

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

BEFORE SHRI C.L. SETHI, JUDICIAL MEMBER AND
SHRI A.K. GARODIA, ACCOUNTANT MEMBER

I.T.A.No.712/Del/2010
Assessment Year : 2005-06

Dy. Commissioner of Income-tax,
Circle 3(1), New Delhi.

M/s. Cheil Communications
Vs. India Pvt. Ltd.,
3rd Floor, IFCI Tower,
61, Nehru Place, New Delhi.

(Appellant)

(Respondent)

Appellant by : Mrs. Kavita Bhatnagar, CIT-DR.
Respondent by : Shri Rahul Mitra, CA.

ORDER

PER C.L. SETHI, JUDICIAL MEMBER.

This is an appeal filed by the revenue department against the order dated 17.12.2009 of the learned Commissioner of Income-tax (Appeals) in the matter of an assessment made under section 143(3) of the Act, 1961 (the Act) by the Assessing Officer for the Assessment Year 2005-06.

2. The present appeal was heard along with an appeal filed by the assessee against the same impugned order of the CIT(A). The issues involved in this appeal are separate and independent to the issues involved in assessee's appeal. The appeal filed by the assessee has been disposed of by

a separate order dated 6th August, 2010. We now proceed to decide the appeal filed by the revenue.

3. The first issues raised by the revenue vide ground No.1(a) to 1(c) are as under:-

“1(a). The Ld. CIT(A) has erred in law and facts of the case in holding that the profitability ratio of the assessee should be determined on a net basis which is in absolute divergence to the actual procedure of business actually carried out by the assessee.

2(b) The Ld. CIT(A) has erred in law and facts of the case in determining the cost base of the profit level indicator (PLI) by taking income on net basis due to which various costs were ignored while computing cost of the assessee or PLI.

2(c). The Ld. CIT(A) has erred in law and facts in applying the principle of res judicata in this year ignoring the following judgments of the Apex Court, Hon’ble Madras High Court and Hon’ble ITAT, Delhi which apply squarely in this case.

- (i) CIT Vs. British Paints India Limited, 188 ITR 44 (SC).
- (ii) CIT Vs. Shaik Md. Rowther Agencies (P) Limited, 246 ITR 161 (Mad.)
- (iii) DCIT Vs. Carraro India Limited, 28 SOT 53 (Delhi).”

4. In this case, the assessee filed its return of income on 31.10.2005 declaring total income of Rs.4,54,28,436/-. The assessee’s case was selected for scrutiny issued notice under section 143(2) dated 13.06.2006 was served upon the assessee company. The Assessing Officer also issued certain questionnaire to the assessee on 16.07.2007 requiring the assessee to submit

and furnish certain informations. In response to the notice and questionnaire issued by the AO, the assessee's AR appeared before the AO from time to time and filed necessary details, which were stated to be placed on record by the AO.

5. The company is engaged in the business of advertising, communication, publicity and merchandising including undertaking market research planning and providing consultancy services and training in the same field. During the year under consideration, it was noticed by the AO that the assessee had international transactions with associate enterprises/concerns to the tune of Rs.5,53,81,248/-. Hence, in order to determine the arm's length price in relation to international transactions, the AO referred the matter to the Transfer Pricing Officer (TPO) after obtaining the prior approval of the Commissioner of Income-tax. The TPO then examined the issue, heard the assessee and passed an order under sec. 92AC(3) dated 23.10.2008 wherein the arm's length price of international transactions relating to advisory services and reimbursement of expenses from associated enterprises was computed at Rs.9,06,06,349/- as against the transaction value of Rs.5,53,81,248/- declared by the assessee. Therefore, an upward adjustment of Rs.3,52,25,101/- was made to the declared value of

international transaction entered into with the associated enterprises/concerns.

6. In the order under sec. 92CA(3) of the Act passed by the TPO, the TPO suggested the upward adjustment to the extent of Rs.3,52,25,101/- to the book value of international transactions declared by the assessee and since the difference between the book value of international transactions and the arm's length price determined by him was more than 5%, no benefit under Proviso to sec. 92C(2) was given to the assessee.

7. Since in the light of the provisions contained in sub-sec.(4) of sec. 92C, the AO was required to compute the total income of the assessee in conformity with the arm's length price as determined by the TPO, the AO made an addition of Rs.3,52,25,101/- to the total income of the assessee on account of adjustment to arm's length price of international transactions with associated enterprises.

8. Being aggrieved, the assessee preferred an appeal before the learned CIT(A), who had taken a view that in the light of the facts and circumstances of the case, no adjustment to the declared value of international transactions entered into with associated enterprises called for and he therefore, directed the AO to delete the addition.

9. Being aggrieved, the revenue is in appeal before us.

10. We shall now deal with the order of TPO whereby TPO has made an upward adjustment of Rs.3,52,25,101/- to the declared value of international transactions with associate concerns.

11. With a view to determine arm's length price under sec. 92CA(3) in respect of international transactions entered into by the assessee with associated enterprises/concerns, the AO referred the matter to the TPO. The documentations prepared under Rule 10D of the Income-tax Rules were submitted by the assessee and were placed on record. The assessee is a wholly owned subsidiary of Cheil Communications Inc. (Cheil Korea), and it was established to handle the Indian operations of Cheil Korea advertising business. During the year under consideration, the assessee was serving Samsung for creating its advertisement for brands of air-conditioners, mobiles, monitors, outdoor hoardings etc. Cheil Korea is a Samsung group company. It is a global advertising company and it is involved in the global advertisement of Samsung products. Cheil has several branch offices in Korea as well as several overseas offices.

12. During the year under consideration the assessee had undertaken following transactions:-

S.No.	International Transaction	Method	Value (in Rs.)
1.	Advertising Services	TNMM	2,93,95,488

2.	Cost Sharing/Cost Allocation Arrangement	TNMM	2,48,85,114
3.	Reimbursement of expenses to Chiel Korea		11,00,646

The details of functions performed, assets employed and risks assumed by Cheil India has been narrated by the TPO in Para 4 of his order which are summarized as under:-

- (a) Functions performed – Functions of assessee company ranged from gathering and documentation of market information to the creation and arrangement of advertisement public relation advisory services, and corporate image creation. Its functions are broad and are all related to the advertising of client's products or to the creation and promotion of client's corporate image.

As per Foreign Investment Promotion Board approval, Cheil India is permitted to undertake the following activities:-

- Advertising, communication, publicity and merchandising including undertaking market research, planning, providing consultancy services and training on any present and future media/medium and to do all incidental acts and things necessary thereto.

- Managing all kinds of events, shows, fairs and all activities requiring advertising publicity and entertainment; and
- To act as product/brand image builder, product launch promoter, set designer, interior designer, merchandiser and display.

For performing the above functions, Cheil India has entered into following agreements:-

1. Agreement for Advertising.
2. Media Services Agreement
3. Agreement for Outdoor
4. Commission Sharing Agreement.

Agreement for advertising has been entered into between Samsung India Electronics Ltd. (client) and Cheil India (Cheil) and following services are required to be rendered:-

- (1) Print advertising, Broadcast advertising, marketing analysis and consultation, marketing research and other research, Special Public relation services, print material for merchandising and other purposes, sales promotion and other services.

The nature of all these services has been discussed by the TPO in his order and are not a matter of dispute between both the parties. The relevant portion of the agreement shall be discussed at the appropriate stage while deciding the main controversy arising in this appeal.

13. The media service agreement was entered into between Samsung India Electronics Ltd. and the assessee company, and as per this agreement, the assessee company was required to supply to Samsung India Electronics Ltd., the following services for effective and better promotion, advertisement and management of the brands listed in the scope of assignment by and through media:-

(1) Tactics (Planning)

(2) Investment, implementation and post analysis (Buying).

13.1 As per the agreement for the services, the assessee company will be remunerated as per Annexure-B of the agreement.

13.2 Agreement for outdoor was also executed between M/s. Samsung India Electronics Ltd. and the assessee company.

13.3 Commission sharing agreement was executed between Cheil Communication Inc. and Cheil Communication India Pvt. Ltd. i.e. the assessee company and the purpose of the agreement is described fully in the agreement itself.

14. After taking into consideration the TP documentation, queries raised and submissions made by the assessee, the TPO issued a show cause notice to the assessee on 6th October, 2008, asking the assessee to clarify certain issues and matters. The assessee filed its submission in regard to show cause notice on 14th October, 2008 and the relevant excerpts of the same have been reproduced by the TPO in his order.

15. In the light of the show cause notice and reply made by the assessee, the TPO framed two issues which, in his opinion, were pertinent to be discussed and decided and which would be forming the very basis of determination of arm's length price of the international transactions undertaken by the assessee. These two issues framed by the TPO are as under:-

“1. What should be the operating revenue and operating expenses, so as to arrive at correct operating profit and operating cost in the case of assessee as well as in the case of comparables to determine the true net cost plus margin which is the PLI adopted by the assessee for determination of Arm's Length Price of its international transactions.

2. What should be the financial year/years data of which is to be used in regard to the financials of the comparables so as to arrive at arithmetic mean of the NCP margin?”

16. The assessee submitted before the TPO that net revenue model followed by the assessee is as per accounting practices and OECD guidelines. The assessee made a reference to two decisions of Hon'ble Apex

Court reported in the cases of Apollo Tyres Ltd. vs. CIT (2002) 255 ITR 273 (SC) and Malayala Manorama Co. Ltd. vs. CIT (2008) 300 ITR 251 (SC), wherein it has been enunciated that the accounts maintained as per Companies Act are sacrosanct and the Assessing Officer has no power to re-scrutinize these accounts and satisfy himself that these accounts are maintained in accordance with the provisions of the Companies Act. The assessee also submitted before the TPO that once the profit and loss is certified by the Auditors, then the AO does not have the jurisdiction to go beyond the audited profit and loss account. This contention of the assessee was not found favour with the TPO, who was of the opinion that in this respect, the assessee company completely misinterpreted the show cause notice, and submissions are misdirected. TPO further stated that the judgments relied upon by the assessee are completely out of context. The TPO was of the view that the role of TPO was to determine the Arm's Length Price of international transactions undertaken by the assessee on the basis of documents maintained by the assessee, prescribed under Rules and on the basis of five methods prescribed under Rules. TPO further stated that he could utilize the information, which is available in the public domain to judge the Arm's Length Price determined by the assessee as per the provisions of the Income-tax Act and Rules. He further stated that when the

assessee has applied TNMM as the most appropriate method with net cost plus margin as PLI, it was his duty to know as to whether method and the PLI applied was appropriate or not. Net cost plus margin is based on operating profit and total cost. He further stated that to determine the operating profit, determination of operating revenue is utmost important and if the billing is made and payment is received on gross revenue basis, it is very much within the power of TPO to scrutinize as to how the assessee has disclosed net revenue in its financial in spite of the fact that gross revenue is not disclosed in the audited financial submitted by the assessee. It was further pointed out by him that client of the assessee company, namely, M/s. Samsung Electronics India Ltd. has deducted the tax as per provisions of tax deducted at source from the gross payments made to the assessee company. The TPO then discussed the matter about his powers to lift the corporate veil to know the correct facts and in that context some decisions of the Apex Court including the judgment in the case of *Mc Dowell & Co. Ltd. Vs. CTO*, 154 ITR 148 was referred to. The TPO also made a reference to the decision of Hon'ble Apex Court in the case of *Sinclair Murray & Co. Pvt. Ltd. vs. CIT*, 97 ITR 615 where it was held that the sales-tax collected from the customers is a trading receipts. The TPO also made a reference to the decision of the Hon'ble Supreme Court in the case of *Chowringhee Sales*

Bureau Pvt. Ltd. reported in 87 ITR 542. In the light of the aforesaid judgments, the TPO had taken a view that the assessee should have accounted for its gross receipts as operating revenue and the outgo should have been claimed by it as operating expense in its profit and loss account to arrive at the operating profit. In support of this view taken by the TPO, he also made a reference to the following 2 decisions:-

- (i) Jonnalla Narashimha Rao & Co. & Others vs. CIT (1993) 200 ITR 588.
- (ii) CIT vs. Karamchand Thapar & Others (1996) 222 ITR 112.

17. Having taken a view that the assessee should have accounted for its gross receipts as operating revenue and outgo should have been claimed by it as operating expenses in its profit and loss account to arrive at the operating profit, the TPO worked out the NCP margin of the assessee on the basis of gross receipts and expenses as under:-

Particulars	As per financial statement	Non operational/ past years/ other items	Operating items
Revenue (Gross) as given vide Annexure-II of submission dated 06.10.2008	1,183,165,243		1,83,165,243
Other Income	1,441,186	779,428	661,758
Operating Income			1,183,827,001

Operating and other expenses	46,845,804	219,266.00	46,626,538
Personal Expenses	35,512,480		35,512,480
Depreciation	5,162,456		5,162,456
Amortization of intangible assets	1,372,641		1,372,641
Preliminary expenses written off			1,372,641
Direct Cost (As per Annexure-II of submission dated 06.10.2008)	1,050,414,001		1,050,414,001
Operating Expenses (Operating Cost)			1,139,088,116
Operating Profit			44,738,885
NCP%			03.93%

18. TPO then discussed about the use of data for multiple years and in that context, he has taken a view that comparability analysis is to be conducted on the basis of current year data as so held by the decision of Special Bench of ITAT, Bangalore Bench in the case of Aztec Software and Technology Services Ltd. vs. Asstt. CIT (2007) 294 ITR (AT) 32 (Bangalore)(SB) which was followed by the Delhi Bench of ITAT in the case of Mentor Graphics Pvt. Ltd., 109 ITD 101 (Delhi). The TPO then proceeded to make comparability analysis of the comparable companies.

The TPO found that in the Transfer Pricing Report, the assessee has chosen nine comparable companies of which two are Indian companies namely Cinerad Communication Ltd. and SSI Media India Pvt. Ltd. Information regarding these companies are available in data bases, namely, Prowess and Capitaline. Functional analyses of these companies reveal that they are in the business of production and sale of advertising films and documentaries. Though the assessee company does not produce anything on its own, but sources the work from vendors. TPO therefore, taken a view that the function of the assessee company was altogether different from that of these two companies and these are not fit comparable and, he therefore, excluded the same from the comparability analysis.

19. With regard to the remaining 7 companies, TPO stated that these companies were not working in India but were operative in Thailand, China and Korea and the revenue realization model, client servicing and delivery modes of these companies were different. In this view of the mater all the 9 companies of the comparability list, which has been relied upon by the assessee in the Transfer Pricing Report, were not taken as a comparable companies by the TPO.

20. Thereafter, the TPO worked out the NCP margin of 2 comparable cases namely, (i) Contract Advertising (India) Pvt. Ltd.; & (ii) Portland India

Outdoor Advertising Pvt. Ltd. pertaining to the year ended on December, 2004 and arrived at a mean of 7.02% as under:-

Particulars	Contract Advertising (India) Pvt. Ltd. (Year Ending Dec. 04) Rs. In Crores)	Portland India Outdoor Advertising Pvt. Ltd. (Year Ending Dec. 04) Rs. in Crores)
Revenue (Gross)	62.44	66.60
Other Income	0.85	--
Operating Income	63.29	66.60
Direct Cost	34.43	58.87
Personal Expenses	09.62	1.88
Power and fuel	0.47	.09
Other Operating Expenses	11.61	2.93
Misc. Expenses	0.76	.29
Depreciation	0.48	0.06
Amortization of Research Expenses	..	0.09
Total Operating Expenses (Operating Cost)	57.37	64.21
Operating Profit	5.92	2.39
NCP%	10.32%	3.72%

Mean	7.02%	
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21. In the light of the NCP margin of comparable cases worked out at 7.02% as compared to NCP margin of 3.93% in assessee's case, the TPO computed the Arm's Length Price and worked out as under:-

“It is seen that the assessee has earned a NCP margin of 3.93% in comparison to 7.02% earned by the comparable companies. Accordingly, the Arm's Length Price of international transactions of the assessee is computed as under:-

<i>Operating Cost of assessee as computed above</i>	<i>= 1.130,088,116</i>
<i>Profit at 7.02% of revenue</i>	<i>= 79,963,986</i>
<i>Profit booked by the assessee</i>	<i>= 44,738,885</i>
<i>Difference</i>	<i>= 35,225,101</i>

The difference of Rs.35,225,101 is attributable to the difference in the book value and the arm's length price of the international transactions. On the same lines, the Arm's Length price of international transactions in respect of advertising service and cost sharing/cost allocation arrangements is determined as under:-

<i>S.No.</i>	<i>International Transaction</i>	<i>Book Value</i>	<i>Difference Loaded</i>	<i>Arm's Length Price</i>
<i>1</i>	<i>Receipt for advertising services</i>	<i>29395488</i>	<i>19076042</i>	<i>48471530</i>
<i>2</i>	<i>Payment to Cheil Korea for cost sharing</i>	<i>24885114</i>	<i>16149059</i>	<i>8736055</i>

In respect of cost to cost recharge, the assessee has not benchmarked the same and the same is accepted.

The Assessing Officer shall accordingly increase the income of the assessee by Rs.35,225,101/-. Since the difference between the book value of the international transactions and the arm's length price so determined is more than 5%, no benefit under proviso to section 92C(2) is available to the assessee."

22. In the light of the determination of arm's length price and the difference worked out by the TPO, the AO made the addition of Rs.3,52,25,201/- to the total income on account of adjustment to arm's length price of international transactions with associated enterprises.

23. Being aggrieved, the assessee preferred an appeal before the learned CIT(A).

24. After considering the assessee's submissions and TPO's order, and the facts and circumstances of the case, the learned CIT(A) framed as many as 5 following issues which required his adjudication:-

- I. Whether the reference made by the AO to the TPO is bad in law, making the TPO's order void ab initio?*
- II. Whether TPO's rejection of net revenue basis of accounting and grossing up of the revenue and operating costs for the purpose of margin computation of the appellant was appropriate?*
- III. Whether TPO's rejection of comparable companies used by the appellant for benchmarking its international related party transactions in its TP documentation report for the year is appropriate?*

- IV. *Whether in the case of comparables, for the purpose of margin computation, current year data is to be considered?*
- V. *Whether the benefit of $\pm 5\%$ is available as standard deduction.*

25. In this appeal, we are only concerned with the issue whether the TPO's rejection of net revenue basis of accounting and grossing up of the revenue and operating costs for the purpose of margin computation of the assessee is appropriate. In respect of this issue, the assessee made elaborate submissions before the learned CIT(A) which is summarized as follows –

26. Cheil India is an advertising agency and is engaged in undertaking advertising services for its customers in respect of their Products and Brands, in the capacity of an agent. As part of its business operations of preparation of advertisements and provision of related consultancy services, the Company also facilitates placement of such advertisements in the print, electronic etc. media, as the case may be. For this purpose, it makes payments to third parties like advertisement agencies, printing presses, etc. for renting of advertising space etc. on behalf of its customers and recovers the same from the respective customer. Such third party payments per se, do not represent any value-added functions undertaken by the appellant.

26.1 The income earned by the assessee represents commission receivable by the assessee in respect of the provision of advertising services undertaken by it, and it recognizes the commission amount charged from the clients as its revenue/income in its profit and loss account i.e. financial statements, and accordingly, the advertising commission and service fee represents income from jobs completed by the assessee on behalf of its clients and are disclosed net of pass through costs.

26.2 The assessee undertakes advertising services for its customers in capacity of an agent. In this regard, it makes payment to third parties like media agencies, printing press, etc. for renting of advertising space etc. on behalf of its customers and recovers the same from the customer. Such third party payments do not represent any value-added functions undertaken by Cheil India/ advertising agency.

26.3 As per the industry norms in this regard, the advertising space (be it media, print or outdoor) is let out by the third party vendors in the name of the ultimate customer/beneficiary of the advertisement. Advertising agencies/ companies simply act as an intermediary in between the ultimate customer and the third party vendors in order to facilitate the placement of advertisement since the advertising company is engaged in development and preparation of the relevant advertisement.

26.4 Further, it must be noted that as per industry practice, typically, the advertising companies are remunerated/ compensated for their efforts and costs relating to provision of advertisement services on the basis of an agreed commission fixed as a percentage of the mediate spend for the release of the particular advertisement. At this point, it is important to highlight that all the invoices and/ or purchase orders from third party vendors necessarily need to contain “Account Customer Name”. Accordingly, with respect to the appointment and spends on account of renting advertisement space and goods/ services from third party vendors, the assessee also operates as an agent of the customer and the relationship does not constitute a Principal to Principal relationship. Further, it must be noted that the appointment of third party vendors, fixation of pricing etc. terms are taken after taking necessary approvals in this regard from the end customers.

26.5 In addition to the above, the costs if any, paid by the advertising companies to outsourced production houses for production/ shoot of an advertisement are recovered by the advertising company from the end customer on a cost to cost basis, since they act as the agents of the ultimate customer in appointing such third party production houses.

26.6 The fact that the accounting approach of reporting net revenue/ commission income as the revenue of advertising companies is adopted as an industry practice is evident from the accounting adopted by numerous advertising companies both within India as well as globally.

26.7 Further, it must be noted that the assessee pays any amounts to such third parties towards renting of space and/ or procurement of goods/ services only when the same is recovered from the relevant customer. It is a settled industry position that in the event a customer fails to pay any such amounts to the advertising agency, the bad debt risk is borne by the third party vendor. Therefore, in no event whatsoever, does the assessee assume any risk on account of non payment by the debtors.

26.8 As regards the profitability analysis undertaken by the assessee for the purpose of transfer pricing analysis, it was submitted by the assessee that the same is based on the profit and loss position of the company as determined and reflected in the audited financial statements of the company for the relevant financial year.

26.9 The financial statements of the assessee company have thus been duly prepared in accordance with the relevant statutory requirements i.e. in accordance with the provisions laid down in the Companies Act, generally accepted accounting principles and standards issued by the

Institute of Chartered Accountants of India and its accounts have been duly audited by an independent Chartered Accountant under sec. 44AB of the Act.

26.10 A reference was also made to the observations made and guidance provided by the Emerging Issues Task Force (EITF) formed in 1984 by Financial Accounting Standards Board (FASB) to provide assistance with timely financial reporting. The relevant extract of publication issued by the EITF on Gross Verses Net Presentation of Revenue issue was pointed out stating that gross reporting treats the transaction as the company purchasing a product or service from the supplier and then selling that product or service to the end-user, while net reporting treat the transaction as the end-user making a purchase from the supplier, with the company acting as a sales agent.

26.11 The circumstances and indicators in which net revenue reporting may be adopted as the basis for revenue recognition were set out as under:-

“The supplier is the primary obligor in the arrangement. If the supplier is responsible for fulfillment and customer satisfaction, that may be an indication that the company does not have risks and rewards as a principal in the transaction and therefore should recognize only its net fee as revenue. Representations made by a company during marketing and the terms of the sales contract will generally provide evidence as to

a customer's understanding of whether the company or the supplier is responsible for fulfillment.

The amount the company earns per transaction is fixed (in dollars or as a percentage of the arrangement fee). When a company earns a fixed dollar amount per customer transaction or a stated percentage of the amount billed to a customer, it appears to be acting as an agent of the supplier.

The supplier has credit risk. If credit risk exists (that is, the sales price has not been fully collected prior to delivering the product or service) but the supplier assumes that risk, the company appears to be acting as an agent of the supplier.”

26.12 The accounting treatment of adopting commission/ net revenue as the total income of the company is also supported by the conclusions made and guidance provided by the EITF. In the light of the guidance provided by the EITF, it was thus clear that the accounts of the assessee company were duly prepared in accordance with the generally applicable and accepted accounting principles in India and it was absolutely unreasonable and undue on the part of the TPO to completely ignore and disregard the opinion of an independent accountant on the accounts.

27. It was thus submitted by the assessee that net revenue basis of accounting followed by the assessee is justified on the following counts:-

“a. based on the economic/ commercial reality of the operations of advertising companies i.e. the income of such advertising companies is towards the advertisements etc. developed by the company and provision of related services, which is represented by the commission receivable by the advertising agency;

b. in line with the industry practice in this regard, as typically all advertising services companies are remunerated for their advertising services based on a commission model and accordingly, commission/ net revenue is considered as the total income from operations for such companies;

c. in accordance with the accounting principles generally accepted in India as well as Companies Act, 1956, duly certified by independent accountants.”

28. In this connection, the guidelines of Transfer Pricing for Multinational Enterprises and Tax Administrations issued by the Organization for Economic Co-operation and Development (OECD Guidelines) were also pointed out and detailed note there upon was submitted before the learned CIT(A).

29. After considering the assessee's submissions, material available on record, TPO's report and Assessing Officer's order, the learned CIT(A) had arrived at the following finding on this issue:-

“10.2 I have gone through the above submissions of the appellant and have examined them in the light of material available on record, the main bone of contention is whether operating profit is to be calculating after grossing up of the revenue or on net basis.

10.3 The claim of the appellant is that the payments made to the third party vendors/ media agencies are mere pass through in nature and recovered from the customer on whose behalf the payments are made. The appellant only acts an intermediary between the vendor and the ultimate customer. To demonstrate the pass-through nature of such costs, the agreements entered into with the vendors/ media agencies, payment schedules and

invoices/ other relevant back-ups were sought from the appellant during the appellate proceedings. In this regard, the appellant, vide letter dated November 12, 2009 submitted 2 agreements entered into with the vendors viz, MTV and Times of India (TOI). Further, invoices raised by the appellant on Samsung/ Client and corresponding invoices raised by the vendors/ MTV/ TOI on the appellant were also submitted by the appellant for verification. I have gone through the agreements and the invoices submitted by the appellant. The MTV agreement is a tripartite agreement entered into between the appellant, MTV India and Samsung India Electronics Ltd. / Client. The invoices raised by MTV on the appellant contain the name `Samsung`.

The other agreement is entered into between Samsung with TOI with counter signature of the appellant wherein the vendor/ TOI can directly raise invoices on Samsung instead of the appellant.

10.4 During the course of appellate proceeding the appellant was also asked to give the details of collection date with respect to the invoices raised by them on their client etc. and corresponding payments made by them to advertisement agency /media. On test check it was noticed that payment to advertisement agencies/ media agencies are being made only after recovering it from the respective customer. Thus, the appellant follows the advertising agency practice of settling vendor cost based on collection from the client.

From the replies filed by the appellant it is further noticed that the appellant does not assume any risk on account of non-payment by the customers. In case of any default on non-payment by the customer, the appellant does not own any liability towards media owners/ vendors.

10.6 Thus, the agreements and supporting invoices and payment terms support the appellant's contentions that, with respect to the expenditure on account of placing the advertisement etc. with the third party vendors/ media agencies, the appellant operates only as an agent of the customer and the

relationship does not constitute a Principal to Principal relationship.

Further it is also pertinent to mention here that though in the Income Tax proceeding the rules of res-judicata doesn't apply but when in the current year there are no new facts and circumstance and when in the TP proceedings for previous years the TPO has determined by operating profit on net revenue basis as per the industry's practice, I think TPO's action is not correct in the year under consideration to deviate from the established position of maintaining books on net revenue basis.

10.7 Based on the above and also placing reliance on accounting principles followed by advertising companies and the OECD guidelines, I am of the opinion that such costs are merely pass through in nature and do not represent any value adding activity undertaken by the appellant, and accordingly do not warrant any mark-up. As such costs do not impact the profitability statement/ position of the appellant for the purpose of computing the OP/ TC margin of the appellant as well as for the comparables too, the net revenue basis of accounting as reflected in the audited financials is appropriate.”

30. Hence, the revenue is in appeal before us.

31. The learned DR has submitted that the profitability ratio of the assessee, in the present case, is to be determined by taking the gross receipts received by the assessee from associates concerns, and not the net receipt as so accepted by the learned CIT(A) inasmuch as in determining the cost base of the profit level indicator (PLI) by taking income on net basis, various costs incurred by the assessee have been left out and therefore, actual cost of the assessee or the profit level indicator has not been properly determined.

The learned DR relied upon the reasons given by the TPO for determining the net cost plus margin by taking the gross revenue as base as against the net revenue adopted by the assessee. He further contended that to determine the operating profit, the determination of operating revenue is to be made on gross payment basis and therefore, he submitted that the Transfer Pricing Officer was justified in making the adjustment to the profit disclosed by the assessee with regard to the international transactions effected by the assessee with the associate concerns.

32. The learned counsel for the assessee Shri Rahul Mitra supported the order of the learned CIT(A). In the light of the nature of business of advertising, communication, publicity, market research planning etc., services as an agent carried on by the assessee and in the light of the risk assumed by the assessee, he submitted that the net revenue recognition method while determining the net profit margin, is an appropriate method to determine the arm's length price of the transactions entered into by the assessee with its associate concerns. He submitted that the assessee had undertaken advertisement, brand promotion and other related activities for Samsung Group in India, and in respect of these services, the assessee used to raise bills to its associated enterprises, the gross media spends, charged by the third party vendors/ media agencies, which were passed on to associated

enterprises on cost to cost basis, and a fixed commission or charge based on the different types of activities was charged from the associated enterprises. He further pointed out that the fixed commission/charge received by the assessee from associated enterprises represents the assessee's remuneration for the functions performed or services rendered. All the amounts paid by the assessee to the third parties vendor/media agencies were reimbursed by its customers or associated enterprises to the assessee. He further pointed out that in respect of certain intra group services, the commission income is split between the associated enterprises and the assessee based on 70:30 ratio depending on the effort expended by each party.

33. With regard to the method applied by the assessee to determine the arm's length price, the learned counsel for the assessee submitted that the assessee applied Transactional Net Margin Method (TNMM) which has also been applied by the TPO. In the Transfer Pricing report submitted by the assessee, the assessee applied the TNMM on an entity level using Operating Profit/Total cost ("OP/TC") as the profit level indicator. The total cost was comprising the expenses incurred by the assessee towards provision of the advertisement and related service such as personnel expense, other administrative expenses etc. The learned counsel for the assessee further pointed out that in the financial accounts of the assessee, the assessee

recognized revenues on a net basis, i.e., it recognized the commission/charges received in respect of its functions as revenue and the gross media spends i.e. paid to third party media or vendor, costs were passed on to the customers or associated enterprises, without a mark-up as pass-through cost, thereby not including such third party costs in its profit & loss account and OP/TC computation, which is the proper method adopted by the assessee.

34. With regard to the comparables, the learned counsel for the assessee submitted that the comparables cited by the assessee were accepted by the learned TPO as appropriate. The only dispute is with regard to the method of computing of OP/TC margin whether on a gross basis as done by the TPO or net basis as worked out by the assessee. In this respect, the assessee submitted that the payments made to the third party vendor/media agencies do not represent any value added activity carried out by the assessee inasmuch as the assessee was engaged in undertaking advertising services for its customers/associated enterprises in the capacity of an agent.

35. In this respect the assessee's submissions given in writing are as under:-

“18. The assessee's submissions in the instant case are provided below:

I. *Payments made to third party vendors/ media agencies do not represent any value added activity carried out by the assessee.*

19. *The assessee is engaged in undertaking advertising services for its customers/ AEs in the capacity of an agent. As part of its business operations, the assessee facilitates placement of advertisements (for its customers/ AEs) in the print, electronic etc., media. To this end, it may be required to make payment to third parties like advertisement agencies, printing presses, etc. for renting of advertising space on behalf of its customers. Such payments are fully recovered from the respective customers/AEs. Here, it may be reiterated that the assessee's business is provision of advertising and related services and not sale of advertising slots to customers.*

20. *For performing the above functions, the assessee is remunerated by its customers/ AEs on the basis of a fixed commission/charge based on the 'gross media spends' incurred by them for release of a particular advertisement.*

21. *Accordingly, the commission/ charges received by the assessee from its customers/ AEs represent the remuneration for the business functions carried out by the assessee. The third party payments made to the media agencies per se, do not represent any value-added activities undertaken by the assessee.*

22. *In this regard, the assessee relies on the following guidance provided by the OECD in its guidelines issued in 2009 (refer page 13 of the compendium):*

3.41 *In applying the transactional net margin method, various considerations should influence the choice of margin used. For example, these considerations would include how well the value of assets employed in the calculations is measured (e.g. to what extent there is intangible property the value of which is not captured on the books of the enterprise) and the factors affecting whether*

specific costs should be passed through, marked up, or excluded entirely from the calculation.

23. *Further attention is also drawn towards the following observation made by the OECD in its Proposed revision of Chapter I-III of the Transfer Pricing Guidelines (refer page 83 of the compendium):*

2.134 In applying a cost-based transactional net margin method, fully loaded costs are often used, including all the direct and indirect costs attributable to the activity or transaction, together with an appropriate allocation in respect of the overheads of the business. The question can arise whether and to what extent it is acceptable at arm's length to treat a significant portion of the taxpayer's costs as pass-through costs to which no profit element is attributed (i.e. as costs which are potentially excludable from the denominator of the net profit margin indicator). This depends on the extent to which an independent party at arm's length would accept not to be remunerated on part of the expenses it incurs. The response should not be based on the classification of costs as "internal" or "external" costs, but rather on a comparability (including functional) analysis, and in particular on a determination of the value added by the tested party in relation to those costs.

24. *Here it may be noted that as an industry practice, typically the advertising services companies are remunerated for their advertising services based on a commission model and accordingly, commission /net revenue is considered as the total income from operations for such companies.*

25. *The above fact has also been accepted by the OECD IN ITS 2009 Transfer Pricing Guidelines (refer pages 33-34 of compendium):*

7.36 *When an associated enterprise is acting only as an agent or intermediary in the provision of services, it is important in applying the cost plus method that the return or mark-up is appropriate for the performance of an agency function rather than for the performance of the services themselves. In such a case, it may not be appropriate to determine arm's length pricing as a mark-up on the cost of the services but rather on the costs of the agency function itself, or alternatively, depending on the type of comparable data being used, the mark-up on the cost of services should be lower than would be appropriate for the performance of the services themselves. For example, an associated enterprise may incur the costs of renting advertising space on behalf of group members, costs that the group members would have incurred directly had they been independent. In such a case, it may well be appropriate to pass on these costs to the group recipients without a mark-up, and to apply a mark-up only to the costs incurred by the intermediary in performing its agency function.*

26. *Reliance in this regard is also placed upon the landmark judgment of "E.I. DU Pont De Nemours And Company V. The United States", 78-1, USTC, wherein Dr. Charles H Berry while developing the arm's length range for advertising agencies excluded the costs incurred by these agencies for advertisement placement. Attention is drawn to an article written by Dr. Charles H. Berry in which he has clearly mentioned that in case of advertising agencies the cost related to advertisement placement (purchase of advertising space) is a measure of service(s) provided by the media agencies and not by the advertising agency (refer page 119 of the compendium), hence, in the aforesaid case, the ratio of billed commission to total operating costs, excluding the costs of advertising placement was considered as a measure of profitability.*

27. It is further submitted that the “net revenue recognition” model is also in line with the guidance provided by the Emerging Issues Task Force formed in 1984 by FASB (refer extract below and pages 464 & 465 of the paper book and pages 135 & 138 of the compendium):

Gross reporting treats the transaction as the company purchasing a product or service from the supplier and then selling that product or service to the end-user, while net reporting treats the transaction as the end-user making a purchase from the supplier, with the company acting as a sales agent.

Indicators of Net Revenue Reporting

The supplier is the primary obligor in the arrangement. If the supplier is responsible for fulfillment and customer satisfaction, that may be an indication that the company does not have risks and rewards as a principal in the transaction and therefore should recognize only its net fee as revenue. Representations made by a company during marketing and the terms of the sales contract will generally provide evidence as to a customer’s understanding of whether the company or the supplier is responsible for fulfillment.

The amount the company earns per transaction is fixed (in dollars or as a percentage of the arrangement fee). When a company earns a fixed dollar amount per customer transaction or a stated percentage of the amount billed to a customer, it appears to be acting as an agent of the supplier.

The supplier has credit risk. If credit risk exists (that is, the sales price has not been fully collected prior to delivering the product or service) but the supplier assumes that risk, the company appears to be acting as an agent of the supplier.

28. *It may also be noted that as per the industry norms in this regard, the advertising space (be it media, print or outdoor) is let out by third party vendors in the name of the ultimate customer and beneficiary of the advertisement (all the invoices and/ or purchase orders from third party vendors necessarily need to contain "Account Customer Name" and the appointment of third party vendors, fixation of pricing terms etc., are carried out after taking approval from the customers). Advertising agencies/ companies simply act as intermediaries between the ultimate customer and the third party vendors in order to facilitate placement of the advertisements.*

29. *As mentioned earlier, the advertising companies are compensated for their efforts and costs relating to provision of advertisement services on the basis of an agreed commission fixed as a percentage of the gross media spend for the release of a particular advertisement. The payment to the vendors is recovered from the respective customer(s). In the event that a customer fails to pay any such amounts to the advertising agency the bad debt risk is borne by the third party vendor and not by the advertising agency. Therefore, in no event whatsoever, does the assessee assume any risk on account of non-payment by the customers/ AEs.*

36. With regard to the reliance placed by the TPO on the decision in the case of Sinclair Murry & Co. Pvt. Ltd. vs. CIT, 97 ITR 615 and Chowringhee Sales Bureau Pvt. Ltd., 87 ITR 542, where it was held that the gross media spends should be included as the assessee's sales revenue, is totally misplaced in the light of the facts and circumstances of the present case. In that regard, the assessee relied upon the following decisions:-

- (1) CIT Vs. Lakshmi Machine Works, 290 ITR 667 (SC);
- (2) CIT vs. Catapharma India (P) Ltd., 292 ITR 641; &
- (3) CIT vs. Sudarshan Chemcials Industries ltd, 245 ITR 769.

37. The learned counsel for the assessee further submitted that even otherwise, without prejudice to the assessee's main contention that the net margin should be determined with reference to the net revenue, grossing up should be restricted to the quantum of international transactions, and in that regard a suitable adjustment is necessary to be made. The assessee's contentions in this regard given in writing are as under:-

“34. It may be noted that during the financial year 2004-05, out of the total pass-through cost amounting to approx. Rs.105 crores incurred by the assessee, only an amount of approx. Rs.1.8 crores relates to costs incurred towards services provided to its overseas Associated Enterprises (i.e., even less than 2% of the total third party cost of the company) (refer page 199 of the paper book). Further, the value of the international transactions of the assessee to its total revenue for the financial year 2004-05 is approximately 4%. Accordingly, strictly without prejudice to other submissions made by the assessee, even if gross revenue was to be considered, such grossing up would need to be restricted to the amounts recoverable by the assessee from its overseas AEs i.e., to the extent of the international transaction of the assessee on this account.

35. In this regard, the assessee places reliance on the recent ruling pronounced by the Hon'ble Delhi Bench of the Tribunal in the case of IL Jin Electronics (I) Pvt. Ltd. ('IL Jin') (2010 36 SOT 227 refer para 15 of the order). Therein, the Hon'ble Bench has held that the computation of the adjustment, if any, should be proportionate to the quantum of the taxpayer's international transactions.

36. Here it may also be noted that the transactions viz., advertising services and cost allocation/ sharing arrangement amount to a mere Rs.5.42 crores during the financial year 2004-05. By grossing up the entire revenues, the Ld. TPO had

in effect made an adjustment to the domestic transactions of the assessee also, which do not fall under the purview of Section 92 of the Income-tax Act, 1961.”

38. An alternative argument was also made contending that the computation of comparable margins carried out by the TPO are erroneous as the TPO recomputed the average of OP/TC of the comparables on gross basis of accounting at 7.02% being the average of 2 comparable cases which is not correct as per the computation carried out by the assessee, the average of OP/TC margin of the comparables during the F.Y. 2004-05 after grossing up of the revenue and expenses has been worked out to 6.05%. The operating margin for Contract Advertising India Pvt. Ltd. has been worked out at 9% and for Portland India Outdoor Advertising Pvt. Ltd. worked out at 3%. It was also contended by the learned counsel for the assessee that no addition was made in the assessee's case in earlier year where also the assessee used to recognize its revenues on net cost basis, which was not disturbed by the department.

39. Further contention was raised by the learned counsel for the assessee that in any event, the benefit of $\pm 5\%$ range as per proviso to sec. 92C(2) of the Act is also allowable to the assessee and in that connection a reliance was placed on the decision of Income-tax Appellate Tribunal Delhi Bench in the case of Sony India (P) Ltd., 114 ITD 448 and also in the case of

M/s. Development Consultants Pvt. Ltd., 115 TTJ 577 where also $\pm 5\%$ range was allowed to the assessee around the ALP. One more decision in the case of Skoda Auto India Pvt. Ltd. vs. ACIT, 112 TTJ 699, was also pressed into service on this point.

40. The rival contentions of both the parties have been considered and orders of the authorities below have carefully been perused. The only question that falls for our consideration is with regard to the method of computing profit/TC margin whether on gross basis as done by the TPO or net basis as worked out by the assessee. In this case the assessee has applied TNM method to determine arm's length price, which has also been accepted by the revenue authorities. The comparables cited by the assessee has also been accepted by the TPO as appropriate. It is also found by us that in the regular financial accounts maintained by the comparable companies, the comparables recognize revenue on a net basis. The assessee has also recognized revenues on a net basis in its financial account, which had been duly audited by the auditor. The assessee has computed the margin of operative profit on the total cost on the basis of net revenue by way of mark-up received from the associate concern. The payment made by the assessee to third party vendor/media agencies for and on behalf of the principal has not been included in the total cost for determining the profit margin, though,

on the other hand, the TPO has included the payment reimbursed by the assessee's associate enterprise to the assessee on account of payment made to third party vendor/media agencies. It is not in dispute that the assessee is engaged in undertaking advertising services for its customers/associate enterprises in the capacity of an agent. As part of its business operation, the assessee facilitates placement of advertisement for its associate enterprise in the print/electronic etc. media and for that purpose, the assessee is required to make payment to third parties for rendering of advertisement space on behalf of its customers or associated enterprises. It is, thus, clear that the assessee's business is not sale of advertising slots to its customers or associate concern. For performing the functions for and on behalf of associated enterprises, the assessee is remunerated by its associated enterprises on the basis of a fixed commission/charges based on expenses or cost incurred by the assessee for release of a particular advertisement. It is also to be noted that advertising space (be it media, print or outdoor), has been let out by third party vendors in the name of ultimate customers and beneficiary of advertisement. We have gone through the invoices and purchase orders from third party vendors and find that they contain customers' name, and all the terms of advertisement are finalized after taking the approval from the customers. The assessee simply acts as an

intermediary between the ultimate customer and the third party vendor in order to facilitate placement of the advertisement. The payment made by the assessee to vendors is recovered from the respective customers or associate enterprises. In the event customer fails to pay any such amount to the advertisement agency, the bad debt risk is borne by the third party vendor and not by the advertising agency i.e. the assessee. It is, thus, clear that the assessee has not assumed any risk on account of non-payment by its customers or associated enterprises. At this stage a useful reference may be made to ITS 2009 Transfer Pricing Guidelines accepted by the OECD where it is laid down that when an associate enterprises is acting only as an agent or intermediary in the provision of service, it is important in applying the cost plus method that the return or mark-up is appropriate for the performance of an agency function rather than for the performance of the services themselves, and, in such a case, it may be not appropriate to determine arm's length price as a mark-up on the cost of services but rather on the cost of agency function itself, or alternatively, depending on the type of comparable data being used, the mark-up on the cost of services should be lower than would be appropriate for the performance of the services themselves. In this type of cases, it will be appropriate to pass on the cost of rendering advertising space, to the credit recipient without a mark up and to

apply a mark-up only to the costs incurred by the intermediary in performing its agency function. These guidelines are as under:-

3.41 In applying the transactional net margin method, various considerations should influence the choice of margin used. For example, these considerations would include how well the value of assets employed in the calculations is measured (e.g. to what extent there is intangible property the value of which is not captured on the books of the enterprise) and the factors affecting whether specific costs should be passed through, marked up, or excluded entirely from the calculation.

41. In the proposed revision of Chapter I-III of the Transfer Pricing Guidelines issued on 9th September, 2009 – 9th January, 2010 by OECD, it has been provided in Para 2.134 as under:-

“2.134 In applying a cost-based transactional net margin method, fully loaded costs are often used, including all the direct and indirect costs attributable to the activity or transaction, together with an appropriate allocation in respect of the overheads of the business. The question can arise whether and to what extent it is acceptable at arm’s length to treat a significant portion of the taxpayer’s costs as pass-through costs to which no profit element is attributed (i.e. as costs which are potentially excludable from the denominator of the net profit margin indicator). This depends on the extent to which an independent party at arm’s length would accept not to be remunerated on part of the expenses it incurs. The response should not be based on the classification of costs as “internal” or “external” costs, but rather on a comparability (including functional) analysis, and in particular on a determination of the value added by the tested party in relation to those costs.”

42. Further, OECD in ITS 2009 Transfer Pricing Guidelines has laid down as under:-

“7.36 When an associated enterprise is acting only as an agent or intermediary in the provision of services, it is important in applying the cost plus method that the return or mark-up is appropriate for the performance of an agency function rather than for the performance of the services themselves. In such a case, it may not be appropriate to determine arm’s length pricing as a mark-up on the cost of the services but rather on the costs of the agency function itself, or alternatively, depending on the type of comparable data being used, the mark-up on the cost of services should be lower than would be appropriate for the performance of the services themselves. For example, an associated enterprise may incur the costs of rendering advertising space on behalf of group members, costs that the group members would have incurred directly had they been independent. In such a case, it may well be appropriate to pass on these costs to the group recipients without a mark-up, and to apply a mark-up only to the costs incurred by the intermediary in performing its agency function.”

43. In the light of these guidelines, it would be, therefore, clear that a mark-up is to be applied to the cost incurred by the assessee company in performing its agency function and not to the cost of rendering advertising space on behalf of its associate enterprises. We further find that the method adopted by the assessee while submitting transfer pricing study based on net revenue has been accepted by the department in earlier year and, therefore, there is no reason to depart from that stand already accepted by the department in earlier year. In the light of the view we have taken above, we

therefore, uphold the order of the learned CIT(A) on this issue and reject the ground raised by the revenue.

44. Before parting with this issue, we may observe that the following decisions relied upon by the department are not relevant to the present issue inasmuch as all these were rendered in different context and not in the context of what would be the basis for determining the net margin in the case of an agent acting for and on behalf of the principal:-

- (i) CIT Vs. British Paints India Limited, 188 ITR 44 (SC).
- (ii) CIT Vs. Shaik Md. Rowther Agencies (P) Limited, 246 ITR 161 (Mad.)
- (iii) DCIT Vs. Carraro India Limited, 28 SOT 53 (Delhi).”

Thus, these decisions are distinguishable on facts.

45. The next ground taken by the revenue in this appeal is against the CIT(A)'s order in allowing depreciation @ 60% on computer peripheral and accessories amounting to Rs.20,424/- though the 60% depreciation is allowable only on the computer and computer software. In this case, a depreciation to the extent of Rs.11,424/- was disallowed by the AO for the reason that the depreciation on computer accessories and peripherals as claimed by the assessee at 60% is not allowable but the same is to be allowed only @ 25% treating the computer accessories and peripherals to be

in the nature of normal plant and machinery. On an appeal, the CIT(A) allowed the assessee's claim by observing and holding as under:-

“During the year under consideration the appellant made the additions to the block of computers included computer peripherals/accessories such as printers etc. amounting to Rs.54,400 and on which he claimed depreciation @ 60%. The AO didn't admit this claim on the ground that 60% depreciation is allowable on computer and computer accessories and it is not available on computer peripherals like printers etc.

During the course of appellate proceedings the appellant made the detail submissions and stated that in their own case for assessment year 2004-05, the addition on this issue was made and ITAT Delhi Bench vide their order no. ITA No. 1451/DEL/2008 dated 13.02.2009 have allowed the claim of depreciation of 60% on printers, scanners etc.

I have gone through the detail submissions made by the appellant and it is noticed that the issue in the year under consideration is same as was in the assessment year 2004-05 in appellant's own case. Respectfully following the decision of Hon'ble Tribunal in appellant's own case for assessment year 2004-05, as there are no change in the facts and circumstances in the year under consideration, I allow the claim of the appellant on this issue on current year also.”

46. Hence the department is in appeal before us.

47. In the course of hearing of this appeal, it has been pointed out by the learned counsel for the assessee that identical issue has been decided in favour of the assessee by the ITAT, Delhi Bench `B', New Delhi in the assessment year 2004-05 holding that depreciation on monitors and scanners shall be allowable @ 60%.

48. We have heard both the parties and gone through the material on record. We have also gone through the above referred Tribunal's order dated 13.02.2009 passed in the assessee's case pertaining to the Assessment Year 2004-05 where the coordinate Bench of the Tribunal has decided this issue as under:-

“3. In the next ground of appeal, grievance of revenue relates to grant of depreciation @ 60% on computer peripheral. On due consideration of the facts and circumstances, we find that the assessee had claimed depreciation @ 60% on computer peripheral such as monitors & scanner etc. The Assessing Officer held that such instrument cannot be treated at par with the computer and, therefore, depreciation was granted @ 25%. On appeal, learned CIT(Appeals) allowed the depreciation @ 60%. This issue is squarely covered in favour of the assessee by the order of the ITAT rendered in the case of ITO vs. Samiran Mazumdar reported in 98 TTJ (Calcutta) page 119 wherein it has been held that depreciation would be admissible @ 60% on monitors and scanners etc. The ITAT after an elaborate discussion held that such items are to be treated at par with the computers because they cannot function independently. Respectfully following the ITAT's order, we do not find any error in the order of learned CIT(Appeals) on this issue. This ground of appeal is rejected.”

49. Respectfully following the Tribunal's order passed in assessment year 2004-05, we uphold the order of the CIT(A) in allowing the assessee's claim of depreciation @ 60% on computer accessories and peripherals. At this stage, it is pertinent to note that the order of the Tribunal allowing depreciation at higher rate of 60% on computer accessories and peripherals

instead of the normal rate of 25%, has been upheld by the Hon'ble Delhi High Court in the case of CIT Vs. BSES Rajdhani Powers Ltd. (ITA No.1266/2010) vide order dated 31st August, 2010. Thus, this ground No.2 raised by the revenue is rejected.

50. In the result, the appeal filed by the revenue is dismissed.

51. This decision is pronounced in the Open Court on 30th November, 2010.

Sd/-
(A.K. GARODIA)
ACCOUNTANT MEMBER

Sd/-
(C.L. SETHI)
JUDICIAL MEMBER

Dated: 30th November, 2010.

Copy of the order forwarded to:-

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

By Order

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Deputy Registrar, ITAT.