3.7, Ld DR submitted that in respect of the amount of Rs. 13,51,93,089/- being customs duty (CVD) paid to be adjusted against excise duty payable on finished products, a coordinate Bench of this Tribunal has also accepted that under the 'Inclusive method' it will be included in purchases, sales, and opening and closing stock of inventories, as a result of which the ultimate impact is revenue neutral and no deduction will be allowable to the assessee under this head. As regards the amount of Rs. 1,93,27,627/-being customs duties on goods in transit/ under inspection, he contends that it is be noted that the duty paid is not tax deductible as goods in transit are not expenditure of the year and are not routed through the P&L account. Further according to him, the liability to pay customs duty is incurred only after the goods have reached the customs barrier and since the assessee has claimed deduction on this account, the onus of proving this fact was on the assessee. He points out that it is not on record whether the assessee has discharged this responsibility, as such in view of the decision of Hon'ble Supreme Court in Indian Molasses Co. (P.) Ltd. 37 ITR 66, this amount has to be treated as an advance payment, which is not an allowable deduction. Lastly he contended that these

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are continuous issues forming part of the assessment order for AY 2005-06, 2006-07 and 2007-08 also, and are at present pending adjudication before Hon'ble Delhi High Court.

3.27. Substantially this question had fallen for consideration before a coordinate Bench of this tribunal in assessee's own case for the AY 2006-07 and 2007-08 and by para Nos. 5.3 and 5.4 of its order for A.Y. 2006-07, a coordinate Bench of this Tribunal resolved the issue in the following manner,

> *"5.3. Next item is customs duty (CVD) paid to be adjusted against excise duty payable on finished products amounting to Rs. 15,59,44,832/-. Simultaneous with this, there is another item of Rs.5,40,40,258/-, which is the amount of customs duties on goods in transit/under inspection. The assessee clamed deduction for the above amounts u/s 43B of the Act, which the AO denied.*
>
> *5.4. We have heard the rival submissions and perused the relevant material on record. The Id. AR contended that this issue has been decided in earlier years in the assessee's favour by the Tribunal. He further referred to the judgment of the Hon'ble Delhi High Court in CIT vs. Samtel Colour Ltd. (2009) 184 Taxman 120 (Del) in which it has been held that advance customs duty paid in the year in question is an admissible deduction u/s 43B. In our considered opinion, there can be no dispute on the otherwise availability of deduction of advance customs duty paid by the assessee, which has to be allowed in the year of payment. In this judgment also, the Hon 'ble High Court has noticed vide para 3 that the provisions of section 145A were not applicable as the assessment year under consideration was 1995-96. In view of the detailed discussion supra with reference to the applicability of section 145A to the year in question, there can be no escape from valuation of purchase, sale and inventories under the inclusive method. We, therefore, direct the AO to recast Profit and loss account under 'Inclusive method' as per the mandate of section 145A, thereby, inter alia, increasing the purchase value with the above customs duty. Then the AO will allow separate deduction for the above referred sums to the extent not getting eventually deducted separately by way of increased purchase price, as has been discussed above. At the same time, we also direct the AO to make sure that such amount separately getting deducted in this year does not get deduction once again in the next year. In the like manner, the last year's similar deduction separately allowed should be taxed in the computation of income of the current year ",*

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and by following the same for AY 2007-08, vide para 14.1 the matter was set aside to the file of the Assessing Officer to decide the issue afresh as per the above direction of the ITAT in the appeal for the assessment year 2006-07 after affording opportunity of being heard to the assessee. In the absence of any change of circumstances or law, we think it fit to follow the same line of reasoning and set aside to the file of the Assessing Officer to decide the issue afresh as per the above direction in the appeal for the assessment year 2006-07 and 2007-08 after affording opportunity of being heard to the assessee. Ground Nos 3.6 and 3.7 are, accordingly, allowed for statistical purposes.

Ground No 3.8 Customs duty paid under protest

3.28. With regard to the disallowance of claim for deduction under section 43B of the Act for a sum of Rs. 92,431 /- being Customs Duty paid under protest, assessee submits that the Custom duty paid under protest represented the duties paid as per the additional demand raised by the statutory authorities, i.e. the Customs Department, and though they have disputed such additional demand and paid the amount under protest, in view of the demand being in the nature of a statutory liability, the same represented accrued/ crystallized liability. According to the assessee, as per the mandate of section 43B of the Act, the aforesaid additional custom duty so actually paid under protest was claimed as deduction on payment basis which has been disallowed by the assessing officer. However, the assessing officer disallowed the aforesaid following assessment order for the assessment year 2005-06. Ld. AR invited our attention to the decision of the Mumbai Bench of the Tribunal in the case of Euro RSCG Advertising (P) Ltd v. ACIT : 154 TTJ 389 (Mum) wherein it was held that wherein the service tax liability alongwith the interest was paid on the basis of show cause notice issued by the service tax authorities, the same was allowable under section 43B in the year in which the payment was

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made irrespective of the fact that such demand was paid under protest and the matter was subjudice before the authorities. He further submitted that in similar circumstances the Hon'ble Delhi High Court in the case of CIT v. Dharampal Satyapal Sons (P.) Ltd.: 50 DTR 287, held that the amount paid by the assessee against excise duty demand raised by excise authorities was allowable deduction as it was statutory liability which was allowable on payment basis under section 43B of the Act, and also submitted that in assessee's own case for A.Y's 1999-00, 2000-01, 2001-02, 2002-03, 2005-06, 2006-07 and 2007-08, coordinate Benches of this Tribunal have held that, since the duty is paid, deduction claimed u/s 43B of the Act has to be allowed.

3.29. This aspect of disallowance of claim for deduction under section 43B of the Act for the amount of Customs Duty paid under protest has been one of the subject of matters in assessee's own case for the AY 2006-07 and 2007-08 successively, and for the AY 2006-07 vide para 5.5 of the order dated 24.8.2015, the following finding was returned by the Tribunal,

> *"5.5. Next item is Customs duty paid under protest amounting to Rs.1,34,25,787. We have discussed similar issue supra while dealing with `Excise duty paid under protest' by holding that first the Profit and loss account be recast as per `Inclusive method' in terms of section 145A and then some adjustments as stated above be separately made. Such directions are fully applicable pro tanto to the customs duty paid under protest. The AO is directed to follow the same."*

3.30. While following the same for AY 2007-08, Tribunal set aside the matter to the file of the Assessing Officer to decide it afresh as decided above by the ITAT after affording opportunity of being heard to the assessee.

3.31. Ld. DR fairly concedes that the decision of the Tribunal on the issue of 'Excise duty paid under protest', in A.Y. 2006-07 and 2007-08 was acceptable to the Revenue, and accordingly, no further appeal

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was preferred on this issue. In these circumstances, while following the same, we set aside Ground No 3.8 to the file of the Assessing Officer to decide it afresh as decided by the ITAT for the AYs 2006-07 and 2007-08 after affording opportunity of being heard to the assessee.

Grounds No. 4 to 4.2 Not allowing withdrawal of add back u/s 43B:

4. Adverting to Ground No 4 to 4.2, in the AY 2008-09 the assessee company offered an amount of Rs. 117,72,92,005/- in its return of income representing the amounts received back or adjusted in the Profit and Loss Account during FY 2007-08 out of the amounts which have already been claimed as deduction on payment basis u/s 43B of the Act in the preceding assessment years, and this amount was offered to tax by the assessee during AY 2008-09 on the presumption that deduction would be allowed in preceding years on payment basis. It is pleaded that the aforesaid total amount of Rs.117,72,92,005/- has not been allowed to the assessee on payment basis in the preceding assessment years and thus the assessee has prayed that it be allowed to withdraw the add back of the said amount and not allowing withdrawal of add back has resulted in the claim not being allowed in any year. Ld. AR brought to our notice that assessee's claim under Section 43B deduction was allowed in the earlier assessment years, as such, said amount of Rs. 117,72,92,005/- would certainly be liable to be added to the assessable income of the present year. It is submitted on behalf of the assessee that the withdrawal of write-back has been allowed by AO for AY2007-08, which has been confirmed by DRP. He submitted that identical claims have been allowed in the assessee's own case by ITAT in AY 1999-2000, 2000-01 AY 2005-06 and AY 2006-07 and by CIT(A) in AY 2001-02 and 2002-03.

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4.1. As submitted by the Ld. AR, in the order dt 24.08.2015 for the AY 2006-07, this Tribunal in assessee's own case, vide paragraph No 6.3 and 6.4 dealt with this issue in the following manner:

> *"6.3. Ground nos. 4 to 6.1 deal with a sum of Rs. 1,41,59,08,897, which has been stated to be a total of certain amounts claimed by the assessee as deductible in the preceding year u/s 43B as excise duty and customs duty and voluntarily offered for taxation in the current year's income. The ld. AR contended that since such deductions have been denied by the AO, the corresponding offering of the same to tax in the current year, be eliminated.*
>
> *6.4. We agree with the ld. AR that one amount cannot be taxed twice. It is but natural that if an amount claimed as deduction by the assessee in the earlier year has not been allowed, then on the assessee's suo motu offering of it as an item of income for the current year on the strength of deduction claimed in the earlier year, which finally stands denied, should not be charged to tax. On being called upon to furnish the detail of such amount, it was stated that it, inter alia, includes a sum of Rs.71,63,89,449, which is subject matter of ground no. 3.5, that we have discussed immediately hereinbefore. We note that apart from the sustenance of disallowance of Rs.71.63 crore in the preceding year, there is no other disallowance u/s 43B which has been upheld by the Tribunal. It is overt that all other disallowances made by the AO u/s 43B have been deleted by the tribunal. The ld. AR could not furnish any detail of the remaining amount of Rs.69.96 crore (Rs.141.59 crore minus Rs.71.63 crore), allegedly finally disallowed u/s 43B of the Act by the tribunal in the preceding year. It is simple and plain that if the tribunal has allowed deduction for the amounts disallowed by the AO in the preceding year, then the same are rightly chargeable to tax in the current year. This ground is, therefore, dismissed, subject to our decision on ground no. 3.5 in granting deduction of Rs.71,63,89,449, representing last year's unutilized Modvat credit which was claimed by the assessee as deductible u/s 43B but disallowed by the AO and also the tribunal."*

4.2. For the AY 2007-08, though the AO refused to allow the deductions claimed by the assessee under section 43B of the Act, by order dated 20-05-2016 the Tribunal considered the case of the assessee and set aside the matter to the file of AO, and the relief on this aspect is dependent upon the findings of the AO while implementing the said order, as such we deem it just and proper to direct the AO to consider this aspect also in the light of implementing

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the order of this Tribunal for the AY 2007-08. These grounds are, therefore, allowed for statistical purpose.

Ground No 5 to 5.4 addition of Rs.1.7045 Crores in respect of purported alleged excess consumption of raw material and components

5. In respect of disallowance to a tune of Rs.1,70,45,000/- on account of alleged excess consumption of raw materials and components, it is the argument of the Ld. AR that in the manufacturing process of automobiles, the assessee procures and utilizes more than 12000 items of raw material and components for manufacturing the range of automobiles, and during the previous year relevant to the assessment year 2008-09, the year under consideration, the turnover of the assessee (excluding excise duty) amounted to Rs.17,860 crores. He explained that the assessee followed the elaborate system of book keeping for receipt and issue of raw material and component as also manufacture of finished goods. The assessee followed "Just in Time" system for management and reorder of inventory, whereby the inventories are ordered just in time when the requirement for said inventory arises in respect of production shops, in that process the material so required is delivered straight to the shop floor in the relevant department and at a time there remain only a few hour inventories except for certain items, and on daily basis, a consolidated entry is passed for consumption of various materials on the basis of Bill of Material (`BOM'), which basically contains the standard quantity of material required for manufacture of a vehicle on the basis of the number of vehicles manufactured. However, in case of certain material, such as paint, consumption is recorded on actual basis as against consumption of other material being recorded on the basis of standard bills of material and at the year end, actual physical verification of the inventories is carried out by the assessee followed by preparation of stock

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reconciliation in respect of variation between physical stock and the stock as per computerized books of account. He submitted that for the purposes of financial accounting, the assessee debits to the profit and loss account figure of consumption at the year end, which is derived on the basis of Opening stock (as per physical inventory) enhanced by purchases and reduced by closing stock (as per physical inventory). In this process, for the AY 2008-09, as per stock reconciliation, it was found that the value of items as per stock register was more than physical stock variation by Rs.1.7045 crores, which merely worked out as 0.013% of total consumption of Rs.13,034 crores. He submitted that in the assessment order, the assessing officer has accepted the system of accounting being followed by the assessee, as such, since there is no dispute as regards the figure of opening stock, purchases, closing stock and also the sales, in the absence of any allegation of any suppression of sales, excess consumption, if any, without anything more cannot lead to addition to income. He further submits that the alleged wastage is only 0.013% of the consumption of Rs.13,034 crores debited to profit and loss account, which is below the norm of 1% fixed by the Government of India as a tolerance level of production losses for allowing import against advance licenses, having regard to nature and skill of the operation and that similar issue raised by the Excise Authorities in the earlier year(s) has been decided in favour of the assessee by the CESAT in financial years 2000-01, 2001-02 and 2002-03. He placed reliance on a decision of the Hon'ble Apex Court in Commnr. Of Central Excise Vs. M/s Maruti Suzuki India Ltd in Civil Appeal No 7829/2004 decided on 3.4.2015 wherein the Hon'ble Apex Court held that when the shortage of in-putes as corrected is only 0.24%, that would be immaterial and correction of the total input is in use. Besides placing reliance on the decisions reported in Setia Plastic Industries: 316 ITR 133(Del.), R.B.

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Bansilal Abhirchand Spng & Wvng Mills v. CIT: 75 ITR 260 (Bom.), Surat District Co-operative Milk Producers Union Ltd: 99 TTJ 390 (Ahd.), Geetanjali Woollens Pvt.Ltd.v. ACIT: (1991) 121 CTR (Trib) (Ahd.), and ITO vs. Himalaya Drug Company : 17 TTJ 9 (Del.) Ld. AR submitted that the issue is squarely covered in favour of appellant by ITAT orders for assessment years 1999-2000 to 2002-03, AY 2005-06, 2006-07 and 2007-08.

5.1. Per contra, it is the argument of the Ld. DR that though AO held that while the system of accounting employed by the assessee is not being challenged, at the same time, it is noted that the system has produced an error, which has also been accepted by the assessee, as such, there is no reason why revenue authorities should continue with the error and allow the assessee excess consumption. Further according to him even if the amount of variation is insignificant and arises out of a systematic problem, there is no reason for the same to be accepted, once it is noticed. He urges that one needs to understand the reasoning behind the disallowance made in the assessment. According to him, since the coordinate Bench of this Tribunal has not controverted the stand taken by the AO, it was an error to direct the AO to allow the excess consumption on the ground of its being insignificant. He further submitted that the decision of the ITAT for the immediately preceding AY is at present pending adjudication before the Hon'ble High Court.

5.2. There is no denial of the fact that the issue is squarely covered in favour of assessee by ITAT orders for assessment years 1999-2000 to 2002-03, AY 2005-06, 2006-07 and 2007-08. This issue was covered by Grounds Nos. 7 to 7.4 of the assessee's appeal for the AY 2006-07 and vide para 14.1 and 14.2 of its order a coordinate Bench of this Tribunal has held as under:

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"14.1. Ground nos. 7 to 7.4 are against the addition of Rs.4.48 crore made by the AO on account of excess consumption of raw material and components. The facts apropos these grounds are that the assessee is following 'Just-in-time ' system for management and reorder of inventory, in which inventories are ordered just in time when their requirement arises. The material so required is delivered straight to the shop floor in the relevant department. As a result of this, though the purchases are recorded as per actual bills upon the arrival of goods in the premises, the inventories are procured by considering the standard consumption of various raw materials for manufacture of vehicles. Due to this difference in the making of entry in the books of account and actual receipt of goods directly in the relevant department, which, in turn, is based on standard quantity of material required for manufacture of vehicles, sometimes there arises difference between the physical inventory taken and the inventory as per books of account at the end of the year. Some items of stock may be eventually under-consumed while others over consumed. The net effect of under/over consumption is nothing, but, the deviation from the standard consumption. During the year in question, the variation between physical stock and stock register was Rs. 4.48 crore negative, which means items where stock as per stock register was more than physical stock and Rs.2.86 crore positive i.e., items where stock as per stock register was less than the physical stock, leaving the net difference of Rs.1.62 crore. The AO disallowed Rs.4.48 crore ignoring the excess amount of Rs.2.86 crore. The assessee is aggrieved against this addition.

14.2. It is manifest that the net difference of Rs.1.62 crore is nothing, but, excess consumption over the standard consumption. Such shortage of Rs.1.62 crore is only 0.018% of total consumption of material debited to the Profit & Loss Account. In view of the fact that this amount has actually been consumed in the manufacturing of goods, it cannot call for any disallowance. There may be production efficiencies or inefficiencies leading to under or over consumption of inputs vis-a-vis standard consumption. Such under or over consumption becomes a part of the cost of production. In our considered opinion, there can be no logic in disallowing such amount, which is nothing but excess consumption of inputs. Similar view has been taken by the Tribunal in the assessee 's own case for earlier assessment years including the immediately preceding assessment year. This ground is allowed".

5.3. Following the above decision, this Tribunal for AY 2007-08, directed the Assessing Officer to delete the disallowance. Further the

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Ld. AR brought to our notice, a decision of the Hon'ble Apex Court in Commnr. Of Central Excise Vs. M/s Maruti Suzuki India Ltd in Civil Appeal No 7829/2004 decided on 3.4.2015 wherein the Hon'ble Apex Court held that when the shortage of in-putes as corrected is only 0.24%, that would be immaterial and correction of the total input is in use. It is, therefore, clear that for the successive AYs 2006-07 and 2007-08, the Assessing Officer was directed to delete the disallowance in respect of the excess consumption by a coordinate Bench of this Tribunal while placing reliance on two factors, namely, that the net difference of stock is negligible in tune with the observations of the Hon'ble Apex Court (supra), and that the Tribunal has taken similar view in the assessee's own case in the earlier assessment years including the immediately preceding year. We, therefore, respectfully following the same direct the Assessing Officer to delete the addition Rs.1,70,45,000/- on account of alleged excess consumption of raw materials and components. Grounds No 5 to 5.4 are allowed accordingly.

Ground No 6.0 to 6.4 disallowance of Rs. 7,43,27,349/- under section 14A of the Act

6. Adverting to the aspect of disallowance u/s 14A of the Act, we find from the record and contentions of the parties that, during the year under consideration, the appellant earned dividend income of Rs.166,83,50,967/-, which was claimed as exempt from tax under sections 10(34) and 10(35) of the Act, on the basis of which, the assessing officer concluded that provisions of section 14A of the Act becomes applicable to the assessee and consequently, expenditure incurred in relation to exempt income is required to be disallowed, while computing taxable income and by placing reliance upon the decision of the Special Bench of the Tribunal in the case of Daga Capital Management Pvt. Ltd: 312 ITR (AT) 01(Mum.), the assessing

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officer applied the method prescribed in Rule 8D of the Income-tax Rules, 1962 (the 'Rules') and determined the amount disallowable under section 14A of the Act at Rs.7,43,27,349/-, comprising of the following:

S.No.	Particulars	Amount in Rs. (in millions)
1	Direct expenditure	Nil
2	Interest expenditure incurred during the year (Rs.128.46millions) attributed in the ratio of average value of investments resulting in exempt income to average value of total assets	13.73
3	½ % of average value of investments	60.59
	Total	**74.32**

6.1. It is contended on behalf of the assessee that the disallowance made on this count in the final assessment order is without judicious appreciation of the facts and correct position of law, and is liable to be deleted. Ld. AR based his arguments on three reasons:

1. *the assessing officer, in the assessment order, has not pointed out even a single expenditure being incurred by the appellant during the year, having relation/ proximate nexus with exempt dividend income earned during the year;*
2. *no investments were made from borrowed funds;*
3. *while computing disallowance as per Rule 8D, entire investments have been considered, without excluding the strategic long-term business investments, not for the purpose of earning dividend but for furthering the operations/ business of the company; and investments not resulting in any exempt income during the year under consideration;*

6.2. On the first aspect, basing on the provisions of section 14A it is contended that even for assessment years 2008-09 and onwards, disallowance under section 14A, as per provisions of Rule 8D of the Rules can be made only if the assessing officer, having regard to the

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accounts of the assessee, reaches a finding that assessee has incurred actual expenses, which have proximate nexus with earning of exempt income. Ld. AR submitted that the onus is on the assessing officer to find proximate nexus of expenses with earning of exempt income, before rejecting the claim of assessee and computing disallowance under section 14A of the Act, and the provisions of sub-section (2) and (3) to section 14A, which empowers the assessing officer to compute disallowance as per provisions of Rule 8D of the Rules, w.e.f. assessment year 2008-09, also provides that disallowance as per provisions of Rule 8D can be computed, only if the assessing officer, having regard to the accounts of assessee is not satisfied with the claim of assessee that no expenditure in relation to exempt income has been incurred by assessee. In other words, even from assessment year 2008-09 and onwards, the assessing officer can compute disallowance under section 14A as per the provisions of Rule 8D, only if assessing officer, having regard to accounts of assessee, reaches a finding, that assessee has incurred expenses, having proximate nexus with earning of exempt dividend income. According to the Ld. AR in the absence of such finding, as is held in CIT vs. Walfort Share & Stock Brokers: 326 ITR 1 (SC), Godrej & Boyce Mfg. Co. Ltd. v. DCIT : 394 ITR 449 (SC) – affirming Godrej & Boyce Mfg. Co. Ltd. v. CIT: 328 ITR 81 (Bom.), Maxopp Investment Ltd. vs. CIT: 347 ITR 272 (Del.), and Punjab & Haryana High Court in the case of CIT vs. Hero Cycles: 323 ITR 518, assessing officer does not have power to compute disallowance under section 14A as per provisions of Rule 8D, even for assessment years 2008-09 and onwards. He submitted that similar view is taken in CIT v. Metalman Auto P. Ltd.: 336 ITR 434 (P&H) , CIT v. Reliance Utilities and Power Ltd.: 313 ITR 340 (Bom) , CIT v. Torrent Power Ltd.: 363 ITR 474 (Guj).

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6.3. Reference can also be made to the decisions in Chemical & Mettallurgical Design Co. Ltd : ITA No. 803/2008 (Delhi), CIT Vs Ms. Sushma Kapoor : 319 ITR 299 (Delhi), ACIT v. Eicher Limited: 101 TTJ 369 (Del.) , Maruti Udyog Limited V. DCIT: 92 ITD 119 (Del.), on the aspect of section 14A of the Act, wherein it has been held that without any cogent basis and material on record, no artificial/ ad-hoc disallowance is permissible for expenses incurred by the assessee, and the legal position that emerges from the these decisions is that: (a) there must be some actual expenditure incurred; and (b) such expenditure must be incurred "in relation to" the earning of exempt income, which means that there must be some nexus between the actual expenditure and the exempt income. In this regard he placed reliance on SIL Investment Ltd. vs ACIT: 148 TTJ 213 (Del.) , M/s Multi Commodity Exchange of (India) Ltd. Vs. DCIT: ITA No.1050/Mum/2010 (Mum.), M/s. Auchtel Products Ltd. vs ACIT: I.T.A. No. 3183 /Mum/2011 (Mum.)**,** Om Era Engineering (P) Ltd. vs ITO: ITA No. 3913/D/2010 (Del.), Minda Investments Ltd. v. DCIT: 138 TTJ 240 (Del.), Punjab National Bank V. DCIT: 103 TTJ 908 (Del.), Vidyut Investment Ltd: [2006] 10 SOT 284 (Del.) , Impulse (India) Pvt. Ltd.: (2008) 22 SOT 368 (Del.) , D.J. Mehta v. ITO: 290 ITR 238 (Mum.)(AT), Jindal Photo Ltd vs. DCIT: ITA No. 814 (Del) 2011, Dishman Pharmaceuticals & Chemicals Ltd. v. Dy. CIT: 45 SOT 37 (Ahd.), Minda Investments Ltd. Vs. Dy. CIT: 138 TTJ 240 (Del), Bunge Agribusiness (India) (P.) Ltd. v. Dy. CIT: 132 ITD 549 (Mum.) also.

6.4. In the present case of the assessee, the assessing officer has simply applied the procedure prescribed in Rule 8D of the Rules to compute the amount disallowable under section 14A of the Act without appreciating that in the present case, no part of interest and/or administrative expenditure was incurred in relation to exempt income.

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6.5. Further the assessing officer, in the assessment order, has not pointed out even a single expenditure being incurred by the appellant during the year, having relation/ proximate nexus with exempt dividend income earned during the year. The assessing officer, it is submitted, invoked the provisions of section 14A read with Rule 8D of the Rules in a mechanical manner, which, it is respectfully submitted is beyond jurisdiction.

6.6. For the principle that disallowance under section 14A of the Act cannot be sustain without any satisfaction being recorded by the assessing officer before applying Rule 8D of the Rules, reliance is placed on the decisions reported in Pr.CIT vs. U.K. Paints (India) (P.) Ltd.: 244 Taxman 309 (Del.), Joint Investments P. Ltd. v. CIT: 275 CTR 471 (Del.), Minda Investments Ltd. vs. DCIT: 138 TTJ 240 (Del.) , ACIT vs. MMTC Limited: ITA No. 724/Del/2014 (Del. Trib.), REI Agro Ltd vs. DCIT: 144 ITD 141 (Revenue appeal dismissed by Calcutta High Court in appeal No. GA No.3581 of 2013)., CIT v. Abhishek Industries Ltd - 231 Taxman 85 (P&H),

6.7. Second contention raised on behalf of the assessee is that the assessee is an operating company engaged in manufacture of automobiles and the entire expenditure incurred was in relation to the manufacturing operations of the assessee and the assessing officer has failed to bring on record any evidence/ material to demonstrate that any part of such expenditure was relatable to the exempt income. It is submitted on behalf of the assessee that the entire expenditure incurred by the assessee was actually related to the manufacturing operations, all the borrowed funds available with the appellant were utilized for business operations and not used for making the investments and that the interest free own funds available with the appellant far exceeds the investment made in shares/securities on

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which exempt dividend income was received. During the year interest paid by the appellant was on account of the following:

Particulars	Amount (Rs. millions)
Interest on-	
(a) advances from dealers	67
(b) Others including interest on cash credit/overdraft	61
Total :	**128**

6.8. Whereas as is evident from the balance sheet the following interest free funds were available at disposal of the assessee:

(a) Share Capital	Rs. 144 crores
(b) Reserves and Surplus	Rs. 8,271 crores
	Rs. 8,415 crores

6.9. Ld. AR submitted that in case of mixed pool of funds, the correct method to establish source of investment would be to consider the macro fund/ cash flow position during the year and basing on the decisions in East India Pharmaceutical Works Ltd. v. CIT: 224 ITR 627 (SC), Indian Explosives Ltd. V. CIT: 147 ITR 392 (Cal.), Woolcombers of India Ltd. v. CIT: 134 ITR 219 (Cal.) - approved by Supreme Court in the case of East India Pharmaceutical Works Ltd. v. CIT: 224 ITR 627, Alkali & Chemical Corp. of India v. CIT: (1986) 161 ITR 820 (Cal.), CIT v. Reliance Utilities and Power Ltd.: 313 ITR 340 (Bom.), CIT vs. M/s. Ashok Commercial Enterprises: ITA No. No.2985 of 2009 (Bom), Gujarat State Fertilizers and Chemicals Ltd : 358 ITR 323 (Guj), Hero Honda Finlease Ltd vs. ACIT: ITA No. 3726 & 6102/Del/2012 (Del) he submitted that if the assessee had sufficient surplus funds available, presumption should be drawn in favour of the assessee that surplus funds have been utilized for making investments. He submitted that the Gujarat High Court in the case of CIT v. UTI Bank Ltd: 215 Taxman 8 (Mag.) held that where there are

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sufficient interest free funds to meet tax free investments, they are presumed to be made from interest free funds and not loaned funds and no disallowance can be made under section 14A of the Act, and the Hon'ble Apex Court has dismissed the revenue's SLP in Civil Appeal No. 468/2014 against the aforesaid decision.

6.10. He contended that in the case of mixed funds, the option is with the assessee to appropriate fund and expenditure in a manner most favorable to the assessee, and by placing reliance on Godrej & Boyce Mfg. Co. Ltd. v. DCIT : 394 ITR 449 (SC), HDFC Bank Ltd v. DCIT: 366 ITR 505 (Bom), HDFC Bank Ltd v. DCIT: 383 ITR 529 (Bom), CIT v. K. Raheja Corporation Pvt. Ltd: ITA No.1260 of 2009 (Bom.), Bright enterprises Pvt Ltd. v. CIT: 381 ITR 107 (P&H), CIT v. Max India Ltd: 388 ITR 81 (P&H), Gurdas Garg v. CIT: ITA No.413 of 2014 (P&H), CIT v. Microlabs Ltd. : 383 ITR 490 (Kar.), Lubi Submersibles Ltd.: ITA No.868 of 2010 (Guj.), CIT v. Gujarat Power Corporation Ltd.: 352 ITR 583 (Guj), Gujarat State Fertilizers and Chemicals Ltd: Tax Appeal No. 82 of 2013 (Guj HC), CIT v. Torrent Power Ltd.: 363 ITR 474 (Guj), CIT vs. Suzlon Energy Ltd.: 215 Taxman 272 (Guj), M/s Gogrej Agrovet Ltd. v. ACIT: ITA No. 1629/Mum/09 (Mum.), Dy.CIT v. Eimco Elecon (India) Ltd.: 142 ITD 52 (Ahd), Dy.CIT v. Jammu & Kashmir Bank Ltd.: 142 ITD 553(Asr.), T and T Motors Ltd. v. Addl. CIT : 154 ITD 306 (Delhi), Hero Honda Finlease Ltd vs. ACIT: ITA No. 3726/Del/2012 (Del), ACIT vs. Champion Commercial Co Ltd: 152 TTJ 241 (Kol), TML Drive Lines Ltd vs. ACIT : ITA No. 6064/Mum/2010 (Mum), Kulgam Holdings Pvt. Ltd. vs. ACIT : ITA No. 1259/Ahd/2006 (Ahd), he submitted that that interest expenditure cannot be disallowed under section 14A of the Act, where the assessee had sufficient surplus funds and there was no finding by the assessing officer of any direct nexus of borrowed funds with investments:

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6.11. Lastly it is contended on behalf of the assessee that the disallowance computed under section 14A of the Act is incorrect since while computing disallowance as per Rule 8D, entire investments have been considered, without excluding the following:

(a) strategic long-term business investments, not for the purpose of earning dividend but for furthering the operations/ business of the company; and
(b) investments not resulting in any exempt income during the year under consideration.

6.12. Reliance is placed on the decisions in CIT v. Oriental Structural Engineers Pvt. Ltd.: 216 Taxman 92 (Del.) , Cheminvest Ltd v. CIT : 379 ITR 33 (Del HC), Eicher Goodearth Ltd. v. CIT: 378 ITR 28 (Del.), VA Tech Escher Wyss Flovel (P) Ltd. v. ACIT: [2014] 147 ITD 678 (Del Trib.) , CIT v. Knorr Bremse India(P) Ltd.: ITA No 1676/2002 (Del Trib.), Interglobe Enterprises v. DCIT: ITA No. 1362 & 1032/D/2013 (Del Trib.), Garware Wall Ropes v. ACIT: ITA No. 5408/2012 (Mum.), ACIT vs. M/s Spray Engineering Devices Ltd: ITA No. 646/Chd/2009 (Chd.), J.M. Financial Ltd. v. ACIT: ITA No. 4521/ Mum/2012 (Mum. Trib.), Piem Hotels Limited v. DCIT: I.T.A No. 240/Mum/2012 (Mum Trib.), DCIT v. Morgan Stanley India Securities Pvt. Ltd: ITA No.114/Mum/2013 (Mum.Trib.), in support of the contention that while computing average investments, strategic long-term business investments not for earning dividend but for promoting manufacturing operations ought to have been excluded. In view of the above, without prejudice to their contention that no disallowance is warranted under section 14A of the Act, Ld. AR prayed that, the assessing officer may be directed to re-compute disallowance under that section after reducing the strategic long-term trade investments.

6.13. For the principle that disallowance under section 14A of the Act is only to be made only if there is exempt income and not otherwise, support is derived from the decisions in ACB India Ltd. v. ACIT: 374

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ITR 108 (Del.), Cheminvest Ltd. v. CIT : 379 ITR 33 (Del.), CIT v. Holcim India (P) Ltd.: 272 CTR 282 (Del.), ACIT v. Vireet Investments (P.) Ltd: 165 ITD 27 (Del SB), CIT v. Corrtech Energy Pvt. Ltd.: 372 ITR 97 (Guj.), CIT v. Winsome Textile Industries Ltd.: 319 ITR 204 (P&H), CIT v. M/s Lakhani Marketing: 272 CTR 265 (P&H) , CIT v. M/s. Shivam Motors (P) Ltd.: 272 CTR 277 (All), Interglobe Enterprises v. DCIT: ITA No.1362 & 1032/Del./2013 (Del. Trib.) – affirmed by Delhi High Court in ITA No.456 of 2016, REI Agro Ltd vs. DCIT: 144 ITD 141 (Kol. Trib.) – Department appeal dismissed in CIT v. REI Agro Ltd. : I.T.A.T No.220 of 2013 (Cal. HC), DCIT v. Morgan Stanley India Securities Pvt. Ltd. : ITA No. 114/Mum/2013 (Mum.), ACIT v. M. Baskaran: 152 ITD 844 (Chn. Trib.), and it is submitted that the assessing officer erred in considering the entire investments while computing disallowance u/s 14A read with rule 8D. The disallowance u/s 14A read with rule 8D is to be in relation to the income which does not form part of the total income and this can be done only by taking into consideration the investment which has given rise to this income which does not form part of the total income.

6.14. Basing on the contentions and submissions made for the AY 2006-07 and 2006-07, Ld. DR argued on the aspects whether earning of exempt income is necessary for disallowance u/s 14A, relationship of expenditure with exempt income, dominant object or purpose test, what does it mean by expenditure incurred etc by placing extensive reliance on the decisions in Maxopp Investments, Walfort share and Stock Brokers P Ltd., DBDT Circular No 5/2014 etc.

6.15. In this matter, assessee earned dividend income of Rs.166,83,50,967/-, which was claimed as exempt from tax under sections 10(34) and 10(35) of the Act. However, according to the assessee, they did not incur any expenditure in earning this. Making investment, maintaining or continuing with any investment in a

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particular share/mutual fund etc. and the time when to exit from one investment to another are all the activities requiring well coordinated and well informed management decisions, involving not only inputs from various sources but it also involves acumen of senior management functionaries. There are incidental administrative expenses on collecting the information, research, etc. which helps in arriving at particular investment decisions and these expenses, relating to earning of income are embedded in the indirect expenses without which it would not be possible to carry out this herculean task. It, therefore, cannot be said that no expenditure at all incurred to earn Rs.166,83,50,967/-, when huge amounts to a tune of Rs. 8,415 crores was available with the assessee. By looking into these factors, Ld. AO proceeded to hold that Rule 14A is applicable. In these circumstances, we are of the considered opinion that the AO is justified in taking the view that the plea of the assessee that no expenditure was incurred for earning the exempt income cannot be accepted, and to proceed with the application of the formula prescribed under Rule 8D of the Rules, which is in force from the AY 2008-09.

6.16. Adverting to the arguments of the Ld. AR on the aspects of interest expenses relevant under Rule 8(ii) of the Rules and the reckoning of the investment amount relevant for 8D(iii), on a consideration of the same in the light of the principles of law laid down by the Court, as stated supra, we agree with the submissions made on behalf of the assessee that insofar as the interest expense under Rule 8D(ii) is concerned, it has to be determined after examination of the macro fund/ cash flow position during the year and if the assessee had sufficient surplus funds available, presumption should be drawn in favour of the assessee that surplus funds have been utilized for making investments, and while

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calculating the disallowance under Rule 8D(iii) has to be calculated in relation to the income which does not form part of the total income and this can be done only by taking into consideration the investment which has given rise to this income which does not form part of the total income after reducing the strategic long-term trade investments. We, therefore, deem it just and proper to set aside the impugned order on this score and send the matter to the file of AO for making disallowance u/s 14A, in accordance with the view taken above.

Ground No 7.0 to 7.3 disallowance of deduction under section 35DDA

7. Now turning to the disallowance of Rs.23,91,54,836/- deduction claimed by the assessee u/s 35DDA of the Act, the assessee company had, during the assessment year 2008-09 claimed deduction of Rs.23,91,54,836/- u/s 35DDA of the Act, being 1/5th of the payment of Rs.119.58 crores made by the assessee company during AY 2004-05 to its employees under VRS scheme, and the AO has held that payments under VRS made in earlier years, is violative of Section 35DDA of the Act and as such all claims made as a consequence of the original claim are also violative of that section. Ld. AR submitted that this issue of claim u/s 35DDA is covered in favour of assessee by the order of the ITAT for AY 2002-03, AY 2004-05, AY 2005-06, AY 2006-07 and AY 2007-08. Further, reliance is placed on CIT vs. Sony India (P) Ltd : 210 Taxman 149 (Del) and State Bank of Mysore vs. CIT, 139 ITD 526 (Bang) where it has been held that compliance with the conditions of rule 2BA is mandatory only to avail the exemption under section 10(10C) by employees and not for the purposes of deduction under section 35DDA.

7.1. Per contra, it is the argument of the Ld. DR that this issue was also adjudicated upon by the coordinate Bench of this Tribunal in favour of the assessee based on the findings in the decision in the

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assessee's own case for AY 2004-05, 2006-07 and AY 2007- O8 and the Department is in appeal against such orders.

7.2. In State Bank of Mysore vs. CIT, 139 ITD 526 (Bang) it was held as follows:

> *"It is clear from the proviso to s. 10(10C) that in order to claim an exemption under this section in respect of any payments received/receivable by an employee under any voluntary retirement scheme/schemes, such scheme/schemes must comply with the guidelines prescribed in this regard i.e. guidelines prescribed under Rule 2BA. In other words, the employee is entitled to exemption u/s. 10(10C) of the Act only if the voluntary retirement scheme fully complies with the conditions as prescribed in Rule 2BA. There are no such provisions in s. 35DDA of the Act similar to proviso to s. 10(10C), so as to include the conditionalities of Rule 2BA into s. 35DDA of the Act. A plain reading of provisions of s. 35DDA of the Act, it is clear that compliance with the conditions of Rule 2BA is mandatory only to avail exemption u/s. 10(10C) of the Act by the employees and thus the said rule is not relevant to deduction u/s. 35DDA of the Act. In the Finance Bill, 2001, the deduction u/s. 35DDA was linked to the provisions of Rule 2BA. In other words compliance with Rule 2BA would be mandatory in order to avail deduction u/s. 35DDA. However, when the bill was finally enacted, the link between s. 35DDA and Rule 2BA was deleted. Accordingly, the deletion of conditionalities originally incorporated in the Bill shows that legislative intendment was not to incorporate all the conditions of s. 10(10C) in s. 35DDA. Thus, the legislature has finally left the scheme of voluntary retirement open-ended and did not place any restriction on the scheme…"*

7.3. Further, on this issue, a coordinate Bench of this Tribunal while dealing with the same issue for the AY 2006-07 noticed that an identical issue has been decided by the ITAT in the earlier assessment years in the case of assessee itself and lastly in the appeal for the assessment year 2006-07 (supra), held that -

> *"…After making a thorough discussion on the issue, the Tribunal has held that Rule 2BA is relevant only for the purpose of availing exemption u/s 10 by employees and not for the purpose of allowing deduction to the employer u/s 35DDA of the Act. Resultantly, the disallowance made by the AO came to be knocked down by the tribunal. In the absence of any distinguishing factor having been pointed out by the ld. DR, respectfully following the precedent, we*

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direct to allow deduction u/s 35DDA for a sum of Rs.38.63 crore."

7.4. Following the same for the AY 2007-08 also, this Tribunal directed the Assessing Officer to allow the claimed deduction under sec. 35DDA of the Act at Rs.23,91,54,586. Since facts are similar in assessee's own case, we follow the decisions above and direct the Assessing Officer to allow the deduction under section 35DDA of Rs.23,91,54,836/- (being 1 /5th of the total expenditure of Rs. 119.58 crores incurred by the appellant company, in respect of payment made to its employees under the voluntary retirement scheme during the F.Y. 2003- 04). Ground Nos 7 to 7.3 are allowed accordingly.

Ground No 8 disallowance of expenditure incurred on club membership

8. On the aspect of disallowance of Rs. 10,06,470/- expenditure incurred on club membership, case of the assessee is that the assessee company has debited Rs. 10,06,470/- to profit & loss account, the expenditure was incurred on subscription to clubs provided to various employees and directors on account of club membership fees and the assessing officer has, in the impugned assessment order disallowed the said expenditure of Rs.10,06,470/- by holding that the same cannot be considered as business expenditure. Ld. AR argued that this expenditure has been incurred for business purposes on the grounds of commercial expediency and there is no element of any personal benefit being granted either to the employee or director and the Tax Auditors have amply clarified this position vide clause 17(b) of the Tax Audit Report. Basing on the decision of the Supreme Court in the case of Samtel Color Ltd (Civil appeal No 6449/2012) by way of which the Hon'ble Apex Court dismissed the SLP filed by Revenue against the order of Delhi High Court in CIT v. Samtel Color Ltd.: 326 ITR 425 (Del.) allowing the

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claim for deduction representing expenditure incurred on club membership, he argued that this expenditure is allowable as deduction. He submitted that besides being covered by the decisions in Nestle India Limited:296 ITR 682 (Del.), CIT v. Samtel Color Ltd.: 326 ITR 425 (Del.), Otis Elevators Co. (India) Ltd v. CIT 195 ITR 682 (Bom);, American Express International Banking Corporation v CIT 258 ITR 601 (Bom);, CIT v. Citibank N.A.: 264 ITR 18 (Bom), CIT v. Force Motors Ltd.: ITA No. 5296 of 2010 (Bom), CIT v. Sundharam Industries Ltd 240 ITR 335 (Mad);, Gujarat State Export Corporation Ltd. v. CIT: 209 ITR 649 (Guj.), CIT v. Infosys Technologies Ltd.: 205 Taxman 59 (Kar), Assam Brook Ltd. v CIT: 267 ITR 121 (Cal), DCIT v. Max India Ltd (2007) 112 TTJ (Asr.) 726, this issue is also covered in favour of the assessee by the decisions of the Tribunal in the assessee's own case for the assessment years 2001-02, 2002-03, 2004-05, 2005-06, 2006-07 and 2007-08.

8.1. On this aspect, Ld. DR submitted that in view of the decision of Hon'ble Supreme Court cited above, the decision of the ITAT was accepted and further appeal before the Hon'ble High Court u/s. 260A was not preferred on this issue for AY 2006-07 and 2007-08. In view of this submission of Ld. DR this ground is allowed and the Assessing Officer is directed to allow a sum of Rs. 10,06,470/- being expenditure incurred on account of club membership fees.

Ground No 9 to 9.3 disallowance of expenditure of Rs. 192.77 Cr out of the total amount of Rs.495.15 Cr incurred on account of royalty.

9. Insofar as the disallowance of Rs.192.77 Crores royalty paid to Suzuki Motor Corporation, Japan ('SMC'), is concerned, according to the assessee, during the year under consideration, the assessee paid royalty of Rs.495,15,40,443/- to Suzuki Motor Corporation, Japan ('SMC') for use of licensed information for the engineering, design and

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development, manufacture, testing, quality control, sale and after sales service of products and parts, but the assessing officer, in the impugned assessment order, has held that inasmuch as the life cycle of a car is only 5 years whereas the licence agreement is for 10 years, extendable by 5 years and even thereafter the assessee can produce the said model of car, and the licence agreement led to the assessee setting up a new factory based on new technology, and for these reasons the assessee had enduring benefit as such royalty paid by the assessee was capital in nature, and consequently, held that the entire royalty is disallowable. On this premise, basing on the adjustment of Rs.237.24 crores, made by TPO the assessing officer has computed the disallowance out of royalty payments to a tune of Rs. 192.77 Cr.

9.1. It is the argument of the Ld. AR that the assessing officer failed to appreciate the fact that the nature and purpose for which the royalty has been paid to SMC is only the use of licensed information for the engineering, design and development, manufacture, testing, quality control, sale and after sales service of Products and Parts, and as per clause 7.01 of the agreement the duration of the agreement has been specified as 10 years and vide clause 7.04 of the agreement it was subject to termination at earlier date for breach. He submitted that as evidenced by clause 2.02 of the agreement SMC does not transfer to MSIL any specific patents or copyrights or other secret or protected information or knowhow so as to make MSIL a proprietor of the same or so as to enable MSIL to exercise proprietary rights such as unrestricted rights of transfer to third party, either by way or assignment or license.

9.2. According to him in order to determine the nature of the royalty payment, whether capital or revenue, what is material is the underlying purpose for which payment is made and not the tenure or

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its extendibility or the life cycle of the product that is manufactured with the help of the technology that is accessed from SMC. If the payment is for use of technical knowhow, simplicitor, then the payment has to be regarded as revenue, irrespective of the tenure for which permission is granted for such use. Since in the present case, under the License Agreement, the assessee was merely granted permission to access the technical knowhow for the limited purpose of using the technology relating to the new models during the currency of the agreement and the proprietary rights for the know-how and the intellectual property rights in relation thereto continue to be owned by SMC alone, the payment is undoubtedly revenue in nature.

9.3. While placing reliance on Circular No. 21 of 1969 issued by CBDT, he argued that if in terms of the Agreement, only a license is obtained for user of technical knowledge from a foreign participant for a limited period together with or without the right to use the patents and trademarks of the foreign party, the payment would not bring into existence an asset of enduring advantage to the Indian party. He further submitted that while following the aforesaid Circular, the jurisdictional Delhi High Court in case of CIT v Lumax Industries Limited: 173 Taxman 390 held that similar royalty payment was allowable as revenue deduction.

9.4. He submitted that in a host of decisions, namely, CIT v. Ciba India Ltd: 69 ITR 692 (SC) , Alembic Chemical Works Co. Ltd. v. CIT: 177 ITR 377 (SC), CIT v. Shriram Pistons and Rings Limited -CC 12154/2009 (SC) (dismissing the SLP filed by the revenue against the order of the Delhi High Court in ITA No. 167/2008), Shriram Refrigeration Industries Ltd. v. CIT: 127 ITR 746(Del), Triveni Engineering Works Ltd. v. CIT 136: ITR 340 (Del), CIT v. Sharda Motor Industrial Limited: 319 ITR 109 (Del), Climate Systems India Limited

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v. CIT: 319 ITR 113 (Del), Shriram Pistons and Rings Limited v. CIT: 307 ITR 363 (Del), CIT v Lumax Industries Limited 173 Taxman 390 (Del), CIT v. J.K. Synthetics Ltd. 309 ITR 371 (Del), CIT v. Munjal Showa Ltd. : 329 ITR 449 (Del), CIT v. Hero Honda Motors Ltd.: 372 ITR 481 (Del.), CIT v. Denso India P. Ltd.: 232 Taxman 437 (Del.) , CITv. Modi Revlon (P) Ltd : 210 Taxman 161(MAG.) (Del.), CIT v. Prem Heavy Engineering Works P. Limited: 282 ITR 11 (All.), CIT v. Artos Breweries Ltd : [2013] 215 Taxman 80 (AP), CIT v. Essel Propack 325 ITR 185 (Bom), CIT v. Eicher Motors Ltd : 293 ITR 464 (M.P.), ITO v. Shivani Locks : 118 TTJ 467 (Del ITAT), Goodyear India Ltd. v. ITO : 73 ITD 189 (Del ITAT), Hero MotoCorp Limited v. ACIT : ITA Nos. 5130/Del/2010 for assessment year 2006-07 (Del. ITAT), Fenner (India) Ltd v. ACIT : [2012] 139 ITD 406 (Chennai), Glaxo SmithKline Consumer Healthcare Limited : ITA No. 1324/Chd/2012 (Chd), GlaxoSmithKline Consumer Healthcare Ltd. v DCIT : 175 TTJ 552 (Chd. Trib.), the issue of allowability of royalty payments as revenue expenditure is covered in favour of the assessee company.

9.5. He further relied upon the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. J.K Synthetics: 309 ITR 371@ pg 391, wherein while culling out legal principles based on various decisions it was held that the fact that assessee could use the technical knowledge obtained during the tenure of the License for the purposes of its business after the agreement has expired, and in that sense, resulting in an enduring advantage, has been categorically rejected by the Courts, and that this, by itself, cannot be decisive because knowledge by itself may last for a long period even though due to rapid change of technology and huge strides made in the field of science, the knowledge may with passage of time become obsolete. Ld. AR disputed the factual correctness of the observation of the assessing officer that the license Agreement led to the assessee setting up a new

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factory based on new technology, and submitted that no new plant/ factory was setup by the assessee on the basis of the agreement entered into for use of technical knowledge/ information. According to him the assessing officer failed to appreciate that the assessee is engaged in the business of manufacture of automobiles and various models of the cars introduced by the assessee from time to time are nothing but part of the same business of the assessee, as such the mere fact that new models/ variants of car are introduced by the assessee based on the license agreement does not mean that an altogether new product was manufactured. He made a reference to the decisions of the Delhi High Court in case of CIT v. Hero Honda Motors Ltd.: 372 ITR 481 and decision of the Delhi Bench of the Tribunal in the case of Hero Honda Motors Limited v. DCIT: ITA no. 5130/Del/2010 for A.Y. 2006-07, and also to the decision of the Delhi Bench of the Tribunal in the case of Hero Honda Motors Limited v. DCIT in ITA Nos. 716 to 718/Del/2008 for the assessment years 2000-01 to 2002-03 wherein, a coordinate Bench of this Tribunal, after analyzing all the decisions, held royalty to be in the nature of revenue expenditure even though royalty was paid for exclusive use of technical knowhow/ information, the agreement was for 10 years and extendable, the assessee was permitted to continue to manufacture motorcycles even after termination of the agreement. Lastly he submitted that the aforesaid issue has now been decided in favour of the assessee by the Delhi Bench of the Tribunal in assessee's own case for the AY2006-07 and AY 2007-08holding that amount of royalty considered by AO as capital expenditure should be allowed as revenue expenditure. For these reasons he prayed that the assessing officer may be directed to allow the entire royalty payment as allowable revenue deduction.

9.6. Per contra, Ld. DR vehemently defended the observations of the

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AO, while submitting that in the scenario of a New Model coming every 2nd or 3rd year and the old Models getting phased out, License Agreement is for 10 years, extendable by 5 years and even thereafter MSIL can produce the said model of Car, is more than enduring. Further, there has been technology transfer for manufacturing the product, and the personnel of the company have been technically trained. The transfer of technology is as per the License Agreement but the Skill which has been acquired year after year due to training of the companies personnel has been absorbed in the company and can be used across the other Products. This is again an enduring benefit. Referring to the cases cited by the Ld. AR, it is the argument of the Ld. DR that in all the cases where the Courts have held that the Royalty payment is Revenue and not capital are the ones where the License Agreement was only to approach or access the technology without imparting any trade secrets and above all the time period was much short, say 5 years or less coupled with the fact that , the product was different and the right given was not exclusive. He submitted that the Tribunal's order in assessee's own case for AY 2007-08 cannot be relied upon because on this aspect the Tribunal was swayed by the assessee contention that TPO has disallowed the royalty, but as a matter of fact, TPO had determined the value of the ALP of the co-branding done by Suzuki. The value of the same is determined by equating the trade mark royalty Maruti was paying to Suzuki for its brand. The logic is simple if Maruti was paying licensed trade name royalty to Suzuki then Suzuki should also be paying back the trade name royalty to Maruti. Whereas it is a fact that royalty being paid is a composite royalty including the usage of Trademark and technical information. It is Suzuki who has been charging this royalty even if its name was used only on the rear of the vehicle. But now after taking over the management of the company, it has

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repositioned its name and brand and logo on these vehicles. The question is whether any independent party that had assiduously over the years have built up a name and reputation would have allowed so? And that too absolutely free when the other party had been throughout charging it for whatever it was providing it be it machinery, technology, spare parts, technical assistance, corporate guarantee, trade name, trade mark. That does not seem to be a situation in normal and independent circumstances and this was not appreciated by the Tribunal, as a consequence of which the Revenue preferr3d an appeal on this issue also. According to him, the Tribunal had merely relied on its order for earlier years which in turn relied merely on decision of Hon'ble Delhi High Court in *Hero Honda Motors Ltd. (2015) 372 ITR 481 (Del)* and not discussed the facts that are recorded in the assessment order. It is submitted that on the basis of the facts mentioned in the assessment order, the *ratio decidendi* of the Delhi High Court decision in Hero Honda Motors Ltd. *(supra)* would not be applicable in the instant case. Lastly, *it is argued by the Ld. DR that these are continuous issues forming part of the assessment order for AY 2005-06, 2006-07 and 2007-08 also, and are at present pending adjudication before Hon'ble Delhi High Court.*

9.7. On this issue, a coordinate Bench of This tribunal in assessee's own case for AY 2007-08, vide para 20.5 and 20.6 on page 91-93 of order, referred to order for AY 2006-07 and held as under:

> *"8.5. The ld. DR has relied on certain decisions, which categorize payment for use of technical know-how etc. as a capital expenditure. Similarly, the ld. AR has also relied on certain decision which mark such payment as a revenue expense. In all these decisions, the dividing line is whether the consideration is for purchase of technical information, know-how information, designs and drawings, etc., or for its use. If it is for use alone, then it is revenue and vice versa. Recently, the Hon'ble jurisdictional High Court in CIT vs. Hero Honda Motors Ltd. (2015) 372 ITR 481 (Del), on consideration of the relevant clauses of the agreement before it, which considerably match with the Agreement*

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under consideration, has held that the payments made for Model fee (which is equivalent of Lumpsum royalty in our case) and Running royalty are revenue expenses. In this judgment, the Hon'ble jurisdictional High Court has considered several judgments of the Hon'ble Supreme Court and Hon'ble High Courts and on consideration of their cumulative effect, it has come to the conclusion that both the amounts are revenue in nature. The Hon'ble Delhi High Court in an earlier judgment in Shriram Refrigeration Industries Ltd. vs. CIT (1981) 127 ITR 746 (Del), has held that the lumpsum royalty is a revenue expenditure. After going through the relevant clauses of the Agreement, we have noted that royalty paid by the assessee is for use of licensed information and no part of the same is towards its acquisition as an owner. In the light of the above discussion, it is absolutely clear that the view canvassed by the AO in treating this amount as capital expenditure, is not sustainable.

8.6. Our above finding decides the nature of royalty payment for use of licensed information as revenue expenditure and not its quantum part. We have noticed above that the tribunal in its order for the immediately preceding year has also given some observations, which prima facie indicate that the entire amount of royalty is for the use of licensed information. Since we have held the royalty for use of licensed information as revenue expenditure, the quantification aspect becomes irrelevant. It is so because the TPO has held royalty for use of licensed information at ALP. We, therefore, hold that the amount of royalty considered by the AO as capital expenditure should be allowed as a revenue expenditure. At the same time, depreciation allowed by the AO on this amount should be taken back."

9.8. Following the above decision for AY 2006-07, which is on an identical issue in the case of assessee itself, this Tribunal for the AY 2007-08 hold that the amount of royalty considered by the Assessing Officer as capital expenditure should be allowed as a revenue expenditure, and at the same time, depreciation allowed by the Assessing Officer on this amount should be taken back. This tribunal specifically held that the terms of the agreement considered by the Hon'ble Jurisdictional High Court in CIT vs. Hero Honda Motors Ltd. (2015) 372 ITR 481 (Del), are considerably matching with the Agreement under consideration. On the face of this observation, without the same being disturbed by the higher forums, we find it difficult to countenance the argument of the Ld. DR that the *ratio*

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decidendi of the Delhi High Court decision in Hero Honda Motors Ltd. *(supra)* would not be applicable in the facts of the instant case. We, therefore, respectfully following the same hold that the amount of royalty considered by the Assessing Officer as capital expenditure should be allowed as a revenue expenditure, and at the same time, depreciation allowed by the Assessing Officer on this amount should be taken back. Grounds No 9 to 9.3 are, accordingly, allowed.

Ground No 10 to 10.2 disallowance of Rs.16,93,68,741/- on account of R&D Cess on Royalty

10. Case of assessee in respect of Disallowance of R&D Cess paid, is that as per provisions of Research and Development Cess Act, 1986, R&D cess is imposed on import of technology by the Government of India, which is definitely not a related party of the appellant company, and the assessee has been instructed by the Government of India's approval for remittance of royalty to pay R&D cess on the payment of royalty. R&D cess, being a statutory payment, is governed by section 43B, which is a separate code in itself and overrides the other provisions of the Act. Further according to the assessee, this issue is dependent and interlinked to the issue of royalty expenditure, and if it is held that royalty payments by assessee are revenue expenditure, then the R&D cess should also be considered as a revenue expenditure. Ld. DR submitted that the issue of R&D Cess paid by the assessee is decided in favour of the assessee by the Delhi Bench of the Tribunal in assessee's own case for the AY 2006-07 and AY 2007-08.

10.1. This issue is based on Ground No. 9 above, i.e. capitalisation of Royalty expenditure. The ITAT has also decided this issue in favour of the assessee on the basis of its decision on Ground No. 9. Since the decision of the ITAT in Ground No. 9 is not acceptable, therefore, its decision

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on this issue is also not acceptable. It is further averred that these are continuous issues forming part of the assessment order for AY 2006-07 and 2007-08 also, and are at present pending adjudication before Hon'ble Delhi High Court.

10.2. In the Order for the AY 2007-08, a coordinate Bench of this Tribunal found that this issue has been decided in the case of assessee itself in the appeal before the ITAT for the assessment year 2006-07 and in that case it was held that:

> *"9. The next ground is disallowance of R&D cess paid amounting to Rs.9,68,47,294/-. Relevant discussion has been made by the AO on page 26 of his final order. The assessee treated the amount of royalty and cess on royalty as revenue expenditure. The AO disallowed a sum of Rs.9.68 crore after proportionately allowing deduction to the extent of depreciation allowed by him on royalty. There is no dispute on the nature of cess, which is on royalty and has been treated both by the assessee as well as the AO as part and parcel of royalty and accordingly claimed/disallowed in line with the treatment of royalty. Since we have allowed deduction for the entire amount of royalty paid by the assessee during the year by deleting the TP adjustment and also overturning the action of the AO in treating the remaining half part as capital expenditure, the consequential amount of cess on royalty payment automatically becomes deductible. We, therefore, direct to allow deduction of Rs.9.68 crore. "*

10.3. This Tribunal followed the above reasoning for the AY 2007-08 also. Since the related facts of the present assessment year are similar to those in the assessment year 2006- 07 and 2007-08 on an identical issue, we, while respectfully following the same direct the Assessing Officer to allow the deduction as directed by the ITAT in the appeal for the assessment year 2006-07 and 2007-08 after affording opportunity of being heard to the assessee. Grounds 10 to 10.2 are allowed accordingly.

Ground No 11 to 11.5 not accepting the claim of the appellant that sales tax subsidy

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11. Grounds No 11 to 11.5 relate to the Sales Tax Subsidy claimed as capital receipt from the total income. Briefly stated relevant facts on this ground, as apparent from record and the Industrial Policy, 1999 notified on 11.11.1999 by the State Government of Haryana having a bearing on the claim of the assessee, are that the assessee had, for the relevant year under consideration, received sales tax concessions amounting toRs.13,55,68,826/- from the Government of Haryana under Rule 28C of the Haryana General Sales Tax Rules, 1975, and claimed it to be a capital receipt not liable for tax. However, AO denied the same and brought it to tax by treating the same as revenue receipt.

11.1. It is submitted on behalf of the assessee that the incentive/ subsidy was granted to the assessee for undertaking substantial expansion of existing industryin line with the larger public objective of the Policy to promote industrialization and employment generation and not to supplement trading receipts, which is, it is respectfully submitted, clearly in the nature of a capital receipt, not liable to tax. Ld. AR submits that the issue regarding taxability of sales tax incentive is squarely covered in favour of the assessee by the decisions reported in CIT vs Ponni Sugars and Chemicals Ltd: 306 ITR 392 (SC), Sahney Steel and Press Works Ltd. v. CIT: 228 ITR 253 (SC), V.S. S.V. Meenakshi Achi: 60 ITR 253 (SC), CIT v. Johnson Matthey India Pvt. Ltd. : ITA No. 193/2015 (Del.), Bougainvillea Multiplex Entertainment Centre (P.) Ltd.: 373 ITR 14 (Del), CIT vs. National Co-operative Consumer Federation Ltd.: 254 ITR 599 (Del), Shree Balaji Alloys vs. CIT: 198 Taxman 122 (J&K) – Revenue's appeal dismissed by the Supreme Court in Civil Appeal No. 10061 of 2011 [287 CTR 459 (SC)], CIT vs. Ruby Rubber Works Ltd., 178 ITR 181 (Ker. FB) – *affirmed by the Supreme Court in Kalpetta Estates Ltd. Vs. CIT : 260 ITR 601,* CIT vs. Sham Lal Bansal in ITA: 472 of 2010 (P&H), CIT vs. Siya Ram Garg

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(HUF): 237 CTR 21 (P&H), CIT vs. Talbros Engineering Ltd. : 386 ITR 154 (P&H), Chaphalkar Brothers: 351 ITR 309 (Bom.), Sadichha Chitra vs. CIT: 189 ITR 774 (Bom.), CIT vs Rasoi Ltd.: 335 ITR 438 (Cal.), CIT vs. Balarampur Chini Mills Ltd.: 238 ITR 445 (Cal.), CIT vs. Madurantakam Co-operative Sugar Mills Ltd.: 263 ITR 388 (Mad), Garden Silk Mills Ltd. v. CIT and Anr. : 394 ITR 192 (Guj.), DCIT vs. Inox Leisure Ltd.: 351 ITR 314 (Guj), CIT vs. Birla VXL Ltd.: 215 Taxman 117 (Guj.), DCIT vs. Munjal Auto Industries Ltd.: 218 Taxman 135 (Guj.), DCIT vs. Reliance Industries Limited: 88 ITD 273 (Mum SB.).

11.2. He drew support from the decision of the jurisdictional High Court in the case of CIT v. Bougainvillea Multiplex Entertainment Centre (P.) Ltd.: 373 ITR 14. Ld. AR further submitted that a coordinate Bench of Delhi Bench of the Tribunal considered all relevant facts and decided the issue in favour of the assessee in assessee's own cases in ITA No.1927/Del/2010 (AY 2005-06), ITA No.5120/Del/2010 (AY 2006-07), ITA No.5720/Del/2011 (AY 2007-08) and the decision in ITA No.1927/Del/2010 for assessment year 2005-06 was followed by the Delhi Bench of the Tribunal in the case of Johnson Matthey India (P) Ltd.v. Addl. CIT in ITA No.952/Del/2011, wherein the Tribunal, in the context of the aforesaid sales tax incentive in the State of Haryana, held the incentive to be capital receipt, not liable to tax, most importantly the Hon'ble Delhi High Court affirmed the said decision in the case titled as CIT vs. Johnson Matthey India Pvt. Ltd. in ITA No. 193/2015.

11.3. Basing on this set of facts and law, Ld. AR submitted that the issue of taxability of Sales Tax Subsidy pursuant to the Haryana Government's Scheme is squarely covered in favour of the assessee by

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the aforesaid binding decision of the jurisdictional Delhi High Court in the case of Johnson Matthey (supra).

11.4. Per contra, Ld. DR placed reliance on the decision of the Delhi High Court in the case of CIT vs Bhushan Steel and Stripes Ltd., dt. 13.7.2017, ITA No. 315/03,316/03,317/03,349/03 and 434/05 and submitted that in this decision after considering all the decisions specially Sahney Steel and Ponni Sugars and Chemicals Ltd. of Hon'ble Supreme Court, it was concluded by the Hon'ble Delhi High Court that the Sales Tax subsidy received by the assessee as revenue receipt. The Industrial Policy and Sales Tax subsidy policy have discussed in detail for consideration of such receipts in the hands of the assessee **"**whereas the State Government is of the opinion that for promoting of certain industries and expansion of diversification or modernization existing units (Page No. 15 of the above said order of the Hon'b!e Delhi High Court). Page No. 23 of the above said order also mentions that "the object of providing subsidy by way of permission to not deposit amounts collected (as sales tax liability) - which meant that the customer or servicer user concerned had to pay sales tax, but at the same time, the collector (i.e the assessee) could retain the amount so collected, undoubtedly was to achieve the larger goal of industrialization. This has been the basis of sales tax subsidy received during the year. In principle there has not been any difference in Haryana sales tax subsidy policy and UP sales tax policy. The Ltd. AR of the assessee has been gas lighting the issues of sales tax subsidy simply bifurcating it in the name of the States. The different forms cannot be taken away the substance from the issues of sales tax subsidy. According to him, the jurisprudence keeps involving, and accordingly, the Delhi High Court has decided the issues of sales tax subsidy as revenue receipts in the case of Bhushan Steel and Stripes Ltd. stating very clearly at page No. 26 of its

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judgment.

11.5. According to the Ld. DR the assessee's case also encircles the issues of sales tax subsidy in the similar ways, thereby, the sales tax subsidy received in the hands of the assessee needs to be treated as revenue receipts, and the Assessee's reliance on Bougainvillea multiplex Entertainment Centre Pvt. Ltd. 373 ITR 14(Del) and Johnson Matthey India Pvt. Ltd., ITANo. 192/2015(Del) are misplaced. Ld. DR emphasizes that the Hon'ble Delhi High Court's decision in the case of M/s Bhushan Steel and Stripes Ltd. dt. 13.7.2017 being the recent decision after consideration of all the case laws, wherein the wisdom of the Delhi High Court has reached, in the processes of advancement of jurisprudence, as to treat the sales tax subsidy as revenue receipt, has to be preferred to other earlier decisions. This is being recent, speaking and the well reasoned order needs to be followed by the Hon'ble Bench, ITAT which falls under the jurisdiction of the Hon'ble Delhi High Court.

11.6. On this premise, Ld. DR, therefore, prayed to consider the recent decision of the Hon'ble Delhi High Court reached in the case of Bhushan Steel & Stripes Ltd. for considering the sales tax subsidy as the revenue receipt without considering the decision as per incuriam which is a subject matter of Hon'ble supreme Court.

11.7. In reply, Ld. AR submitted that in the case of the Bhushan Steel & Strips Limited the Hon'ble Delhi High Court considered the case of sales-tax subsidy received under an altogether different industrial policy of the Government of UP, and in that different context of the policy of the Government of UP, the Court held that the sales tax subsidy was in the nature of a revenue receipt and not a capital receipt.

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11.8. Ld. AR referred to the paragraph No 25 and 26 of the decision in Bhushan Steel & Strips Limited (supra) in support of his submission that this decision of the Delhi High Court in the case of Bhushan Steel (supra) is confined to the peculiar facts of the Uttar Pradesh Industrial Policy, 1990, as would be evident from the following observations**:**

> *"25…………Paras 6 (A) and 6(B) of that scheme specifically provided for capital subsidy to set up prestige units; the amounts indicated (Rupees fifteen lakhs) were to be towards capital expenditure. Now, if that was the scheme under which the assessees set-up their units, undoubtedly it contained specific provisions that enabled capital subsidies. Whether the assessees were entitled to it, or not, is not relevant. The assessees are now concerned with the sales tax amounts they were permitted to retain, under the amended scheme (dated 27.07.1991) which allowed the facility of such retention, after the unit (established and which could possibly claim benefit under the first scheme) was already set up. This subsidy scheme had no strings attached. It merely stated that the collection could be retained to the extent of 100% of capital expenditure. Whilst it might be tempting to read the linkage with capital expenditure as not only applying to the limit, but also implying an underlying intention that the capital expenditure would thereby be recouped, the absence of any such condition should restrain the court from so concluding".*
>
> *"26. How a state frames its policy to achieve its objectives and attain larger developmental goals depends upon the experience, vision and genius of its representatives. Therefore, to say that the indication of the limit of subsidy as the capital expended, means that it replenished the capital expenditure and therefore, the subsidy is capital, would not be justified. The specific provision for capital subsidy in the main scheme and the lack of such a subsidy in the supplementary scheme (of 1991) meant that the recipient, i.e. the assessee had the flexibility of using it for any purpose. Unlike in Ponni Sugars (supra), the absence of any condition towards capital utilization meant that the policy makers envisioned greater profitability as an incentive for investors to expand units, for rapid industrialization of the state, ensuring greater employment. Clearly, the subsidy was revenue in nature."*

11.9. Basing on the above observations, he submitted that the Hon'ble Court gave much emphasis to the fact that the UP Industrial Policy specifically provided for capital subsidies, and considering the fact that the in that case assessee was not granted capital subsidy, as specifically contained in the said Policy, the Court concluded that the

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subsidy received was not in the nature of a capital subsidy but only a revenue subsidy; whereas, according to the Ld. AR, unlike in the UP Industrial Policy, there is no specific provision in the Haryana Industrial Policy for capital subsidy and hence, the decision in the case of Bhushan is not applicable. As regards observations of the Hon'ble Court regarding no strings being attached to the incentives, Ld. AR submitted that such observations have to be read in the aforesaid context/ discussion wherein the Court held that the case of Bhushan was not falling in capital subsidy scheme as contained in the UP Policy.

11.10. Ld. AR pointed out that in fact, in Johnson Matthey (supra) and Bougainvillea Multiplex Entertainment Centre (P) Limited: 373 ITR 14 the Hon'ble Delhi High Court held that despite no strings being attached thereto, the subsidy or incentive, as the case may be, was in the nature of capital subsidy. He submitted that in similar view has been taken in Shree Balaj Alloys : 198 Taxman 122 (J&K) – affirmed by SC in 287 CTR 459, CIT v. Chaphalkar Brothers: 351 ITR 309 (Bom) , CIT v. Rasoi Limited : 335 ITR 438 (Cal) , CIT v. Birla VXL Ltd: 215 Taxman 117 (Guj) , DCIT v Inox Leisure Ltd. : 351 ITR 314 (Guj) , CIT v.Samta Chavigarh: 268 CTR 199 (Raj.).

11.11. Ld. AR emphatically submitted that the issue of taxability of sales tax subsidy pursuant to the Haryana Government's Scheme is squarely covered in favour of the assessee by the binding decision of the jurisdictional Delhi High Court in the case of Johnson Matthey (supra), whereas the decision in the case of Bhushan Steel (supra) rendered in the context of an altogether different industrial policy of the Government of UP, as such, it is not applicable to the facts of the present case.

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11.12. According to the Ld. AR there is no conflict between the Judgements of the Hon'ble Jurisdictional High Court in the cases of Johnson Matthey (supra) and Bougainvillea Multiplex Entertainment Centre (P) Limited: 373 ITR 14 on one hand and Bhushan Steel (supra) on the other, inasmuch they dealt with two different industrial policies surrounded by different facts and circumstances. However, according to him, even if it is construed that there is a conflict between two judgements of the Division Bench of the jurisdictional High Court, then it has to be seen that the decision of the jurisdictional High Court in the case of Johnson Matthey (supra) having been rendered in the context of the very same scheme, Haryana Industrial Policy, 1999 in the context of which the case of assessee falls, has to be preferred over the decision of the jurisdictional High Court in the case of Bhushan Steels (supra), because it has been rendered in context of an altogether different Industrial Policy.

11.13. Placing reliance on the decisions rendered in Government of Andhra Pradesh and Anr. vs. B. Satya Naraina Rao(dead) by LRs. and Others (2000) : 4 SCC 262(SC), A.R. Antuleyvs. R.S.Naik: AIR 1988 SC 1531 (SC), R. Thiruvirkolam v. Presiding Officer and Another : 1 SCC 9 (SC), State of Assam v. RipaSarma : 3 SCC 63 (SC), Punjab Development and Reclamation Corporation Limited vs. Presiding Officer, Labour Court : 1990 : 3SCC 682 (SC), CIT v. Thana Electricity Supply Ltd.: 206 ITR 727 (Bom.), CIT v. Cascade Holdings (P) Ltd.: 365 ITR 84 (Bom.), Ld. AR submitted that even if there is a conflict between the judgements of jurisdictional High Court, viz., Bougainvillea Multiplex Entertainment Centre (supra) and Johnson Matthey (supra) on the one hand, and Bhushan Steels (supra) on the other, the judgment rendered in case of Johnson Matthey (supra) has to be preferred because the decision in the case of Bhushan Steel

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(supra) was rendered without considering the earlier decisions rendered by the bench of co-equal strength in case of Johnson Matthey (supra) and Bougainvillea Multiplex Entertainment Centre (P.) Ltd. (supra). Saying so, he submitted that the contention of the Ld. DR that in the processes of advancement of jurisprudence, the Hon'ble High Court has evolved the law to treat the sales tax subsidy as revenue receipt cannot be accepted.

11.14. Lastly, Ld. AR contended that in Sandeep Kumar Bafna v. State of Maharashtra and Anr. : AIR (2014) SC 1745; and Mamaleshwar Prasad v. Kanhaiyalal (Dead) through L.Rs. : AIR (1975) SC 907 it has been held that where two judicial precedents of co-equal strength are available on the issue and the later judgment does not consider the earlier one, then, the lower court shall follow the judicial precedent rendered earlier in point of time.

11.15. We have carefully gone through the rival contentions in the light of the decisions of the Hon'ble jurisdictional High Court in CIT v. Bougainvillea Multiplex Entertainment Centre (P.) Ltd.: 373 ITR 14 and CIT vs Bhushan Steel and Stripes Ltd**.,** and the decision of the Delhi Bench of the Tribunal in the case of Johnson Matthey India (P) Ltd.v. Addl. CIT in ITA No.952/Del/2011, and upheld by the Hon'ble Delhi High Court in the case titled as CIT vs. Johnson Matthey India Pvt. Ltd. in ITA No. 193/2015. In all these cases the guidance is taken and strength is derived from the decisions of the Hon'ble Apex Court in Sahney Steel and Press Works Ltd. v. CIT: 228 ITR 253 (SC), and CIT vs Ponni Sugars and Chemicals Ltd: 306 ITR 392 (SC). Purposive test is the key principle that is applied for determination of the nature of the subsidy. Though it is an undisputed fact that a coordinate Bench of this Tribunal considered all relevant facts and decided the issue in favour of the assessee in assessee's own cases in

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ITA No.1927/Del/2010 (AY 2005-06), ITA No.5120/Del/2010 (AY 2006-07), ITA No.5720/Del/2011 (AY 2007-08), submission of the DR that the law is kept on evolving by the Hon'ble jurisdictional High Court, inasmuch as the Hon'ble Court in a subsequent and latest judgement in Bhushan Steels case (supra) held that the subsidy given at post project stage without mandating for any specific use of such subsidy fund, is only a revenue receipt, necessitates this Bench to look afresh at the issue in the light of the march of law. For proper appreciation of the contentions of the parties, it is but necessary to find out the principles of law laid down in these decisions.

11.16. In Sahney Steel and Press Works Ltd (supra) facts involve the notification issued by the Andhra Pradesh Government where under certain facilities and incentives were to be given to all the new industrial undertakings which commenced production on or after 1st Jan., 1969 with investment capital (excluding working capital) not exceeding Rs. 5 crores. The incentives were to be allowed for a period of five years from the date of commencement of production. Concession is also available for subsequent expansion of 50 per cent and above of existing capacities provided in each case, the expansion was located in a city or town or panchayat area other than that in which the existing unit is located. The incentives were, refund of sales-tax on raw materials, machinery and finished goods, levied by the State Government subject to a maximum of 10 per cent of the equity capital paid up in the case of public limited companies and the actual capital in the case of others; subsidy on power consumed for production to the extent of 10 per cent in the case of medium and large scale industries etc; exemption from payment of water rate Liability on account of assessment of land revenue or taxes on land used for establishment of any industry, shall be limited to the amount of such taxes payable immediately before the land is so used.

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11.17. In Sahney Steel's case, it was contended on behalf of the assessee that the subsidy given was up to 10 per cent of the capital investment calculated on the basis of the quantum of investment in capital, and, therefore, receipt of such subsidy was on capital account and not on revenue account. It was also urged in that case that subsidy granted on the basis of refund of sales tax on raw materials, machinery and finished goods were also of capital nature as the object of granting refund of sales tax was that the assessee could set up new business or expand his existing business. However, Hon'ble Apex Court on examination of the decisions in the case of Seaham Harbour Dock Co. vs. Crook 16 Tax Cases 333 (HL), Lincolnshire Sugar Co. Ltd. vs. Smart 20 Tax Cases 643 and a Canadian case St. John Dry Dock & Ship Building Co. Ltd. vs. Minister of National Revenue 4 DLR 1, and while affirming the principle laid down in Ostime vs. Pontypridd & Rhondda Joint Water Board *28 Tax Cases 262,* held that the contention that the subsidies were of capital nature and were given for the purpose of stimulating setting up and expansion of industries in the State cannot be upheld because of the subsidy scheme itself. Hon'ble Court observed that no financial assistance was granted to the assessee for setting up of the industry, and it was only when the assessee had set up its industry and commenced production, various incentives were given for the limited period of five years. The Hon'ble Court further observed that that the endeavour of the State was to provide the newly set up industries a helping hand for 5 years to enable them to be viable and competitive, sales-tax refund and the relief on account of water rate, land revenue as well as electricity charges were all intended to enable the assessee to run the business more profitably, as such the amount paid to the assessee was in the nature of subsidy from public funds to assist it in carrying on its trade or business. Having regard to the scheme of the

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Notification, it was held that there can be little doubt that the object of various assistances under the subsidy scheme was to enable the assessee to run the business more profitably, since the payments were made only after the industries have been set up. Payments are not being made for the purpose of setting up of the industries. But the package of incentives was given to the industries to run more profitably for a period of five years from the date of the commencement of production. In other words, a helping hand was being provided to the industries during the early days to enable them to come to a competitive level with other established industries. In such circumstances, the Hon'ble Court held that the payments were nothing but supplementary trade receipts, though the assessee could not use this money for distribution as dividend to its shareholders, but, the assessee was free to use the money in its business entirely as it liked and was not obliged to spend the money for a particular purpose, as such, by no stretch of imagination can the subsidies whether by way of refund of sales-tax or relief of electricity charges or water charges can be treated as an aid to setting up of the industry of the assessee. If any subsidy is given, the character of the subsidy in the hands of the recipient—whether revenue or capital—will have to be determined by having regard to the purpose for which the subsidy is given. If it is given by way of assistance to the assessee in carrying on of his trade or business, it has to be treated as trading receipt. The sales-tax upon collection forms part of the public funds of the State. In this sense it was held that the source of the fund is quite immaterial. If the purpose is to help the assessee to set up its business or complete a project, the monies must be treated as to have been received for capital purpose. But, if monies are given to the assessee for assisting him in carrying out the business operation and the money is given only after and conditional upon commencement of

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production, such subsidies must be treated as assistance for the purpose of the trade. In Sahney's case, subsidies have not been granted for production of or bringing into existence any new asset, but were granted year after year only after setting up of the new industry and commencement of production and such a subsidy could only be treated as assistance given for the purpose of carrying on of the business of the assessee. These subsidies are of revenue character and will have to be taxed accordingly. Hon'ble Apex Court also noted many decisions of Indian Courts on this aspect, viz., V.S.S.V. Meenakshi Achi & Anr. vs. CIT (1966) 60 ITR 253 (SC), CIT vs. Ruby Rubber Works Ltd. (1989) 78 CTR (Ker) 75, Sadichha Chitra vs. CIT (1990) 90 CTR (Bom) 135, Kesoram Industries & Cotton Mills Ltd. vs. CIT (1991) 191 ITR 518 (Cal), CIT vs. Dusad Industries (1986) 51 CTR (MP) 217 etc.

11.18. In this context, it is pertinent to note that the Madhya Pradesh High Court in the case of CIT vs. Dusad Industries (1986) 51 CTR (MP) 217 : (1986) 162 ITR 784 (MP) : TC 13R.622, dealt with a case where Government had framed a scheme for granting sales-tax subsidies to industries set up in backward areas took the view that the object of the scheme was not to supplement the profits made by industries. In that view of the matter, the High Court held that the subsidies given under the said scheme by the Government to newly set up industries were capital receipts in the hands of the industries and could not be taxed as revenue receipts. In that case, 75 per cent of the sales-tax paid in a year for a period of five years from the day of starting of production was to be given back by the Government to the industry concerned. The High Court was of the view that obviously the subsidy was given by way of an incentive for capital investment and not by way of addition to the profits of the assessee as was clear from the facts and circumstances of the case. While referring to these facts,

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Hon'ble Apex Court held that the Madhya Pradesh High Court, however, failed to notice the significant fact that under the scheme framed by the Government, no subsidy was given until the time production was actually commenced, mere setting up of the industry did not qualify an industrialist for getting any subsidy, and the subsidy was given as help not for the setting up of the industry which was already there but as an assistance after the industry commenced production. Hon'ble Apex Court, therefore, held that the view taken by the Madhya Pradesh High Court is erroneous.

11.19. Law laid down by the Hon'ble Apex Court in Sahney Steel and Press Works Ltd (supra) is, therefore, that the character of the subsidy in the hands of the recipient—whether revenue or capital—will have to be determined by having regard to the purpose for which the subsidy is given. If the purpose is to help the assessee to set up its business or complete a project, the monies must be treated as to have been received for capital purpose, and if it is given by way of assistance to the assessee in carrying on of his trade or business, it has to be treated as trading receipt. The source of the fund is quite immaterial. In a case where 75 per cent of the sales-tax paid in a year for a period of five years from the day of starting of production was to be given back by the Government to the industry concerned, t*he* view taken by the Madhya Pradesh High Court that the subsidy was given by way of an incentive for capital investment and not by way of addition to the profits of the assessee was expressly disapproved basing on the significant fact that under the scheme framed by the Government, no subsidy was given until the time production was actually commenced.

11.20. In Ponni Sugars case (supra), four factors exist in the Incentive Schemes, were, (i) benefit of the incentive subsidy was available only

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to new units and to substantially expanded units, not to supplement the trade receipts; (ii) the minimum investment specified was Rs. 4 crores for new units and Rs. 2 crores for expansion units; (iii) increase in the free sale sugar quota depended upon increase in the production capacity. In other words, the extent of the increase of free sale sugar quota depended upon the increase in the production capacity; (iv) the benefit of the Scheme had to be utilized only for repayment of term loans. The important point noted by the Hon'ble Apex Court in this case is that Government of India, financial institutions as well as the sugar industries are parties to the Scheme in the sense that but for the Scheme the financial institutions would not have given term loans to set up new units/expansion of the existing units. Keeping in mind the object behind the payment of the incentive subsidy such payment received by the assessee under the Scheme was not in the course of a trade but was of capital nature, while reiterating the principle of purposive test enunciated in Sahney Steel & Press Works Ltd., Hon'ble Apex Court held, that the receipt of the subsidy by the assessee in that case was capital in nature as the assessee was obliged to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of existing business.

11.21. In Bougainville case (supra), facts submitted to the Court are that against the backdrop of steep decline of viewership due to various reasons including onslaught of cable television leading to erosion in entertainment tax collections and with a view to encourage setting up of multiplex cinema halls and malls, in order to promote the viewership in cinema halls, various State Governments, being aware that setting up an operation of such multiplexes involves various problems including huge capital investments, had come up with schemes offering incentives to cinema industry and the Government of

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the State of Uttar Pradesh formulated a promotional scheme to such effect and notified it by Government order issued on 13.07.1999. Hon'ble jurisdictional High Court after noticing the decisions of the Hon'ble Apex Court in Sahney Steel and Press Works Ltd. v. CIT: 228 ITR 253 (SC), and CIT vs Ponni Sugars and Chemicals Ltd: 306 ITR 392 (SC) found vide Para No 32, that the UP Scheme under which the assessee claims exemption to the extent of entertainment tax subsidy, claiming it to be capital receipt, is clearly designed to promote the investors in the cinema industry encouraging establishment of new multiplexes. Since the subsidy of such nature cannot possibly be granted by the Government directly, the Entertainment tax is leviable on the admission tickets to cinema halls only after the facility becomes operational, and since the source of the subsidy is the public at large which is to be attracted as viewers to the cinema halls, the funds to support such an incentive cannot be generated until and unless the cinema halls become functional, by applying the "purpose test", referred to in *Ponni Sugars* (supra) held that the assistance in the form of entertainment tax exemption came in the hands of assessee to enable it to set up the new unit which renders it a receipt on capital account. The periodicity (year to year) of the subsidy, its source (collections from the public at large) and the form (deemed deposit) are irrelevant considerations.

11.22. In CIT vs. Johnson Matthey India Pvt. Ltd., while referring to the decisions in *Sahney (supra)*, Ponni Sugars (supra) and *Bougainvillea Multiplex Entertainment Centre (supra), Hon'ble jurisdictional High Court* observed as under:

> *"This Court has considered the submissions and is of the opinion that the ITAT's impugned order has noted the relevant law. Crucially, Ponni Sugars (supra) is a later decision of the Supreme Court which had gone to deal with various authorities, including Sahney (supra). The Supreme Court has emphasized in each case the purpose for which subsidy or assistance is given by the State government or a public agency. If that*

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is to promote an industry, especially with special interest of development of capital infrastructure, the amounts received are to be treated as capital and not revenue. This Court too had the occasion to deal with the issues in CIT v. Bougainvillea Multiplex Entertainment Centre Pvt. Ltd. (ITA 586/2013, decided on 30.01.2015) where the decision in Ponni Sugars (supra) and previous authorities were discussed and applied in given facts of the case.

We are of the opinion that the impugned order of the ITAT does not disclose any infirmity. No substantial question of law arises.

It is accordingly dismissed."

11.23. Recently the Hon'ble Delhi High Court in the case of CIT vs Bhushan Steel and Stripes Ltd., dt. 13.7.2017, ITA No. 315/03,316/03,317/03,349/03 and 434/05 after considering all the decisions specially Sahnev Steel and Ponni Sugars and Chemicals Ltd. of Hon'ble Supreme Court, and Bougainville case (supra) of High Court, reached a conclusion that the Sales Tax subsidy received by the assessee as revenue receipt.

11.24. In this case, the Hon'ble Court observed that the object of providing subsidy by way of permission to not deposit amounts collected (as sales tax liability)- which meant that the customer or servicer user concerned had to pay sales tax, but at the same time, the collector (i.e. the assessee) could retain the amount so collected, undoubtedly was to achieve the larger goal of industrialization, and the achievement of a quantitative limit (of 125% of capital expenditure in the case of small scale units and 100% in the case of other units) meant that the subsidy could no longer be claimed. However, it was further observed that whilst it might be tempting to read the linkage with capital expenditure as not only applying to the limit, but also implying an underlying intention that the capital expenditure would thereby be recouped, the absence of any such condition should restrain the court from so concluding. In this matter, it was stated that in Sahney Steel (supra) and Ponni Sugars (supra) the issue decided was - what was the true purpose of the incentive or the

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subsidy, whereas the end use of the funds was considered as an additional argument to decide the matter either way. Further more, basing on the amendment to Section 2(24) of the Act by the Finance Act, 2015, it was contended before the Hon'ble jurisdictional High Court that,

> *........ the Finance Act of 2015 which came into force on 01.04.2016 amended Section 2(24) of the Income Tax Act and inserted Clause (xvi). It is stated that assistance in the form of subsidy or grant or cash incentive or duty drawback or waiver by Central or State Governments or any authority in cash or kind to the assessee other than subsidy or grant or reimbursement which is taken into account determining the actual cost of the asset, is deemed to be income. It was submitted that this amendment clarifies the intent of Parliament which is that the assistance received otherwise than towards capital augmentation or creation is deemed to be income. This amendment is prospective which means that the law is to be interpreted in the light of the judgments applicable, notably Ponni Sugars (supra) in the present case.*

11.25. After considering the entire case law on this aspect, vide paragraph No 26, the Hon'ble court held,-

> *26. How a state frames its policy to achieve its objectives and attain larger developmental goals depends upon the experience, vision and genius of its representatives. Therefore, to say that the indication of the limit of subsidy as the capital expended, means that it replenished the capital expenditure and therefore, the subsidy is capital, would not be justified. The specific provision for capital subsidy in the main scheme and the lack of such a subsidy in the supplementary scheme (of 1991) meant that the recipient, i.e. the assessee had the flexibility of using it for any purpose. Unlike in Ponni Sugars (supra), the absence of any condition towards capital utilization meant that the policy makers envisioned greater profitability as an incentive for investors to expand units, for rapid industrialization of the state, ensuring greater employment. Clearly, the subsidy was revenue in nature.*

11.26. A reading of all these decisions, therefore, makes the golden principle that runs through them very clear. While framing its policy to achieve its objectives and attain larger developmental goals, depending upon the experience, vision and genius of its representatives, it is always open for the State to provide incentives, which results in capital and revenue receipts in the hands of the

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receiver, depending upon the purpose for which they are given. If any subsidy is given, the character of the subsidy in the hands of the recipient—whether revenue or capital—will have to be determined by having regard to the purpose for which the subsidy is given. If the purpose is to help the assessee to set up its business or complete a project, the monies must be treated as to have been received for capital purpose. But, if monies are given to the assessee for assisting him in carrying out the business operation and the money is given only after and conditional upon commencement of production, such subsidies must be treated as assistance for the purpose of the However, any stipulation placing the assessee is under obligation to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of existing business, or to liquidate the cost incurred in creating the capital asset, makes the receipt a capital receipt and renders the time of providing the subsidy irrelevant. Mere indication of the limit of subsidy as the capital expended does not justify the conclusion that it replenished the capital expenditure and therefore, the subsidy is capital. It is, therefore, neither the lofty ideals/objectives of the policy document nor the presumed end use of the subsidy amount that determines the nature or subsidy in the hands of the recipient, but the purpose envisaged by the policy document that satisfies the 'purpose test' formulated under Sahney's case. Unless the intention of the policy makers is express and clear discernible from the policy document to link up the utilization of subsidy amount, irrespective of the time of recipient getting it, with liquidation of the capital cost, as could be gather from the decisions of Sahney steels and Ponni Sugars cases, no inference is permissible to be drawn that the subsidy results in capital receipt in the hands of the recipient. Developmental objectives of the subsidy policy document, ipso facto, do not determine the nature of

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subsidy. Purpose as could be culled out from the framework of the policy document is the sole determinative factor. Having noted the context of relevancy or otherwise of the source, form and time of subsidy in determining its nature, now we shall proceed to examine the nature of receipt in the hands of the assessee in this matter.

11.27. Main objectives of the Haryana Industrial Policy are to increase the share of industry in the Net/Gross State Domestic Product by attracting new investments and growth of existing industry; to increase the employment in Industrial and Allied sector by 20% in the next five years; to attain sustainable economic development through catalysis of investments in all sectors of the economy; to achieve larger value addition within the State thereby contributing to a higher quality of life etc. According to the assessee, a perusal of the aforesaid indicates that the objectives of the Policy inter-alia, included growth of existing industry and increasing the employment opportunities. For achieving the aforesaid objective, the stated approach, inter alia, was to rationalize the package of incentives making it more effective and meaningful for speedy development of the State. The Policy specifically provided for customised package of incentives and concessions for prestigious projects to be decided by a high power committee.

11.28 Policy document says,

> *"SCHEME OF INCENTIVES*
> *CUSTOMISED PACKAGE OF INCENTIVES*
> *Customised package of incentives and concessions will be provided for prestigious projects having investment of Rs.30 crores and above. A High Powered Committee will be constituted under the chairmanship of the Chief Minister to decide the package in individual cases"*

11.29. Accordingly, sales tax concessions were to be provided to new units and also industrial units undergoing expansion/ diversification. Pursuant to the aforesaid Policy, Chapter IV-C was inserted in July,

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2000 in the Haryana General Sales Tax Rules' 1975, containing Rule 28C dealing with "Tax Concessions, Class of Industries, Period and Other Conditions". The Salient features of the said Rule 28C, to the extent relevant, are as under:

(a) *Concessions shall be available to an "eligible industrial unit";*

(b) *The expression "eligible industrial unit" was defined in sub-clause (c) of Rule 28C(3) of Haryana General Sales Tax Rules'1975 to include a new industrial unit or unit undertaking expansion or diversification subject to fulfillment of other conditions. The relevant extract of the said definition is as under:*

"Rule 28-C

....

(3)(c) "eligible industrial unit" means-

(1) a new industrial unit or a unit ***undertaking expansion*** *or diversification which, on the date of commercial production of new/expanded/diversified unit, fulfills the following conditions......" (emphasis supplied)*

(c) *The term "expansion" was defined in clause (f) of Rule 28C(3) of Haryana General Sales Tax Rules'1975 as under:*

"expansion" means an industrial capacity set up or installed during the operative period which creates additional production facilities for manufacture of the same product (s) as of the unit before expansion in which the additional fixed capital investment in plant and machinery made during the operating period in one go, not exceeding the period of one year, ***exceeds 25% of the fixed capital investment*** *(gross block) of the unit before expansion at the same or new location." (emphasis supplied)*

(d) *Eligibility of prestigious units defined in clause (m) as unit having fixed capital investment exceeding Rs.30 crores, shall be determined by the High Powered Committee;*

(e) *Clause 5(b), provides that decision to grant tax concession to prestigious unit shall be taken by the High Powered Committee on the basis of factors like employment generation, likely revenue, growth of ancillaries, impact on overall industrial growth, etc. [Also refer clause 6(e)].;*

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(f) *Clause 8(a) provides for issuance of the entitlement certificate in form ST-72B.*

11.30. In terms of sub-rule (5)(b) of Rule 28C, it is provided that the decision to grant tax concession to a prestigious unit is given on the basis of factors like employment generation, impact on overall industrial growth, etc. According to the Ld. AR assessee in this case falls in the category of 'prestigious unit'. He emphasized that the underlying objective of conferring the benefit under Rule 28C, clearly proves beyond any doubt the fact that the avowed intent/ purpose of granting the concession is industrial development of the State and employment generation.

11.31. In this background, the assessee had undertaken industrial expansion in terms of the Rule 28C of Haryana General Sales Tax Rules, 1975. The High Powered Committee, thereafter, in its meeting held on 14.06.2001 granted sales tax concession to the assessee, whereby the assessee was required to pay 50% of the sales tax collected on sales of finished products from expanded unit and, retain balance 50% of the tax so collected, subject to maximum permissible benefit of Rs.564.35 crores. The letter/ communication received from Director of Industries, Haryana intimating the aforesaid decision, clearly referred to concession being granted "only in respect of vehicles rolled out of production capacity of 70,000 vehicles added as a result of first expansion". Pursuant thereto, the assessee was issued entitlement certificate dated 01.08.2001 under rule 28C of Haryana General Sales Tax Rules, 1975 to avail sales tax concession to the extent of Rs.564.35 crores during the period 01.08.2001 to 31.07.2015.

11.32. Ld. AR submitted that in the case of the Bhushan Steel & Strips Limited the Hon'ble Delhi High Court considered the case of sales-tax subsidy received under an altogether different industrial

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policy of the Government of UP, and in that different context of the policy of the Government of UP, the Court held that the sales tax subsidy was in the nature of a revenue receipt and not a capital receipt.

11.33. A comparative analysis of the both the policies, namely, Uttar Pradesh Industrial Policy, 1990 (applicable to the facts of Bhushan's case (supra)) and Haryana Industrial Policy, 1999 (applicable to the case of the appellant), is tabulated by the Ld. AR as follows:

Salient Features	Bhushan's case	Appellant/ Johnson Matthey case
Policy	Uttar Pradesh Industrial Policy, 1990	Haryana Industrial Policy, 1999
Governing Act and section	Section 4A of the UP Sales Tax Act, 1948 read with Rule 25 of the UP Sales Tax Rules.	Rule 28C of the Haryana Sales Tax Rules.
Object of subsidy (see Preamble)	To encourage the capital investment and establishment of New Industrial Units in the State of Uttar Pradesh	To promote industrial growth in the context of overall economic development of the State by creating an investor friendly enabling environment that facilitates the industry to move strongly to the front ranks of global competition.
Eligibility criteria for a prestigious unit	*"STATE CAPITAL SUBSIDY SCHEME* ………. *"6 (A) :Special capital subsidy for the prestige units:—* *Any district, where any industry of fixed capital investment of 25 crore is not already established, the first industrial unit to be established from the*	*"SCHEME OF INCENTIVES"* *CUSTOMISED PACKAGE OF INCENTIVES* *Customised package of incentives and concessions will be provided for prestigious projects having investment of Rs.30 crores and above. A High Powered Committee will be constituted under the chairmanship of the Chief Minister to decide the package in*

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	capital ***investment of Rs.25 crore or more****, within the period of 1.4.90 to 31.3.95,* ***shall be treated as "Prestige" Unit and the special state capital subsidy worth Rs.15 lakh shall be granted to this unit.*** *If prestige unit incentive to the ancillary units for the supply of requirement of more than 30% of its own purchased parts and components, then the further additional special capital subsidy of Rs.15 lakh shall be available to it. This scheme shall be applied with effect from 1.4.90 and the facility of subsidy shall not be admissible in the district under the scheme, where any unit of the capital investment of Rs.25 crore has already been established prior to 1.4.90.*	*individual cases"* *"Rule 28-C* ……… (3)(c)"eligible industrial unit" means- *(1) a new industrial unit or a unit undertaking expansion or diversification which, on the date of commercial production of new/expanded/diversified unit, fulfills the following conditions……"* ……………. *(f) "expansion" means an industrial capacity set up or installed during the operative period which creates additional production facilities for manufacture of the same product (s) as of the unit before expansion in which the additional fixed capital investment in plant and machinery made during the operating period in one go, not exceeding the period of one year, exceeds 25% of the fixed capital investment (gross block) of the unit before expansion at the same or new location."* ………… *(m)"****prestigious unit" means an eligible unit having fixed capital investment exceeding Rs.30 crores.*** ………….. *(5)(b) Decision about the tax concession to prestigious unit shall be taken by the High Powered Committee on the basis of factors like employment generation, likely revenue, growth of ancillaries, impact on overall*

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		industrial growth etc. A prestigious unit shall not be, as a matter of right entitled to benefits available to other units.

11.34. Basing on this he submitted that the Uttar Pradesh Industrial Policy, 1990 and the Haryana Industrial Policy,1999, are altogether different Industrial Policies with altogether different eligibility criteria. He submitted that the UP Industrial Policy specifically provided for "Capital Subsidy Scheme", which is not there in the case of Haryana Policy.

11.35. However, on a careful perusal of the schemes in question, we find that, but for certain changes in the form and expression, there is no material difference between these schemes in substances. They are similar in respect of the time, its source and the form of subsidy in the hands of the assessee. Time of assessee getting subsidy as is adverted to in Sahney's case or the stipulation of utilization of subsidy as is in Ponni's case are similar in both the schemes. In the case on hand the fact remains that the concession is granted only in respect of vehicles rolled out of production capacity of 70,000 vehicles added as a result of first expansion. Except making some specific provision for capital subsidy in the main scheme and the lack of such a subsidy in the supplementary scheme (of 1991) in respect of the UP Scheme, under both the schemes there is no difference. Under both the schemes no strings attached in respect of the utilization of funds and the assessees have the flexibility of using it for any purpose. There is no stipulation as to how the subsidy money has to be utilized which means that the assessee had the flexibility of using it for any purpose. Specific provision for capital subsidy in the main scheme and the lack of such a subsidy in the supplementary scheme (of 1991) in respect of the UP Scheme only corroborated the conclusion that the recipient of

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the subsidy, i.e. the assessee had the flexibility of using it for any purpose. Per se, the existence or otherwise of provisions for capital subsidy does make any difference in the nature of subsidy funds in the hands of the assessee insofar as they are allowed only after the completion of the formation of capital asset and the absence of any condition towards capital utilization meant that the policy makers envisioned greater profitability as an incentive for investors to expand units, for rapid industrialization of the state, ensuring greater employment which fact distinguishes the present case from the facts of Ponni Sugar's case. When the purpose of the subsidy is clearly revenue in nature, end use of the funds by the assessee to liquidate the cost incurred in the expansion activity remains irrelevant having regard to the fact that the subsidy was not expressly for meeting the capital expenses either in the presenti or of past as was the case in Ponni Sugar's case. Though the case in Bougainville was referred to in the case of Johnson Matthey, the Hon'ble Court noticed the said case in Bougainville while rendering the decision in Bhushan Steels case also. Though the findings of the Tribunal in Johnson Matthey's case were upheld by the Hon'ble Jurisdictional High Court in CIT vs. Johnson Matthey India Pvt. Ltd., we find it difficult to agree with the argument of the Ld. AR that the observations of this Tribunal made in assesee's case were approved by the Hon'ble High Court, inasmuch as the Hon'ble Court has not specifically considered the same. As has been consistently held in all the decisions from Sahney Steels to Bhushan steels that insofar as the subsidy benefits inure to the benefit of the assessee after the accomplishment of the expansion without any burden of any condition towards capital utilization of the subsidy amount meant that the policy makers envisioned greater profitability as an incentive for investors to expand units, for rapid industrialization of the state, ensuring greater employment. In this

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context, we find it difficult to agree with the submission of the Ld. AR that the decision in CIT vs. Johnson Matthey India Pvt. Ltd., has to be preferred to the latest decision of the Jurisdictional High Court in CIT vs Bhushan Steel and Stripes Ltd. on the ground that the Haryana State scheme was considered in the later, whereas in the later one UP Scheme was considered. For that matter in both Bougainville's case and Bhushan Steels's case, the very same UP scheme was considered, but with different result. No conflict could be seen in the principle applied or laid down, but what we understand is that the change in result is occasioned by the variance of facts.

11.36. For the reasons stated in the preceding paragraphs, we are of the considered opinion that any subsidy given to the assessee post accomplishment of the project or expansion there, without any obligation to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of existing business, or to liquidate the cost incurred in creating the capital asset or its expansion, is only in the nature of the revenue receipt and is liable to be brought to tax. We, therefore, uphold the addition on this count and accordingly dismiss the grounds 11 to 11.5.

Ground No 12 to 12.5 Disallowance on account of Provisional Liability relating to Expenditure on account of FPI-OE Components

12. On the aspect of Disallowance of Rs.32,11,63,153 on account of Provisional Liability relating to Expenditure on account of FPI-OE Components, case of the assessee is that the assessee had accounted for liability on account foreseen price increase (FPI) on an estimate basis, this FPI of Rs.32,11,63,153 was debited to consumption of raw material and components in the profit and loss account in accordance with mercantile system of accounting and the same was claimed as

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business deduction in the computation of income. Grievance of the assessee is that the assessing officer however, disallowed the aforesaid claim of the assessee on the ground that assessee has quantified the liability without acknowledging the quantified liability to the creditors. However, according to the assessee the change in price of the components takes place to give effect to the increase in the cost of the inputs required for manufacturing of the components. The same is, as per the agreement with the suppliers, to ensure uninterrupted supply of components, even when their cost has increased. According to the assessee FPI is an existing liability as per the understanding arrived at with the suppliers of the components, who are original manufacturers of the components. It is submitted on behalf of the assessee that the liability of FPI was estimated by the purchase department with substantial degree of accuracy as they are in constant touch with suppliers and have knowledge of the claims of suppliers, trend of the cost of inputs, etc. The personnel in the purchase department updates the foreseen price of each component for each supplier and effective date, based on their input and available information in computer system regarding quantity purchased and price paid. The liability in respect of each component was worked out considering the weight of each material, the quantity procured, the old rate and new rate worked by the assessee considering the price changes occurred during the period. It is on the basis of analysis of the claims, price trend, and correspondences/ discussions/negotiations with the suppliers during the year and past dealings that the assessee had computed the impact of change in price of components, and, therefore, it is not a case of provisional liability/contingent liability, incurring of which is dependent on happening of an event, but in fact it is in respect of such purchases already made by the assessee and duly debited in the books of accounts resulting in that the amount of FPI is a liability

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which accrues simultaneously with each purchase made by assessee and is allowable as deduction in determining the income of the relevant assessment year. The accounting of FPI was justified by the assessee on account of the liability that was determined and computed with a substantial degree of accuracy on account of materials already supplied by suppliers, at the time of determining and booking the amount as per information available till date of finalization of accounts and such a liability was required to be booked as per accrual system of accounting as the goods were already received. According to the Ld. AR this practice of provision for FPI is in accordance with practice prevalent in motor vehicles industry. Reference in this regard is invited to a notification dated 28.7.2003 issued by the Excise Authorities on the subject of charging of interest under section 11AB wherein the excise authorities recognized prevailing commercial practice of supplementary invoices being made in addition to the original invoices.

12.1. Placing reliance on the decision in assessee's own case decided in favour by CIT (A) for AY 2003-04 and by ITAT for AY 2007-08, and also the decisions reported in Calcutta Discount Co. Ltd.: 37 ITR 1 (SC), Metal Box India (P) Limited (1969): 73 ITR 53 (SC) , United Commercial Bank v. CIT 240 ITR 355 (SC), Bharat Earth Movers: 245 ITR 428 (SC) , CIT v Vinitec Corpn. (P) Ltd.: 278 ITR 337 (Delhi), National Mineral Development Corporation Ltd. v JCIT: 98 ITD 278 (Hyd. ITAT), Ld. AR argued that that liability which has arisen in the relevant accounting year is an allowable deduction even though its actual quantification and discharge is deferred to a future date. In respect of the vendor-wise and item-wise details of total provision of Rs.32,11,63,153 made during the relevant year in the paper book, it is submitted that the said details contain name of the vendor, the amount of additional value in respect of the component, the invoices,

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raised by the suppliers, were provisional and each invoice was liable to be reviewed/ amended once the quantum is determined and that this quantum of increase would apply to re-compute the prices payable by assessee on all supplies made by the suppliers during the year, and the liability for FPI was provided in the books of accounts on a scientific analysis of increase in price of components due to change in input cost, representing additional purchase price of the goods. It is submitted that since the liability accrued during the relevant assessment year, even though was finally paid in the following assessment years, the same was allowable deduction.

12.2. Ld. AR placed reliance on the decision of the Hon'ble Supreme Court in the case of CIT vs Woodward Governor India (P) Ltd.: 312 ITR 254 wherein it is held that:-

> *"21. In conclusion, we may state that in order to find out if an expenditure is deductible the following have to be taken into account (i) whether the system of accounting followed by the assessee is mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received; (ii) whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide; (iii) whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it; (iv) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains; (v) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards; (vi) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation."*

12.3. Further reliance is also placed on the judgment of the apex Court in the case of Rotork Controls India (P) Ltd. vs CIT: 314 ITR 62 wherein it has been held that:-

> *"17. At this stage, we once again reiterate that a liability is a present obligation arising from past events, the settlement of which is expected to result in an outflow of resources and in respect of which a reliable estimate is possible of the amount of obligation."*

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12.4. Ld. AR submitted that this practice is in consonance with the provisions of the Companies Act and generally accepted accounting principles and practices of Institute of Chartered Accountants of India and has been regularly followed by assessee and claims were accordingly made which has been duly accepted by Revenue in all the preceding years except in assessment year AY 2003-04 and AY 2007-08. There has been no change in method of accounting or estimation. It is submitted that this method of accounting regularly and consistently followed does not lead to any loss of revenue, whatsoever and the liability estimated in a particular year finally settled in the subsequent year gets reflected in the profit & loss account, whereby the income as well as the charge on settlement in the subsequent year is brought to the income or expenses statement of the assessee company to the extent of variation from the actual FPI liability. Ld. AR argued that it is well settled that mere timing difference should not be used to disturb the method of accounting and books of accounts of a tax payer consistently maintained and accepted year after year. In support of his argument that while the principle of res judicata does not apply to the income-tax proceedings, the Courts have emphasized there must be consistency in the position that the Revenue takes on an issue in different assessment years, Ld. AR cited the decisions reported in CIT vs. Excel Industries (P) Limited: 358 ITR 295 (SC), Radhasoami Satsang v. CIT 193 ITR 321(SC), DIT (E) v. Apparel Export Promotion Council: 244 ITR 734 (Del), CIT v. Neo Polypack (P) Ltd: 245 ITR 492 (Del.), CIT v. Girish Mohan Ganeriwala: 260 ITR 417 (P&H), CIT V. Dalmia Promoters Developers (P) Ltd: 200 CTR 426 (Del.), Escorts Cardiac Diseases Hospital: 300 ITR 75 (Del). Since the issue now stands covered in favour of the assessee by the order of the Tribunal in the assessee own case for the assessment year 2007-08,

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wherein the Tribunal held that provision for foreseen price increase made by the appellant represented an accrued/crystallized liability, which is an allowable business deduction, Ld. AR submits that the addition on this account may be deleted.

12.5. Per contra, Ld. DR submitted that the decision of ITAT for AY 2007-08 is not acceptable because the assessee's methodology is unique and no case law applies to the modus operandi adopted by the assessee. Further according to him Assessee's reliance on the case of Hon'ble Supreme Court in the case of Radha Saomi Satsang v. CIT reported in 193 ITR 321 and, Berger Paints v. CIT reported in 266 ITR 199, is also misplaced because in these cases Hon'ble Supreme Court was considering the situation where the liability was certain, but what was not certain was the quantum of such liability. In the case of the assessee, the assessee has quantified the liability without being sure of the liability and at the same time not acknowledging the quantified liability to the creditors and not leaving any note in the audit report. He placed reliance on the decisions reported in ITO vs. EMCO Transformers Ltd. (ITAT, Bom) 32 1TD 260, Srinivasa Computers Ltd. vs. ACIT (ITAT, Chennai) 107 1TD 357, and CIT vs. Rotork Controls India Ltd. (Mad) 293 ITR 311. According to him, *later on the Hon'ble Supreme Court has laid down General Principle on this issue, wherein it was stated that t*he value of contingent liability, like warranty expense, if properly ascertained and discounted on accrual basis can be an item of deduction under section 37, the principle of estimation is not the normal rule it would depend on the nature of business, nature of sale, nature of product and scientific method of accounting adopted by the assessee, and it would also depend upon the historical trend and number of articles produced.

12.6. On a perusal of the order of the Tribunal for the AY 2007-08 on

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this issue, we find that this issue covered by the ground Nos. 13 to 13.5 and by noticing that similar disallowance was deleted by the first appellate authority and revenue did not prefer any appeal thereon, and the Tribunal observed as follows:

> *"26.5 Considering the above submissions, we find that similar disallowance was made in the assessment year 2003-04 and the first appellate order had deleted the disallowance while deciding the issue in favour of the assessee against which Revenue did not prefer any appeal before the ITAT. Thereafter, only during the year under consideration, such disallowance has been made. Of course, principles of res-judicata is not application in the income-tax matters but rule of consistency is applicable as per which under the similar facts and circumstances, department ought to follow same approach on an issue in other assessment years. It is an established proposition of law that a method of accounting regularly and consistently followed does not lead to any loss of Revenue, whatsoever. The liability estimated in a particular year finally settled in the subsequent year gets reflected in the profit and loss account. We thus set aside the matter to the file of the Assessing Officer with direction to decide the issue afresh after affording opportunity of being heard to the assessee as per the first appellate order on the issue in the assessment year 2003-04 against which no appeal was preferred by the Revenue before the ITAT."*

12.7. When a similar question was dealt with by the first appellate authority and the Revenue accepted the same without preferring any appeal thereon, it is not open for the Revenue now to contend that Assessee's reliance on the case of Hon'ble Supreme Court in the case of Radha Saomi Satsang v. CIT reported in 193 ITR 321 and, Berger Paints v. CIT reported in 266 ITR 199, is also misplaced because in these cases Hon'ble Supreme Court was considering the situation where the liability was certain, but what was not certain was the quantum of such liability. There is no dispute that the same method of accounting is regularly and consistently followed by the assessee as such rule of consistency is applicable as per which under the similar facts and circumstances, department ought to follow same approach on an issue in other assessment years. We, therefore, respectfully following the reasoning adopted by the coordinate Bench

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of this Tribinal for the AY 2007-08, set aside the matter to the file of the Assessing Officer with direction to decide the issue afresh after affording opportunity of being heard to the assessee as per the first appellate order on the issue in the assessment year 2003-04, as followed by this Tribunal for the AY 2007-08 also. Grounds 12 to 12.5 are disposed of accordingly.

Ground Nos 13 to 13.3 disallowance Rs.58,61,136/- on account of Expenditure on Excise duty:

13. In respect of disallowance Rs.58,61,136/- on account of Expenditure on Excise duty, case of the assessee is that during the relevant assessment year, the assessee paid excise duty of Rs.58,61,136/-, being provision for MODVAT on quantity difference on inputs disallowed in earlier years now claimed on payment basis u/s 43B of the Act, but the assessing officer disallowed the aforesaid claim on the ground that assessee would not have been liable to make the aforesaid payments of Rs.58,61,136/- to the Excise Department if it had been able to establish that all consumptions claimed by it were for the purposes of manufacturing. Assessee submits that the payment made by them is clearly in the nature of excise duty, which is admissible as deduction on payment basis under section 43B of the Act.

13.1. Ld. AR submits that the issue is also covered in favour of the assessee by the orders of the Tribunal in the assessee's own case for AYs 2000-01, 2001-02, AY 2002-03 and AY 2007-08.

13.2. Per contra, it is the argument of the Ld. DR that this issue is related to the disallowance u/s. 43B for the year immediately preceding the previous year, and the ITAT has allowed this expenditure following the same principle laid down earlier to allow relief to the assessee on the issue of excise duty and customs duty.

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According to the Ld. DR, if this proposition is accepted in the current year, it shall defeat the very purpose of making the disallowance in the previous year and moreover, Revenue has not accepted the proposition of ITAT in allowing relief to the assessee and in that sense is a live issue. Accepting the decision of tribunal on this issue shall give finality to this issue for that particular year only. *It is further averred that these are* continuous issues forming part of the assessment order for AY 2005-06, 2006-07 and 2007-08 also, and are at present pending adjudication before Hon'ble Delhi High Court.

13.3. On a perusal of the decision, we find that this issue is substantially involved in Ground Nos. 14 to 14.3 in the assessee's appeal for AY 2007-08, and on this aspect, a coordinate Bench of this Tribunal held as under:

> *"27.3 We find that in its order dated 16.10.2012 in the case of assessee itself for the assessment year 2002-03, an identical issue has been decided in favour of the assessee by the ITAT following its earlier orders. Relevant para No. 50 thereof is being reproduced hereunder:*
>
> > *50. We have heard both the sides on this issue. This issue is covered in favour of the assessee by the decision of ITAT in assessee's own case for assessment years 2000-01 and 2001-02. The relevant para of the order for assessment year 2001-02 is reproduced hereunder:*
> >
> > > *"22. In regard to Ground No. 9 which is against the action of CIT(A) in deleting the disallowance of the Excise Duty paid by the assessee representing the reversal of the excise MODVAT availed in inputs on clearance of finished goods, it was fairly conceded by both the sides that this issue was squarely covered by the decision of the co-ordinate bench in assessee's own case for assessment year 2000-01 in ITA No. 678/Del/2004. Respectfully following the decision f the Co-ordinate Bench of this Tribunal in assessee's own case for assessment year 2000-*
> > >
> > > *01, the findings of the CIT(A) on this issue stands confirmed.*
> > >
> > > *23. It is also noticed that this Excise Duty is paid*

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> *against the order of the Settlement Commission and is in the nature of reversal of MODVAT availed on the inputs and not in the nature of penalty or fines. In the circumstances, the ground of appeal as raised by the Revenue on this issue stands dismissed."*

> *27.4 In view of the above finding of the ITAT on the issue and of the Excise Tribunal in the assessment year 2000-01 that shortage of stock of raw-material and the minor discrepancy was the result of accounting error due to use of large quantity of inputs procured from several hundred suppliers, we hold that the assessee was justified in claiming Rs.77 lacs on account of expenditure on excise duty on payment basis under sec. 43B of the Act. The Assessing Officer is accordingly directed to allow the claim. Ground Nos. 14 to 14.3 are thus allowed."*

13.4. When the facts are similar and a particular view is taken by a coordinate Bench of this Tribunal for the earlier years, it is not desirable to deviate from the same in a subsequent year in the absence of any change of circumstances, as such by respectfully following the same, we direct the Assessing Officer to allow the deduction of Rs.58,61,136/- representing the excise duty paid by the appellant during the relevant previous year. Grounds No 13 to 13.3 are allowed accordingly.

Grounds No 14 to 14.4 Sharing of resources with other Group Companies/ Subsidiary Companies

14. Succinctly stated facts relating to this ground are that during FY 2007-08, the subsidiary companies of MSIL were operating as Corporate Insurance agents of different Insurance companies, and in an era of increasing competition and consumer expectations, it was the endeavour of MSIL to provide maximum services to its customers under one-roof to improve customer experience and delight with company products. The company transformed it's dealerships to one-stop shop for sale of its products and providing all related facilities of financing, insurance, auto-card, purchase and sale of used cars, etc. Assessee submits that all these added facilities are integrally linked to the main business of the company to sell passenger cars and although

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the earnings from these activities per-se may not be very significant, the activities contribute significantly in generating the demand for the products of the company. Looking at this, the assessing officer made an ad-hoc disallowance of Rs.12,87,88,243 in the final assessment order holding the same to be relatable to/ towards sharing of appellant's resources with other group companies and

14.1. Ld. AR submitted that in view of the stringent provisions of the Motor Vehicles Act, 1988, it is mandatory that every vehicle should have a valid Insurance to drive on the road at the time of taking delivery itself from the dealership and under the governing insurance laws, it is not permissible for the company to obtain insurance agency, necessitating the assessee to promote the group companies. According to him this promotes the assessee to provide one stop shop for the company's products, which enables the company to not only promote sales but also face the ever increasing competition from rival automobile companies; to ensure smooth and timely delivery of the vehicles; to provide smooth after sale services by taking care of post-sales insurance needs of the customers; sale of spare parts and accessories; and service incomes of the company and its dealers. He further submitted that the simplistic business structure of the Insurance Company required negligible administrative and manpower support for its functioning, which has been provided by the existing set-up of MSIL. Since the assessee provided the support to the Insurance subsidiaries due to its business exigency the related cost is allowable business expenditure for the company, in view of the fact that the expression "for the purpose of business" as used in section 37(1) of the Act is much wider than "for the purpose of earning income".

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14.2. He relied on the decisions of the Supreme Court in the case of CIT vs. Malayalam Plantations Ltd.:53 ITR 140, wherein it was held, that

> *" the expression " for the purpose of the business " is wider in scope than the expression " for the purpose of earning profits ". Its range is wide : it may take in not only the day to day running of a business but also the rationalization of its administration and modernization of its machinery; it may include measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title ; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business ; it may comprehend many other acts incidental to the carrying on of a business. However wide the meaning of the expression may be, its limits are implicit in it. The purpose shall be for the purpose of the business, that is to say, the expenditure incurred shall be for the carrying on of the business and the assessee shall incur it in his capacity as a person carrying on the business. It cannot include sums spent by the assessee as agent of a third party, whether the origin of the agency is voluntary or statutory; in that event, he pays the amount on behalf of another and for a purpose unconnected with the business" (emphasis supplied)*

14.3. He submitted that the said approach is reiterated by the Hon'ble Apex Court in CIT vs. Birla Cotton Spinning. & Weaving Mills Ltd.: 82 ITR 166 (SC) and Madhav Prasad Jatia vs. CIT : 118 ITR 200 (SC) also.

14.4. By placing reliance on the decisions in Sassoon J. David and Co. P. Ltd. vs. CIT : 118 ITR 261 (SC); , CIT v Nestle India Ltd. 337 ITR ITR 103 (Del. HC) (affirmed by the Supreme Court), CIT vs Adidas India Marketing (P) Ltd: 195 Taxman 256 (Del), CIT vs Agra Beverages Corporation (P) Ltd: 200 Taxman 43 (Del. Mag.) (HC); , Sony India (P) Ltd vs. Dy. CIT : 315 ITR 150 (Del ITAT), Star India (P) Ltd.: 103 ITD 73 TM (Mum.) he argued that since the entire expenditure as incurred by the assessee wholly and exclusively for purposes of its business, any incidental/ indirect benefit to the group company(ies), it is settled

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law, cannot be the basis for disallowing the expenditure in the hands of the assessee.

14.5. As a matter of fact, Ld. AR submitted that even if the company were to recover the cost of charges provided to the Insurance subsidiaries, it shall be a very small amount compared to what has been considered by the AO in the impugned assessment order. Assessee estimated the annual cost of services/facilities provided to the different Insurance companies at Rs.1.31 Crores as below:

Salaries of Employees	10,250,000
Travelling Cost	918,000
Office Infrastructure Cost	946,800
IT System/ Application cost	985,000
Total Cost	**13,099,800**

14.6. He further submitted that the said expenditure being the business expenditure, will have to be allowed as deduction under section 37(1) of the Act, either in the hands of the appellant company or to the group companies, in that sense the entire exercise of seeking to tax the normal business expenditure is, in any case, revenue neutral as such in view of the decisions in CIT v. Excel Industries Ltd and Mafatlal Industries (P) Ltd.: 358 ITR 295 (SC), CIT v. Bilahari Investment P. Ltd.: 299 ITR 1 (SC), CIT v. Shri Ram Pistons & Rings Ltd.: 220 CTR 404 (Del.), CIT v. Triveni Engg. & Industries Ltd.: 336 ITR 374 (Del.), CIT v. Nagri Mills Co. Ltd.: 33 ITR 681 (Bom.), and CIT vs. M/s Vishnu Industrial Gases: ITA No. 229/1988 (Del.) Revenue should not agitate issues or make adjustment on issues which are revenue neutral and do not affect overall taxes likely to be collected by the Government. Ld. DR vehemently relied upon the orders of the authorities below.

14.7. On a careful reading of the record in the light of the above arguments of the Ld. Counsel, we find that there is no material that is

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brought on record to controvert the plea of the assessee that they have provided the support to the Insurance subsidiaries due to its business exigency rather than supporting the said companies and it is it is in the best interests of MSIL to do so for maximizing their profits, as such the related cost is allowable business expenditure for the company. It also further goes undisputed that this being the business expenditure will have to be allowed as deduction under section 37(1) of the Act, either in the hands of the appellant company or to the group companies. In these circumstances, while respectfully following the decisions of the Hon'ble Apex Court and the jurisdictional High Court, we find that the addition on this score cannot be sustained. Accordingly, while along ground Nos 14 to 14.4, we direct the Ld. AO to delete the same.

Grounds No 15.1 to 15.1.37 Adjustment on account of allegedly excessive AMP expenses

15. On the aspect of Adjustment on account of allegedly excessive AMP expenses relevant for Ground Nos 15.1 to 15.1.37, case of the assessee is that Maruti Suzuki India Limited ('appellant' or 'MSIL' or 'the Company') was incorporated in February 1981 and is engaged in the manufacture of passenger cars in India. MSIL is the subsidiary Suzuki Motor Corporation ('SMC' or 'the associated enterprises'). During the relevant previous year the appellant incurred expenses on advertising, marketing, sales promotion and distribution amounting to Rs 373 crores which constitutes 2.09% of the sales of the appellant. The TPO held that since the AMP expenses to sales ratio of the appellant at 2.09% was higher than the AMP/sales ratio of 0.57% of the comparable companies, the appellant had incurred non routine AMP expenses for promotion of the brand name 'Suzuki' in India. Accordingly, the TPO applying the Bright Line Test ('BLT') computed an adjustment of Rs 311.88 crore on account of allegedly excessive AMP

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expenses incurred by the appellant. The DRP directed the TPO to consider only AMP expenses incurred by the appellant and not to include sales promotion expenses within the ambit of AMP expenses for the purpose of applying the BLT. The TPO accordingly restricted the adjustment to Rs 195.16 crores. Assessee is challenging the adjustment made by the TPO as not sustainable broadly on the grounds, firstly that there is no international transaction, secondly that the Bright line test is not the prescribed method, thirdly that the appellant is the economic owner of the trademark 'maruti suzuki', fourthly that the expenditure on amp incurred wholly and exclusively for business of the appellant, and that the benefit to AE are only incidental, and lastly that the amp expenditure closely linked with the business of manufacture and sale of motor cars. We shall proceed to deal with these aspects in the light of the submissions made before us.

15.1. Coming to the first contention of the assessee that there is no international transaction, as could be seen from the record, the TPO held that since the appellant had incurred expenditure on advertisement, marketing and promotion ("AMP") expenses in "excess" of the "bright line", the excess would be treated as independent international transaction of rendering service of brand building by the appellant to Suzuki Motor Corporation, Japan ('Suzuki or the associated enterprise) for which the appellant needed to be compensated at arms' length. Ld. AR submitted that in the case of the appellant, the TPO has inferred the existence of an international transaction on the basis of Bright Line Test without placing on record any evidence or material to substantiate the existence of such a transaction, as such, the benchmarking analysis undertaken by the TPO without first establishing the existence of an international transaction is bad in law and is liable to be deleted. In this respect, Ld. AR submitted that the onus is on the revenue to demonstrate the

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existence of an international transaction on the basis of tangible material or evidence and the existence of such a transaction cannot be a matter of inference. It is submitted that in the absence of an international transaction between the applicant and the associated enterprise, there is no question of undertaking a benchmarking analysis to determine the arm's length price. He submitted that for construing transaction of rendering service, it needs to be demonstrated with evidence that there was an offer and acceptance for such transaction of rendering service i.e., the service must be shown to have been rendered at the instance of the AE and such AMP expenses have been incurred on behalf of the AE requiring compensation by the AE to the Indian assessee, and the TPO has not established existence of any mutual agreement or arrangement for allocation of apportionment of such AMP expenses incurred by the appellant for benefit of the associated enterprise.

15.2. By placing reliance on the decision of the Hon'ble Delhi High Court in case of Whirlpool of India Ltd vs DCIT 381 ITR 154 Ld. AR submitted that in this case too it was held that there should be some tangible evidence on record to demonstrate that there exists an international transaction in relation with incurring of AMP expenses for development of brand owned by the associated enterprises and in the absence of such transaction there is no question of undertaking any benchmarking of AMP expenses. He further submitted that the Hon'ble Delhi High Court in the appellant's own case for assessment year 2005-06 & 2006-07 381 ITR 117, while distinguishing the decision in the case of Sony Ericsson Mobile Communications (supra), held that the existence of international transacting relating to AMP expenses was not in dispute and therefore, the findings of the Hon'ble High Court in the case of Sony Ericsson to the extent it upholds the existence of an international transaction cannot be applied in cases

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where the taxpayer raises a dispute as to the existence of such a transaction and that the Revenue needs to establish the existence of an international transaction before undertaking benchmarking of AMP expenses and such transaction cannot be inferred merely on the basis of Bright Line Test.

15.3. Now turning the other ground of challenge stating that Bright Line Test is not the prescribed method, Ld. AR submits that the TPO, in fact has founded the entire case on the Bright Line Test of alleged excessive AMP expenditure incurred by the appellant vis-à-vis comparables, to assume, infer or imply existence of an international transaction, and such application of BLT has no statutory mandate and has been rejected by the Hon'ble Delhi Court in the case of Sony Ericsson (supra).

15.4. Adverting to the contention that the assessee is the Economic Owner of the trademark 'Maruti Suzuki', Ld. AR submitted that the Hon'ble High Court in the case of Sony Ericsson Mobile Communications India Pvt Ltd (supra) has further held that no transfer pricing adjustment in respect of AMP expense can be made where the assessee (Indian entity) has economic ownership of the brand/logo/trademark in question, in the case of long term right of use of the same, and this principle also squarely covers the present case. He further stated that the appellant has a long term agreement for the use of the trademark "Maruti Suzuki' in India, which clearly evidences the fact that the economic benefit arising out of the alleged promotion of the AE's logo is being enjoyed by the appellant. According to him the economic ownership of the trademark 'Maruti Suzuki' rests with the appellant, and the Hon'ble High Court in the case of Sony Ericsson Mobile Communications India Pvt Ltd vs CIT (supra) disagreed with the finding of the Special Bench that the

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concept of economic ownership is not recognized under the Act. He submitted that the Hon'ble Delhi High Court in the case of the appellant for AY 2005-06 & 2006-07 accepted the contention of the appellant that it has been using the brand 'Maruti Suzuki' for a long period of time and the said brand is neither owned nor could be used by SMC. Basing on this, he submitted that the economic ownership of the brand rests with the appellant and accordingly, the appellant cannot be expected to seek compensation for the expenditure incurred on the asset economically owned by it.

15.5. Next contention of the assessee is that the expenditure on AMP was incurred wholly and exclusively for business of the appellant whereas the benefit to AE is only incidental. Relying on the decision of the Hon'ble Supreme Court in the case of Sassoon J. David and Co. (P.) Ltd. vs CIT : 118 ITR 261 he argued that expenditure incurred wholly and exclusively for purpose of business of an assessee would be allowable deduction notwithstanding that such expenditure may incidentally benefit third party. Reliance in this regard is also placed on para 7.12 and 7.13 of the OECD guidelines on transfer pricing. According to him, in the present case, the expenses have been incurred by the appellant herein for promotion of its business in India, which is reflected in the form of higher turnover and increased profitability. The expenditure in question ensures directly for the benefit of business of appellant in India. The benefit, if any, to the AE is only incidental and it is for this reason that no part of the expenditure have been disallowed by the Revenue in terms of section 37(1) of the Act.

15.6. Last contention of the assessee on this aspect is that the AMP expenditure is closely linked with the business of manufacture and sale of motor cars, and on this aspect it is the submission of the Ld.

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AR that the AMP expenditure incurred by the appellant is closely linked with the business of manufacture and sale of models of motor cars undertaken by the appellant, and that the AMP expenditure relates to the entire turnover/production of the appellant and constitutes an essential part of the cost of sales. According to him, without these expenses, the appellant would not be able to compete effectively, as such the AMP expenses being closely linked with `the business of manufacture and sale of models of motors cars, the same has to be benchmarked on aggregate basis by applying entity level TNMM.

15.7. In this regard, reliance is placed on behalf of the assessee on the decision of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications (supra) wherein the Hon'ble Court held that Clubbing of closely linked including continuous transactions is permissible in appropriate cases. The Hon'ble Court further held that once the Revenue accepts the TNMM as the most appropriate method, then it would be inappropriate for the Revenue to treat a particular expenditure as a separate international transaction. Such an exercise, the Hon'ble Court held, would lead to unusual and absurd results. Reliance is also placed in this regard on the decision of the Hon'ble Pune Bench of the Tribunal in the case of Demag Cranes & Components (India) Pvt. Ltd. Vs. DCIT and Cummins India Ltd vs Addl CIT (ITA No 1616/PN/2011) wherein the Tribunal upheld the aggregation of closely linked transactions.

15.8. It is submitted on behalf of the assessee that in the present case, the operating profit margin of the appellant at 13.17% is higher than that of the comparable companies at 0.36% and TNMM has undisputedly been satisfied and accepted by the TPO, and since the operating margins of the appellant are in excess of the selected

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comparable companies, no adjustment on account of AMP expenses is warranted in the case of the appellant.

15.9. Per contra, while place heavy reliance on the comments of the TPO on this issue for AY 2007-08, which are as hereunder,

"4.2 **Issue of AMP**

4.2.1 As per clause 5.01 and 5.02 of the agreement, the assessee was responsible to develop, promote and expand the sale of product and parts manufactured by the AE within India. The responsibility to promote trade mark, and to develop and expand market for sale of Motor car and its parts was on the assessee as per agreement. Therefore it was proposed by the TPO that the assessee should have been compensated for the services rendered by it in building, developing and promoting the brand name of Suzuki on behalf of SMC Japan.

4.2.2 It can be seen that assessee was a leader in the past as it is today. It is beyond any rational logic to understand how brand logo of a foreign company which was relatively unknown as compared to 'MARUTI'' trade mark had established the market share or assisted in retaining the market share. The assessee was a licensed manufacturer and it had paid lump sum royalty as well as running royalty. Also the cost of the AE was embedded in imports of 'M '. Further, there were restrictions put by the AE in use of brand logo 'S'. Since beginning, the assessee had nurtured its own brand "MARUTI" and established itself as a market leader without any assistance from its A.E. It is pertinent to mention that assessee was a market leader prior to the year 2003-2004 also. Therefore, the contention of the assessee that the use of trade mark (S) had benefited assessee is without any economic logic. The assessee has incurred huge expenditure on advertisement for domestic sales and exports made. Therefore, assessee cannot take claim that the use of (S) trade mark had helped in export of goods. The assessee was getting the benefit of the global brand of AE. It was carefully perused by the TPO by the claim of assessee and have noted that assessee had exported goods as a full risk bearing entity. It had used distributors appointed by AE and had also incurred overseas advertisement expenses. The bottom-line that all the goods exported were under the brand name of "SUZUKI" of the AE and "Maruti" brand was not used. Therefore, on the basis of economic analysis of export transactions, it is evident that assessee was made to behave as a contract manufacturer or a license manufacturer depending upon the need of the associated enterprise. If the brand of the AE was to be used, then the risk was to be allocated accordingly between the AE and the assessee.

4.2.3 The TPO examined that M/s Suzuki Motor Corporation, Japan, the AE of the assessee which is engaged in manufacturing and sale of Motor vehicles and Motor vehicles parts had granted license to manufacture Motor car and its parts along with license to sale and after

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sale service to the assessee. It had also granted license to use trade mark "SUZUKI " and "MARUTI-SUZUKI" to the assessee. The responsibility to promote trade mark, and to develop and expand market for sale of Motor car and its parts was on the assessee as per agreement. The assessee had developed market and promoted the trade mark of the AE which has a controlling interest in the assessee company at huge economic cost and the risk. It is evident that the assessee had developed local marketing intangible for its AE in India by incurring huge advertisement expenditure on promotion of cobranded trade mark, development of huge network of dealers and after sale service. Admittedly, the assessee had also incurred a considerable amount as advertisement expenditure on promotion of the "SUZUKI" brand name in European market even when the assessee was a contract manufacturer to the AE and had exported "Suzuki" branded car in that capacity. In the year under consideration the assessee had incurred advertisement expenditure on market and promotion of cobranded trademark including promotion of "SUZUKI " trade mark. It is evident from audited accounts that the AE had not compensated the assessee for cost incurred on development of market intangible. Therefore, the crucial issue in this case revolves around the determination of quantum of advertisement expenditure incurred by the assessee on promotion of brand of the AE and on development of marketing intangible for the AE in India and European countries in addition to routine expenditure of advertisement required by the assessee for its business i.e., to fix bright line limit for advertisement expenditure.

4.2.4 It has been held that the increase in sales is not because of the Suzuki brand name but because of the efforts put in by the Assessee Company since beginning. The assessee had nurtured its own brand "MARUTI" and established itself as a market leader without any assistance from its A. E.

4.2.5 The assessee in its reply to the TPO had mentioned that the Assessee Company is a licensed manufacturer and not a distributor and thus the bright line concept is not applicable to it. In para 6.38, only a reference to the 'distributor' has been made in an exemplary capacity.

For understanding the concept, we will have to refer to the opening para 6.36 and para 6.37 of the ' Marketing Activities ' section of the OECD guidelines

"D. Marketing activities undertaken by enterprises not owning trademarks or trade names:

> *6.36 Difficult transfer pricing problems can arise when marketing activities are undertaken by enterprises that do not own the trademarks or trade names that they are promoting (such as a distributor of branded goods). In such a case, it is necessary to determine how the marketer should be compensated for those activities. The issue is whether the marketer should be compensated as a service provider, i.e. for providing promotional*

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> *services, or whether there are any cases in which the marketer should share in any additional return attributable to the marketing intangibles. A related question is how the return attributable to the marketing intangibles can be identified.*
>
> *6.37 As regards the first issue — whether the marketer is entitled to a return on the marketing intangibles above a normal return on marketing activities — the analysis requires an assessment of the obligations and rights implied by the agreement between the parties. It will often be the case that the return on marketing activities will be sufficient and appropriate. One relatively dear case is where a distributor acts merely as an agent, being reimbursed for its promotional expenditures by the owner of the marketing intangible. In that case, the distributor would be entitled to compensation appropriate to its agency activities alone and would not be entitled to share in any return attributable to the marketing intangible."*

4.2.6 It is seen from the combined reading of the above two paras of OECD Guidelines that the word 'distributor' has been used (as emphasised above) only to explain one particular situation/example. In fact, the general term used in the above guidelines is 'Marketer'. This term does not distinguish between the 'manufacturer' or the 'distributor ' as such. If an example of the distributor' has been used in the guidelines, it does not mean that the 'manufacturers' are excluded /exempted from the term 'marketer'. These portions of the guidelines are directed towards the issue of creation and valuation of marketing intangibles. They are not meant for placing limits, where or by whom the intangibles will be created. Any person incurring expenditure for brand promotion may be involved in creating marketing intangibles.

4.2.7 It is also seen the assessee has not appreciated that para 6.38 does not refer to 'traders' who operate in buy-sell model. It refers to term 'distributor' and even a 'manufacturer' engages in distribution of its products. Specially, in a situation where an independent manufacturer like Maruti Suzuki uses the brand name of its AE for the purpose of distribution of its manufactured products, there is no reason why para 6.38 should not be applicable to the facts and circumstances of its case. Para 6.38 deals with the treatment of marketing intangibles in a situation where a company distributes or manufacture and distributes products under a 'brand ' legally not owned by it.

4.2.8 The assessee company has also not been able to show to the TPO, as to how the creation of market intangibles does not take place, when the AMP expenses are borne by the manufacturer and how the market intangibles are created, when the AMP expenses are borne only by the distributor. Therefore, the argument of the assessee was rejected on this point and the AMP expenses debited to Profit & Loss account was considered for the purpose of calculating the excessive AMP expenditure over the bright line limit.

4.2.9 As noted by the TPO, the assessee had started shifting its

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registered trademark and logo "M'' from front side of the various car models manufactured by it with trade mark "S" of the AE as early as in the year 1993. In the early stage the assessee had piggybacked its logo only in one car model i.e., Zen. Later on after the AE had acquired controlling rights in the assessee company in financial year 2003-04 and the process of piggybacking of the assessee brand "M" by trade mark "S" was hastened w.effinancial year 2003-04 and many more car models were selected for shifting of "M" logo from front side with "S" logo.

4.2.10 The AE has also started process of co-branding of both the trades marks i.e., "Suzuki" and "Maruti" by signing a license agreement with the assessee as early as 1992-93. However, in initial period use of cobranded logo was very rare. The process of putting cobranded logo on the back side of various car models had speeded up only after the AE had acquired controlling rights in the assessee in the financial year 2003-04. Since assessee had started using cobranded logo on the back side of the cars manufactured by it in a big way only after financial year 2003-04, the process of impairment of "Maruti" trade mark and reinforcement of brand value of "Suzuki " trade mark has taken place effectively in a big way only after financial year 2003-04.

4.2.11 It is evident that both the processes of piggybacking of "Maruti" trade mark by the "Suzuki " trade mark and co-branding of "Maruti " logo along with "Suzuki " logo has resulted in impairment of "Maruti" brand value and reinforcement of value of "Suzuki" brand of the AE in a big way from F.Y. 2003-04. Impairment of "Maruti " or "M" brand has started because "Maruti " was super brand in India in its own right as compared to "Suzuki" trademark and was developed by incurring several thousand crores of expenditure on advertisement and marketing for a period of two decades. The process of reinforcement of value of "Suzuki " brand has started because "Suzuki " being a very low value brand in Indian market was used along with "Maruti " trade mark in cobranding process. This resulted in migration of intangible embedded in "Maruti" brand to "Suzuki" brand due to association of both the brands together.

4.2.12 The assessee ignoring the migration of intangible embedded in "Maruti " brand to the low value brand "Suzuki" of the AE through the process of piggybacking and co-branding had agreed to pay the AE a royalty for sale of car using cobranded logo or "Suzuki " logo.

4.2.13 The assessee for non economic reason even ignored an important fact that the co branding of both the trademarks as stipulated in the agreement extracted earlier in this order involves use of "Maruti" trade mark owned by the assessee without any corresponding compensation. The assessee has ignored the vital issue of replacement of "M" logo with "S" logo on existing model of cars. The co-branding of "Maruti- Suzuki " resulted in reinforcement of value of "Suzuki" brand and simultaneous impairment of "Maruti" trademark for which it had received no compensation but had incurred huge expenditure of several thousand

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crores to develop "Maruti " or "M" as super brand. Contrary to this the assessee agreed to pay brand royalty for use of "Suzuki " trade mark as part of cobranded trade mark.

4.2.14 Assessee had incurred advertisement expenses, marketing and distribution expenses for promotion of "SUZUKI" trade mark of the AE in India and abroad. The distribution and the marketing expenditure were also incurred for development of marketing intangible. The advertisement expenses incurred for advertisement on the print and electronic media has resulted in global promotion through satellite television broadcasting. The assessee had advertised "SUZUKI" brand owned by the associated enterprise. The advertisement carried out by the assessee on print and electronic media had contributed to brand building of the AE. Therefore, the advertisement expenses incurred by the assessee would be compared with the advertisement expenses of the comparables selected by the assessee in the transfer pricing report. The contention of the assessee that the cost benefit analysis should be based on the analysis of independent comparables is accepted. The arm's length expenditure would be based on the advertisement expenditure incurred by the independent comparables companies identified by the assessee in the transfer pricing report.

4.2.15 The OECD has recognized that 'brand' is an intangible and represents a combination of intangibles and/or other items, including among others, trademarks, trade names, customer relationships, reputational characteristics and goodwill.

In para 6.7 of the Action 8-10 report, it has been observed by BEPS as under:-

> *6.7 Intangibles that are important to consider for transfer pricing purposes are not always recognised as intangible assets for accounting purposes. For example, costs associated with developing intangibles inleinally through expenditures such as research and development and advertising are sometimes expensed rather than capitalised for accounting purposes and the intangibles resulting from such expenditures therefore are not always reflected on the balance sheet. Such intangibles may nevertheless be used to generate significant economic value and may need to he considered for transfer pricing purposes Furthermore, the enhancement o value that may arise from the complementary nature of a collection of intangibles when exploited together is no: ahvavs reflected on the balance sheet. Accordingly, whether ail item should be considered to be an intangible for transfer pricing purposes under Article 9 of the OECD Model Tax Convention can be informed by[7] its characterisation for accounting purposes, but will not be determined by such characterisation only Furthermore, the determination tliar an item should be regarded as an intangible for transfer pricing purposes does not determine ox follow from its characterisation for*

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general tax purposes, as. for example, an expense or an amortisable asset.

The above text clearly states that spend on advertisement leads to build-up of intangibles and such spend should be capitalized for proper reflection in the Balance Sheet. Failure to do so, as by the assessee in the instant case, calls for immediate compensation by the AE for the significant economic value created for the AE's brand by such advertisement spend. The OECD has also recognised that characterization of an intangible for general tax purposes may not hamper or distort its true characterization of being an intangible. Thus, OECD has reinforced the view that advertisement spend by the assessee leads to creation of an intangible and whatever characterization has been given by the assessee for such advertisement spend for general tax purposes won 't impact the creation of an intangible by the assessee for its AE, for which the former needs to be commensurately compensated with a mark-up.

BEPS has recognised that the legal owner of intangibles must compensate the group entities for the functions performed by them, assets utilised and risks assumed which have contributed to the value of intangibles by observing as under:

6.32 In transfer pricing cases involving intangibles, the determination of the entity or entities within an MNE group which are ultimately entitled to share in the returns derived by the group from exploiting intangibles is crucial.[15] A related issue is which entity or entities within the group should ultimately bear the costs, investments and other burdens associated with the development, enhancement, maintenance, protection and exploitation of intangibles. Although the legal owner of an intangible may receive the proceeds from exploitation of the intangible, other members of the legal owner's MNE group may har e performed functions, used assets.[16] or assumed risks that are expected to contribute to the value of the intangible. Members of the MNE group performing such functions, using such assets, and assuming such risks must be compensated for their contributions under the arm's length principle. This Section B confirms that the ultimate allocation of the returns derived by the MNE group from the exploitation of intangibles, and the ultimate allocation of costs and other burdens related to intangibles among members of the MNE group, is accomplished by compensating members of the MNE group for functions performed, assets used, and risks assumed in the development, enhancement, maintenance, protection and exploitation of intangibles according to the principles described in Chapters I—III.

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6.48 In identifying arm's length prices tor transactions among associated enterprises, the contributions of members of the group related to the creation of intangible value should be considered and appropriately rewarded The arm's length principle and the principles of Chapters I—III require that ail members of the group receive appropriate compensation for any functions they perform, assets they use. and risks they assume in connection with the development, enhancement, maintenance, protection, and exploitation of intangibles, it ***is*** *therefore necessary to determine, by means of* ***a*** *functional analysis, winch member(s) perform and exercise control over development, enhancement, maintenance, protection, and exploitation functions, which member(s) provide funding and other assets, and which member(s) assume the various risks associated with the intangible Of course, in each of these areas, this may or may not be the legal owner of the intangible As noted in paragraph 6.133. it is also important in determining arm's length compensation for functions performed, assets used, and risks assumed to consider comparability factors that may contribute to the creation of value or the generation of returns derived by the MNE group from the exploitation of intangibles determining prices for relevant transactions.*

5. The High Court in writ petition MSIL v ACIT/TPO (2010) 328 ITR 210 (Del), the Division Bench came to the following conclusion:-

(i) *The contractual obligations on MSIL under the agreement dated 12th December 1992 to use the joint trademark 'Maruti Suzuki' as well as the parts manufactured and or sold by MSIL in India showed that SMC wanted to popularize its name in India at the cost of brand Maruti.*

(ii) *It could not be accepted that there was no possible benefit to 'Suzuki' on account of the compulsory use of the joint trademark 'Mamti Suzuki' on all the parts and products manufactured and sold by Maruti in India. Since the TPO may not be able to devise an objective and fair method to assess the monetary value of the benefit obtained by Suzuki m the form of marketing intangibles including the benefit on account of compulsory use of the jomt trademark Maruti Suzuki', the TPO would have to determine the ALP by finding out "what payment, if any, a comparable independent domestic entity would have made in respect of an agreement of this nature.*

6. While giving the above direction, the Division Bench summarized its conclusions which included the following:-

(a) *The onus was on MSEL to satisfy die TPO/AO that die AMP computed by it was consistent with Section 92 of the Act. If the TPO AO proposed to make adjustment by revising the AMP, notices would have to be given to MSIL. followed by their reply and producing evidence.*

(b) *The AMP expenditure incurred by the domestic entity using the trademark of the foreign name does not normally require payment or compensation by die owner of the foreign trademark or such use 'so long*

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> *as the expenses incurred by die domestic entity' do not exceed the expenses which a similarly situated and comparable independent domestic entity would have incurred ".*

7. On the issue of AMP, the Department in AY 2006-07 is already before the Hon 'ble Apex Court, wherein, the following Substantial Question of Law has been taken:-

- i. *Whether the Hon 'ble High Court was right in holding that AMP expenses does not constitute an international transaction and hence, it does not lead to the creation of marketing intangibles?*
- ii. *Whether the Hon'ble High Court was right in law in stating that the existence of an international transaction cannot be arrived at form the clauses of the intercompany arrangement?*
- iii. *Whether the Hon 'ble High Court was right in law in holding that the IT Act does not have machinery provision to benchmark the international transaction arising from AMP expenses?*
- iv. *Whether the Hon'ble High Court was right in rejecting the BLP to benchmark the AMP transactions?*
- v. *Whether the Hon 'ble High Court was right in law in observing that the benefit to the AE due to AMP expenditure in only incidental and not intentional?*
- vi. *Whether the Hon 'ble High Court was right in law in observing that if no application of TNMM the transactions are found to be at arm's length then no adjustment is warranted ignoring the fact that a separate benchmarking of each international transaction is permitted as per IT Act and international guidance? "*

15.10. Ld. DR submitted that the TPO has recommended for filing of further appeal u/s. 260A before the Hon'ble High Court for AY 2007-08, and the issues involved for the AY 2008-09 being continuous issues forming part of the assessment order for AY 2006-07 and 2007-08 are also at present pending adjudication before Hon'ble Delhi High Court.

15.11. We have considered the facts and contentions of either of the parties in the light of the decisions relied upon by them. On a reading of the decisions cited on behalf of the assessee, we find that in case of Whirlpool of India Ltd vs DCIT 381 ITR 154, it was held that, -

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"32. Under Sections 92B to 92F, the pre-requisite for commencing the TP exercise is to show the existence of an international transaction. The next step is to determine the price of such transaction. The third step would be to determine the ALP by applying one of the five price discovery methods specified in Section 92C. The fourth step would be to compare the price of the transaction that is shown to exist with that of the ALP and make the TP adjustment by substituting the ALP for the contract price.

... ...

... ...

34. The TP adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE.

35. It is for the above reason that the BLT has been rejected as a valid method for either determining the existence of international transaction or for the determination of ALP of such transaction. Although, under Section 92B read with Section 92F (v), an international transaction could include an arrangement, understanding or action in concert, this cannot be a matter of inference. There has to be some tangible evidence on record to show that two parties have "acted in concert".

... ...

... ...

37. The provisions under Chapter X do envisage a 'separate entity concept'. In other words, there cannot be a presumption that in the present case since WOIL is a subsidiary of Whirlpool USA, all the activities of WOIL are in fact dictated by Whirlpool USA. Merely because Whirlpool USA has a financial interest, it cannot be presumed that AMP expense incurred by the WOIL are at the instance or on behalf of Whirlpool USA. There is merit in the contention of the Assessee that the initial onus is on the Revenue to demonstrate through some tangible material that the two parties acted in concert and further that there was an agreement to enter into an international transaction concerning AMP expenses.

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39. It is in this context that it is submitted, and rightly, by the Assessee that there must be a machinery provision in the Act to bring an international transaction involving AMP expense under the tax radar. In the absence of any clear statutory provision giving guidance as to how the existence of an international transaction involving AMP expense, in the absence of an express agreement in that behalf, should be ascertained and further how the ALP of such a transaction should be ascertained, it cannot be left entirely to surmises and conjectures of the TPO

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47. For the aforementioned reasons, the Court is of the view that as far as the present appeals are concerned, the Revenue has been unable to demonstrate by some tangible material that there is an international transaction involving AMP expenses between WOIL and Whirlpool USA. In the absence of that first step, the question of determining the ALP of such a transaction does not arise. In any event, in the absence of a machinery provision it would be hazardous for any TPO to proceed to determine the ALP of such a transaction since BLT has been negatived by this Court as a valid method of determining the existence of an international transaction and thereafter its ALP"

15.12. Under a similar set of facts as are involved in this matter, in the assessee's own case for assessment year 2005-06 & 2006-07 in the decision reported in 381 ITR 117, the Hon'ble Court while holding that AMP expenses incurred by the assessee do not constitute an international transaction held as under:

44. However, in the present appeals, the very existence of an international transaction is in issue. The specific case of MSIL is that the Revenue has failed to show the existence of any agreement, understanding or arrangement between MSIL and SMC regarding the AMP spend of MSIL. It is pointed out that the BLT has been applied to the AMP spend by MSIL to (a) deduce the existence of an international transaction involving SMC and (b) to make a quantitative 'adjustment' to the ALP to the extent that the expenditure

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*exceeds the expenditure by comparable entities. It is submitted that with the decision in **Sony Ericsson** having disapproved of BLT as a legitimate means of determining the ALP of an international transaction involving AMP expenses, the very basis of the Revenue's case is negated.*

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*51. The result of the above discussion is that in the considered view of the Court the Revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of AMP expenditure by MSIL. Secondly, the Court is of the view that the decision in **Sony Ericsson** holding that there is an international transaction as a result of the AMP expenses cannot be held to have answered the issue as far as the present Assessee MSIL is concerned since finding in **Sony Ericsson** to the above effect is in the context of those Assessees whose cases have been disposed of by that judgment and who did not dispute the existence of an international transaction regarding AMP expenses.*

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60. As far as clause (a) is concerned, SMC is a non-resident. It has, since 2002, a substantial share holding in MSIL and can, therefore, be construed to be a non-resident AE of MSIL. While it does have a number of 'transactions' with MSIL on the issue of licensing of IPRs, supply of raw materials, etc. the question remains whether it has any 'transaction' concerning the AMP expenditure. That brings us to clauses (b) and (c). They cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of MSIL is "any other transaction having a bearing" on its "profits, incomes or losses", for a 'transaction' there has to be two parties. Therefore for the purposes of the 'means' part of clause (b) and the 'includes' part of clause (c), the Revenue has to show that there exists an 'agreement' or 'arrangement' or 'understanding' between MSIL and SMC whereby MSIL is obliged to spend excessively on AMP in order to promote the brand of SMC. As far as the legislative intent is concerned, it is seen that certain transactions listed in the Explanation under clauses (i) (a) to (e) to Section 92B are described as 'international transaction'. This might be only an illustrative list, but significantly it does not list AMP spending as one such transaction.

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68……………….In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly in light of the fact that the BLT has been expressly negatived by the Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT

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(ii) Question No.2 is answered in the negative i.e. in favour of the Assessee and against the Revenue. In other words, it is held that AMP expenses incurred by MSIL cannot be treated and categorised as an international transaction under Section 92B of the Act.

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"Economic ownership of the brand

77. The next issue is concerning the economic ownership and legal ownership of the brand. According to the Revenue, viewing legal ownership as something distinct from economic ownership "may not be the right way of looking at things."

78. It is necessary at this juncture to examine the history of the relationship between MSIL and SMC. When the licence agreements were originally entered in 1982, MSIL was known as Maruti Udyog Limited ('MUL') and SMC did not hold a single share in MUL. In 2003 SMC acquired the controlling interest in MSIL. There are various models of Suzuki motor cars manufactured by MSIL and each model is covered by a separate licence agreement. Under these agreements SMC grants license to MSIL to manufacture that particular car model; provides technical know-how and information and right to use Suzuki's patents and technical information. It also gives MSIL the right to use Suzuki's trade mark and logo on the product. Pursuant to the above agreement, MSIL has been using the co- brand i.e. Maruti-Suzuki trade mark and logo for more than 30 years. As already noted, this co-brand cannot be used by SMC and is not owned by it."

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"MSIL's higher operating margins

86. In Sony Ericsson it was held that if an Indian entity has satisfied the TNMM i.e. the operating margins of the Indian enterprise are much higher than the operating margins of the comparable companies, no further separate adjustment for AMP expenditure was warranted. This is also in consonance with Rule 10B which mandates only arriving at the net profit by comparing the profit and loss account of the tested party with the comparable. As far as MSIL is concerned, its operating profit margin is 11.19% which is higher than that of the comparable companies whose profit margin is 4.04%. Therefore, applying the TNMM method it must be stated that there is no question of TP adjustment on account of AMP expenditure."

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and a coordinate Bench of the Tribunal, in the appellant's own case for assessment year 2007-08, followed the above decision of the Hon'ble High Court for AY 2005-06 & 2006-07 to direct the TPO to delete the adjustment on account of AMP expenses.

15.13. These findings of the Hon'ble High Court have been followed in the cases of Honda Siel Power Products Ltd vs DCIT (ITA No 346/2015) & Bausch and Lomb Eyecare India Pvt Ltd vs Addl CIT 385 ITR 227 and by coordinate Benches of this tribunal in the case of Essilor India Pvt Ltd vs DCIT (ITA No 29/Bang/2014), Goodyear India Limited vs. DCIT (ITA No 5650/Del/2011), and LÓreal India Private Limited vs DCIT (ITA No. 7714/mum/2012 wherein by placing reliance upon the decision of the Hon'ble Delhi High Court in the case of Maruti Suzuki (supra) it was held that in the absence of an agreement or arrangement between the assessee and the associated enterprise with regard to development of brand, it cannot be inferred that there exists an international transaction between the assessee and the associated enterprise and therefore, the question of

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determination of ALP does not arise. wherein it has been reiterated by the Court that the Revenue needs to establish on the basis of some tangible material or evidence that there exists an international transaction of provision of brand building service between the assessee and the associated enterprise and in the absence of any transaction, there is no question of undertaking any benchmarking analysis with respect to AMP expenses.

15.14. In the case of Loreal India Private Limited vs DCIT (ITA No. 7714/mum/2012, the Hon'ble Mumbai Bench of the Tribunal, rejected the claim of the revenue to set aside the matter to the file of the TPO for finding the existence of an international transaction, holding as under:

> *"With regard to the submissions of the AR that the issue of AMP should be restored back to the file of the AO, we want to mention that law as a concept is supposed to evolve with passage of time-it cannot be static always. Non-availability of a particular decision of the higher forum cannot justify the restoration of issue/cases to the file of AO in each and every case. Unnecessary litigation has to be avoided and issues have to be settled for once and all. We are of the opinion that after the judgments of Maruti Suzuki and Bausch & Lomb (supra) there is no scope of any other interpretation about the AMP expenditure. In the case under consideration, the AO/TPO has not brought anything on record that there existed and agreement, formal or informal, between the assessee and the AE to share/reimburse the AMP expenditure incurred by the assessee in India. In absence of such an agreement the first and primary precondition of treating the transaction in question an international transaction remains un-fulfilled. Conducting FAR analysis or adopting an appropriate method is the second stage of transfer pricing adjustments. The first thing is to find out whether the disputed transaction in is international transaction or not. Without crossing the first threshold second cannot be approached. In the case under consideration, we are of the opinion that AMP expenditure is not an international transaction and therefore we are not inclined to restore back the issue to the file of the AO."*

15.15. Similar view was taken in Essilor India Pvt Ltd vs DCIT (ITA No 29/Bang/2014), Heinz India Pvt. Ltd. vs ACIT (ITA No. 7732/Mum/2010),

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Honda Siel Power Products Ltd. vs. DCIT (ITA No. 551/Del/2014), and Mondelez India Foods Pvt Ltd vs Addl CIT (ITA No 5470/Mum/2012).

15.16. We, therefore, while respectfully following the decision in 381 ITR 117 in assessee's own case hold that the AMP expenses incurred by MSIL cannot be treated and categorised as an international transaction under Section 92B of the Act, and the question of the TPO making any transfer pricing adjustment in respect of such transaction Chapter X does not arise. Grounds No 15.1 to 15.1.37 are allowed accordingly.

Ground No. 15.2-15.2.14 Adjustment on account of payment of royalty for use of brand name

15.17. Now coming to the aspect of addition of Rs. 237.24 crore, adjustment on account of payment of royalty for use of brand name, relevant facts are that during the relevant previous year the appellant inter alia entered into the transaction of payment of royalty of Rs 494.25 crore to Suzuki Motor Corporation ('the associated enterprise') in consideration for the right to manufacture and sell various models of motor cars. TNMM was applied to benchmark the aforesaid transaction of payment of royalty and OP/Sales was considered as the profit level indicator. Since the operating profit margin (OP/Sales) of the appellant at 13.17% was higher than the average of the operating profit ratio of comparable companies, at 6.60% the international transactions entered into by the appellant were considered as having been entered at arm's length price, applying TNMM. The TPO, however, disregarded the benchmarking analysis undertaken by the assessee and held that the international transaction of payment of royalty does not satisfy the arm's length principle, that the appellant was not justified in paying any royalty to SMC towards use of SMC's trademark, and allocated the royalty paid by the appellant in the ratio of R&D and

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AMP expenses incurred by the associated enterprise. The TPO accordingly held that 48% of the total royalty paid by the appellant is towards use of trademark. The TPO accordingly made an adjustment of Rs 237.24 crores being 48% of the total royalty paid by the appellant. In this regard Ld. AR submitted that the Tribunal in the appellant's case for assessment year 2005-06 (ITA No 5237/Del/2011) (para 10 to 17 of the order) and for assessment year 2006-07 (ITA No 5120/Del/2010) (para 7.6 and 7.7 of the order) deleted similar adjustment on account of payment of Brand royalty. Following the order for assessment year 2006-07, the Tribunal directed for the deletion of transfer pricing adjustment on account of payment of royalty in assessment year 2007-08 (ITA No 5720/del/2011) (para 28.8 of the order). Ld. AR further submitted that similarly in the case of Goodyear India Ltd vs DCIT (ITA No 5650/Del/2011) held that payment of royalty cannot be disallowed arbitrarily on the basis that a brand is weak. The Tribunal further held that there is a direct nexus between the revenue of the taxpayer and the payment of royalty and the Revenue cannot challenge or dispute the benefit derived by the taxpayer from payment of such royalty. The Tribunal while deleting the adjustment made by the TPO held as under:

> *"12. Another contention of the TPO that the Goodyear Brand was weak and therefore does not require payment of royalty, is not brought out from the records. The AR of the assessee has made elaborate submission and placed evidence on record to show that 'Goodyear' brand is considered to be one of the top most acclaimed brand across the globe. Therefore, there is no merit in the allegation of the TPO that Goodyear brand has no worth and therefore, the payment made by the assessee for use of Goodyear brand is unwarranted*
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> **...** **...** **...**
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> *16. In light of the above, we conclude that there exists a direct nexus between the revenue earned by the assessee and the payment of royalty*

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made to the associated enterprise for using brand name, and therefore, it would be incorrect to analyze the transaction of payment of royalty in isolation. Further, the ld. DR had raised a contention that the assessee has not demonstrated how the payment for royalty beneficial to the taxpayer. We are of the opinion that, ascertaining whether a service has actually benefitted the assessee is not within the prerogative of the tax authorities"

15.18. Ld. AR, therefore, basing on the findings of the co-ordinate benches in the preceding year, prayed to delete the similar Transfer Pricing adjustment allegedly on account of brand royalty, amounting to Rs. 237.24 crores.

15.19. Per contra, Ld. DR placed reliance on the following comments of TPO on this issue for AY 2007-08 and adopted the same line of arguments before us.

"4 <u>TPO Comments:</u>

*4.1. **<u>ISSUE OF ROYALTY</u>***

4.1.1 The brief facts are that Maruti Suzuki India Limited (earlier also known by the name of Maruti Udyog limited) is a well known small and medium sized passenger cars/vehicles in India. It basically caters to the consumer segment placed in the middle income group and upper middle income group.

4.1.2 The assessee, M/s Maruti Suzuki India Limited, is engaged in the manufacture of passenger cars in India, and is the subsidiary of Japan-based Suzuki Motor Corporation (SMC).

The assessee had started its business in 1982 as a 100% Government of India owned company and is a licensee manufacturer in India. As on 31.3.2005, SMC held 54.21% share in MSIL and approx. 18.30% was held by the GOI and the balance was held by Indian public and others.

4.1.3 The company Maruti Udyog limited came into existence in Feb 1981. It was then a 100% government of India enterprise. It entered into an agreement with M/s Suzuki Corporation (SMC) Japan for technical assistance and use of trademarks and logos. This agreement was signed in October 1982 and at that time SMC was not a related party or an associated enterprise of M/s Maruti Udyog Limited (MUL). SMC was offered 26% stake in the company Maruti Udyog limited. But the main control was with the government of India and actions were subject to government of India approval.

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4.1.4 The assessee has paid royalty to the AE, Suzuki Motor Corporation (in short SMC) for license for the manufacture, sale and after sale service of Motor vehicles manufactured by it. The agreement stipulates use of 'Suzuki' and "Suzuki " trade mark only for export of Suzuki branded motor vehicles (as stipulated in Exhibit B and clause 5.05 of the agreement).

4.1.5 Under license agreement dated 3rd June 1992 between the assessee and the AE, SMC for YE-2 model, the assessee was required to use Suzuki logo on front side of the car. The agreement stipulates for use of trade mark " Maruti-Suzuki "for domestic sales.

4.1.6 Clause 3.02 and 3.03 stipulates that improvement and modification of product, and part by the assessee shall be treated as licensed information i.e., legal ownership of technology intangible will get transferred to the AE, SMC and the assessee shall be compensated for such improvement and modification. It is a matter of record that the assessee had made localization, improvement; modification and up gradation of technology provided by the AE by incurring huge expenditure on Research and Development activities. However, in reality the AE has never compensated the assessee for such improvement and modification. Contrary to this, it has charged royalty on continuous basis from assessee even on modified and upgraded technology. This view is fortified by the fact that the AE has been charging running royalty at certain percentage of the export and domestic sale.

4.1.7 As per clause 5.01 of the agreement, the assessee was responsibleto develop, promote and expand the sale ofproduct and parts manufactured by the AE within India:

"MARUTI shall use its best efforts to develop, promote and expand the sale of PRODUCTS and PARTS within the territory "

The agreement in fact, has restricted the assessee's business opportunity by prohibiting it from the manufacture, sale and export of product or parts of other competitors (refer 5.01 (a) and 5,03 of the agreement).

4.18 The clause 5.02 stipulates that all products and parts manufactured in India shall bear trademark of "MARUTI-SUZUKI" whether for sale in territory or for export. It is important to clarify here that ' MARUTI' or 'M' are registered trademarks of the assessee and "SUZUKI" is registered trade mark of the AE, SMC. It is a fact that "MARUTI-SUZUKI" is not a registered combined trademark.

4.19 This agreement is only related to licensed trademark of SUZUKI and it does not

provide any protection and compensation to trademark of MARUTI even though as per agreement both the trademarks were used together under cobranded trademark.

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4.1.10 The brand development was the responsibility of the Maruti without any compensation. In fact royalty was being paid for using and promoting brand "Suzuki" owned by the AE.

4.1.11 The terms and conditions of the agreement clearly stipulate that all the functions of production, manufacturing, sale, export of products and parts, modification, improvement of product and technology, localization and absorption of technology, brand promotion, market development, after sale service, support service are to be performed by the assessee at its own economic cost and risk in India. It is also amply clear from the terms and conditions that above mentioned functions were performed by the assessee using its own assets.

4.1.12 It was noted by the TPO from terms and conditions of the agreement that risk of license infringement, warrant of products and parts manufactured by using technology of the AE. risk of improvement and modification of product and parts, risk of quality control, standards and specification, risk of sale of products and parts, risk associated with use of trade mark, risk of not selling competitive products, risk of technical manpower were assumed by the assessee i.e., all the critical risk of technology implementation, manufacturing, sale and after sale service were assumed by the assessee whereas AE had hardly assumed any risk.

4.1.13 Lump sum and running royalty payment to SUZUKI is protected from foreign exchange fluctuation and also from taxes and disputes. Over the years MARUTI became a Super Brand in India. The name Maruti was made synonymous with family car over a period of more than two decades of sustained campaigning in India.

4.1.14 Suzuki after getting controlling stake in the company replaced the winged M maruti Logo with "S " logo of Suzuki and rearranged and repositioned arrangement of the brand names, symbols and logo on the vehicle. This was an infringement on the trademarks and trade name of Maruti. Since Maruti India had build up the brand with monetary and intellectual inputs over the years, it has the right to be suitably compensated for the same. But the use of "S" logo and other repositioning of the trade names and logo had been done without any compensation to Maruti Udyog limited.

4 1.15 when assessee is paying to SUZUKI for the use of itstrademark then onthe same basis it should also get paid for the allowing SUZUKI to align itself with brand Maruti in a more explicit manner. Over the years the assessee has even merged the two logos of "M" and "S" and these two appear "MS" on the Maruti showrooms etc and even the name has been changed from Maruti Udyog limited to MARUTI SUZUKI INDIA LIMITED.

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4.1.16 That the scope of the license governs the use of technical assistance in the form of license information and use of license trade mark for the technological development and sales of products and parts within the territory and outside the territory. Thus the constituents of royalty are two. though, the payment being made is composite.

4.1.17 The responsibility of doing the marketing part was however given to Maruti not SUZUKI as being local they understood the Indian customer and it's psyche.

MARUTI shall use its best efforts to develop, promote and expand and the sale of products and parts within the territory. "

4.1.18 Thus the understanding of the agreement shows that it was SUZUKI that was to provide licensed technology and licensed trademarks and Maruti was to make efforts to develop, promote and expand the sale. The purchases were also to be from SUZUKI, SUZUKI was also assured of its royalty on these sales in addition to the lump sum royalty and was also entitled to the dividend on its capital contribution. The marketing part on the other hand was the mandate of the Maruti. The reason being it being local, it is aware of the market and can accordingly develop strategy and design to penetrate the market. And this proved successful also. The logo was also very much Indian with wings attached to the alphabet M denoting its association with air and speed. This brief history is only to show that a thought process has gone into the creation of a brand and its logo keeping in mind the Indian set up and the local mindset and then an intangible has been created.

4.1.19 Over the years situation and circumstances have changed - the economic circumstances have changed, Indian Market has developed with the disposable income of the middle class, the economy has opened up. In the wake of these changes divestment has happened in the M/s Maruti Udyog and M/s SMC has increased in shareholding in the share capital and affairs of the company. The brief history of the increase of share capital of SMC in Maruti and its percentage is given in a tabular format below (from the year 1982 onwards)

S.No.	*Financial Year*	*No. of share In the company*	*Value of the shares*	*Premium paid for acquisition of shares if any*	*Percentage of share holding*	*Name of the company (the year when it changed from MUL to MSIL)*
1	*1982-83*	*173,000*	*17,300,000*		*26.01%*	

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2	*1983-84*	*392,000*	*39,200,000*		*19.94%*	
3	*1984-85*	*320,870*	*32,087,000*		*28.09%*	
4	*1985-86*	*554,987*	*55,498,700*		*25.40%*	
5	*1986-87*	*533,000*	*53,300,000*		*26.65%*	
6	*1987-88*	*244,000*	*24,400,000*		*25.11%*	
7	*1988-89*	*2,191,864*	*219,186,400*		*40%*	
8	*1992-93*	*2,204,860*	*220,486,000*	*269*	*50%*	
9	*2002-03*	*1,216,341*	*121,634,100*	*3,180*	*54.21%*	

4.1.20 No independent party would have allowed the replacement of its own logo or trademark especially in a segment that it dominates and allow anybody else to attach its name to it without being properly compensated for it. The situation becomes even more compelling to demand such compensation when the Indian Entity itself is paying royalty for the use of brand name to Suzuki.

4.1.21 The TPO has in fact benchmarked this transaction of piggybacking the local brand of Maruti without there being any proper compensation for it year after year. This could only happen because the AE had increased its shareholding in the company. It has gained command over the affairs of the company over the year and can easily influence the decision and thus take up or usurp intangibles without paying anything for it. On the other hand it continues to charge the AE for using its logo and trademark on the basis of an agreement that was signed when SMC was a minor share holder in Maruti.

4.1.22 It may be noted that over the years the share of Suzuki has increased in Maruti. The name has changed from Maruti Udyog to Maruti Suzuki. The brand Maruti has been assiduously built over the years since its inception by the local strategist and marketing professionals. That involved understanding of the local psyche, beliefs and sentiments, the customer profiles in terms of disposable incomes, future incomes and family values and then formulating a policy to get a brand name etched in the niche segment of the customers. Though the technology may be coming from Japan but the product was to reach the Indian customer as an Indian product Maruti - something locally made and marketed.

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4.1.23 Suzuki when it started acquiring Maruti knew the reach of the brand, the potential of the brand. SUZUKI may be known world over as an automotive giant but was not known in Indian markets as Maruti was a known brand, it was content playing second fiddle to Maruti as a major brand name and 'M' being the logo. The existence of a brand in a market is the function of its presence there. The brand cannot be built in absentia. Till the time Suzuki did not hold the majority stake the brand that got promoted was Maruti. The name Maruti was at the front of the vehicles with the winged 'M' the logo.

4.1.24 It is also a fact that Suzuki is a multinational entity and its business interest are not confined only to cars. It is manufacturing other technological products as well under the one umbrella of SUZUKI with a logo "S". That's the reason it now intends to propagate its name. Thus it has larger interests and futuristic motives to gel itself with a household brand like Maruti. It can foresee India as a giant market with increasing disposable income and thereby increase in demand. It is foreseeing a greater role for itself and its product by associating with the local name Maruti and thereby making itself visible and known. Thereafter it can by itself launch its products solely in the name of Suzuki thereby relieving it off its dependence on Maruti Suzuki. Thus there are benefits from the association, there is a creation of intangible and there are anticipated gains from the association.

4.1.25 The Hon 'ble ITAT is swayed by the assessee contention that TPO has disallowed the royalty. In fact what the TPO has actually done is that it has determined the value of the ALP of the CO branding done by Suzuki . The value of the same is determined by equating the trade mark royalty Maruti was paying to Suzuki for its brand. The logic is simple if Maruti was paying licensed trade name royalty to Suzuki then Suzuki should also be paying back the trade name royalty to Maruti. Whereas it is a fact that royalty being paid is a composite royalty including the usage of Trademark and technical information. It is Suzuki who has been charging this royalty even if its name was used only on the rear of the vehicle.

4.1.26 But now after taking over the management of the company, it has repositioned its name and brand and logo on these vehicles. The question is whether any independent party that had assiduously over the years have built up a name and reputation would have allowed so? And that too absolutely free when the other party had been throughout charging it for whatever it was providing it be it machinery, technology, spare parts, technical assistance, corporate guarantee, trade name, trade mark. That does not seem to be a situation in normal and independent circumstances. This has not been appreciated by the Hon 'ble ITAT"

15.20. He lastly submitted that the TPO in its comments has recommended for filing of further appeal u/s. 260A before the Hon'ble High Court

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for AY 2007-08, and these are continuous issues forming part of the assessment order for AY 2006-07 and 2007-08 also, and are at present pending adjudication before Hon'ble Delhi High Court.

15.21. This issue was dealt with by a coordinate Bench of this Tribunal in the AY 2006-07. On a perusal of record we find that for the AY 2006-07 a coordinate Bench of this Tribunal in the order dated 24.08.2015 held as follows:

> *"7.6. Thus it is manifest that the tribunal in the immediately preceding year has held two things. First that the payment of royalty under the Agreement is both for the use of licensed information and licensed trademark and there can be no division of royalty payment; and second that brand Suzuki is valuable and not worthless as was held by the TPO. In so far as the first aspect of bifurcation of royalty payment into two parts is concerned, although we find that the arguments put forth by the ld. DR are not absolutely without foundation, yet, the principle of consistency, laid down by the Hon'ble Supreme Court and Hon'ble High Courts in several judgments, persuades us to go with the view taken by the tribunal in its order for the A.Y. 2005-06, more specifically because the TPO has also relied on his finding given for the AY 2005-06 in arriving at the decision taken against the assessee in the extant year. As regards the second aspect, the ld. DR has not brought on record any further material to demolish the finding given by the tribunal in the earlier year about the brand `Suzuki' having substantial value and the royalty payment at ALP.*
>
> *7.7. Addition on account of transfer pricing adjustment can be made by making a comparison between the transacted value of an international transaction and its ALP. Thus it is clear that the availability of the transacted value of an international transaction is sine qua non. If such transacted value is either not separately available or cannot be precisely determined from a combined value of a number of international transactions, then the entire exercise of determining ALP fails. Instantly, we are confronted with such a peculiar situation. There is no separate value of the international transaction of royalty for use of licensed trademark and the tribunal has held in the earlier year that it is a payment of inseparable royalty for use of both the licensed information and the licensed trademarks.*

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> *In such circumstances and respectfully following the order of the tribunal for the immediately preceding year, we order for the deletion of the addition of Rs.127.195 crore on account of transfer pricing adjustment of royalty for use of licensed trademark."*

15.22. For the AY 2007-08, vide Paragraph No 28.8 in the order, this Tribunal followed the above order on the issue under similar set of facts. Since there is no change of law on this aspect, while respectfully following the decision of this Tribunal for the AY 2006-07, we order for the deletion of the addition of Rs. 237.24 crore on account of transfer pricing adjustment of royalty for use of licensed trademark. Grounds 15.2-15.2.14 are allowed accordingly.

Ground No 17 Not allowing credit of TDS certificates claimed through the revised return and during the course of assessment proceedings

16. In respect of the Assessing Officer not allowing credit of TDS certificates, which the assessee claimed through the revised return and during the course of assessment proceedings, it is prayed on behalf of the assessee to direct the Assessing Officer to allow the credit of additional TDS certificates claimed through the revised return of Rs.19,43,693/- whereas the total TDS Claimed is Rs.32,53,79,843/-. Ld. AR further prayed to direct the Assessing Officer to allow credit of additional TDS certificates received amounting to Rs.12,62,180/- (Rs.11,31,295 + Rs.1,30,885).

17. On this issue, Ld. DR fairly conceded that a coordinate Bench of this Tribunal in its order for AY 2007-08, set aside the matter to the file of the Assessing Officer to consider the claimed TDS credit on the basis of revised return after affording opportunity of being heard to the assessee, and it being a consequential ground, the decision of ITAT for the earlier year was acceptable on this issue for AY 2007-08 and further

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appeal was not recommended and preferred. Recording the same we allow Ground No. 17 for statistical purpose by setting aside the matter to the file of the Assessing Officer to consider the claimed TDS credit on the basis of revised return after affording opportunity of being heard to the assessee.

18 to 18.1 Error in computation of interest u/s 234B

18. It is alleged by the assessee that the Assessing Officer grossly erred in computing the interest u/s 234B of the Act in first adjusting the interest computed u/s 234B of the Act on the assessed income against the self assessment tax paid by the assessee. Ld. AR submitted that interest under section 234B of the Act is firstly computed on the assessed income upto the date of payment of first self assessment tax prior to filing the original return, and thereafter self assessment tax paid by the appellant is first adjusted against the interest calculated as aforesaid. However, the Assessing Officer first adjusted the self assessment tax against the interest leviable under section 234B of the Act calculated on the basis of assessed income, and such adjustment, under section 140A of the Act is permissible only with reference to interest computed with reference to the returned income and not with reference to the assessed income. Ld. AR argued that the method of computation used by the Assessing Officer is contrary to the method prescribed in CBDT Circular No.549 dated 31.10.1989: 182 ITR (St.) 40, which is binding on the Income Tax Department. In this respect he placed reliance on the decision of the Ahmedabad Bench of the Tribunal in the case of Patson Transformers Ltd. v. DCIT: 103 TTJ 735 wherein the Tribunal was considering the similar issue regarding the calculation of interest under section 234B in the light of the Explanation to section 140A of the Act and decided the issue in

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favour of assessee. Further reliance is placed on the decision of the Mumbai Bench of the Tribunal in the case of ACIT v. C.C Chokshi and Co.: ITA No. 7791/Mum/2004 (Lex doc: 390032) wherein the Assessing Officer similarly adjusted the self assessment tax firstly against the interest leviable under section 234B of the Act on the basis of the assessed income whereas the assessee contended that the same needs to be computed with reference to the returned income and not the assessed income, and while concurring with the contention of the assessee, the Tribunal observed as under:

> *"3.6.2 We have heard both parties perused the records and considered the matter carefully. The factual and legal background relating to the issue has already been discussed in the preceding paras. The section 140A provides that in case payment made under the said section falls short of the tax payable including interest under the said section then the tax so paid shall be first attributed towards the interest and the balance amount shall be adjusted against the tax payable. In this case, the tax payable under section 140A also included interest payable under section 234B. The issue is whether the interest payable under section 234B which has to be first adjusted against the payment made under section 140A has to be calculated with respect to total income as declared in the return or total income determined in the regular assessment. We find that the section 140(1B) provides that interest payable under section 234B, has to be computed on the amount by which the advance paid falls short of assessed tax and the assessed tax for the purpose of this sub-section has been defined in the Explanation to mean the tax on total income as declared in the return as reduced by tax deducted/collected at source etc. Therefore, we agree with the submission made by ld. A.R that the interest payable under section 234 B for the purpose of adjustment against the tax paid under section 140A has to be computed with respect to assessed tax determined on the basis of total income declared in the return. But this is only for the limited purpose of adjustment of payment made u/s. 140A against interest payable under section 234B while making computation of interest payable by the assessee under section 234B which has to be computed with respect to the total income determined in regular assessment as per the definition of assessed tax given in section 234B. The assessee has also followed the same procedure with which we agree. The order of CIT(A) confirming the method followed by the AO is therefore set aside and the claim of the assessee is allowed."*

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18.1. Lastly he brought it to our notice that this issue is now covered in favour of the assessee in appellant's own case for AY 2007-08. Ld. AR, therefore, prayed to direct the Assessing Officer to recompute interest under section 234B of the Act, as aforesaid. Stating it to be a consequential ground, Ld. DR submitted that the decision of ITAT was acceptable on this issue for AY 2007-08 and no further appeal was recommended.

18.2. We have gone through the observations of the Tribunal on this aspect for the AY 2007-08 and vide paragraph No. 34.1, it was observed that, -

> *"......following the decision of Mumbai Bench of the ITAT in the case of ACIT vs. C.C. Chokshi & Co. (supra) on the issue, we hold that the interest payable under sec. 234B for the purpose of adjustment against the tax paid under sec. 140A of the Act has to be computed with respect to assess tax determined on the basis of total income declared in the return. This is only for the limited purpose of adjustment of payment made under sec. 140A of the Act against interest payable under sec. 234B of the Act while making computation of interest payable by the assessee under sec. 234B which has to be computed with respect to total income determined in regular assessment as per the definition of assessed tax given in sec. 234B of the Act. We thus set aside the matter to the file of the Assessing Officer to decide the issue afresh in view of the above finding in the case of C.C.Chokshi & Co. (supra) after hearing the assessee."*

18.3. In the facts and circumstances of the case, while following the above view taken by a coordinate Bench of this Tribunal for the immediately preceding year, we set aside the matter to the file of the Assessing Officer to decide the issue afresh in view of the above finding in the case of C.C.Chokshi & Co. (supra) after hearing the assessee. Grounds No 18 and 18.1 are thus allowed for statistical purposes.

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20 Errors in computation of interest u/s 234D

19. The amount of interest chargeable u/s 234D of the Income Tax Act has been wrongly computed at Rs. 12,83,50,586/- instead of Rs.12,63,11,186/-. The payment of Self-assessment tax of Rs.1,31,57,417/- made on 27.03.2010 at the time of filing the revised return of income, seems to have been ignored in the computation of interest u/s 234D of the Act. Since the grievance complained by the assessee is only of arithmetical error in nature, we direct the AO to consider the same for re-computation.

20. In the result, the appeal of the assessee is allowed in part for statistical purposes.

Order pronounced in the open court on 09.11.2017

Sd/-	Sd/-
(N.K. SAINI)	**(K.N.CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 09.11.2017
*Kavita Arora

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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