M/S Reckitt Benckiser (I) Ltd., Kolkata vs Assessee on 25 May, 2016

I . T. A . N o s . 1 6 7 1 / KO L . /
Assessment years: 2003-2004 &

I . T. A . N o s . 1 6 9 9 / KO L
Assessment years: 2003-2004 &

IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'C' BENCH, KOLKATA

Before Shri P.M. Jagtap, Accountant Member
and Shri S.S. Viswanethra Ravi, Judicial Member

I.T .A. No. 1671/KOL/ 2008
Assessment Year : 2003-2004

Reckitt Benckiser (India) Limi ted,.....Appellant
206, A.J.C. Bose Road, Business Towers,
Unit 7C, 7 t h Floor,
Kolkata-700 017
[PAN : AABCR 2655 Q]

-Vs.-
Joint Commissioner of Income Tax,..... .....Respondent
Range-12, Kolkata,
3, Government Place (West),
Kolkata-700 001

&

I.T .A. No. 1024/KOL/ 2009
Assessment Year : 2004-2005

Reckitt Benckiser (India) Limi ted,.....Appellant
206, A.J.C. Bose Road, Business Towers,
Unit 7C, 7 t h Floor,
Kolkata-700 017
[PAN : AABCR 2655 Q]

-Vs.-
Joint Commissioner of Income Tax,..... .....Respondent
Range-12, Kolkata,
3, Government Place (West),
Kolkata-700 001

&

I.T .A. No. 1699/KOL/ 2008
Assessment Year : 2003-2004

Deputy Commissioner of Income Tax,..... .....Appellant
Circle-12, Ko lkata,
3, Government Place (West),
Kolkata-700 001
-Vs.-

Reckitt Benckiser (India) Limi ted,.....Respondent
206, A.J.C. Bose Road, Business Towers,

I . T. A . N o s . 1 6 7 1 / KO L . /
Assessment years: 2003-2004 & 2

I . T. A . N o s . 1 6 9 9 / KO L /
Assessment years: 2003-2004 & 2

Unit 7C, 7 t h Floor,
Kolkata-700 017
[PAN : AABCR 2655 Q]

&

I.T .A. No. 973/KOL/ 2009
Assessment Year : 2004-2005

Deputy Commissioner of Income Tax,..... .....Appellant
Circle-12, Ko lkata,
3, Government Place (West),
Kolkata-700 001
-Vs.-

Reckitt Benckiser (India) Limi ted,.....Respondent
206, A.J.C. Bose Road, Business Towers,
Unit 7C, 7 t h Floor,
Kolkata-700 017
[PAN : AABCR 2655 Q]

Appearances by:
Shri R.N. Bajoria, Senior Advocate , for th e assessee
Shri G. Mallikarjuna, CIT, D.R., for the Department

Date of concluding th e hearing : March 11, 2016
Date of pronouncing the order : May 25, 2016

O R D E R

Per Shri P.M. Jagtap:-

These four appeals, two filed by the assessee being ITA Nos. 1671/KOL/2008 and 1024/KOL/2009 and two filed by the Revenue being 2003-04 and 2004-05. Since some of the issues involved in these appeals are common and inter-linked, the same

have been heard together and are being disposed of by a single consolidated order for the sake of convenience.

I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005

2. First we take up the appeal of the assessee for A.Y. 2003-04 being Commissioner of Income Tax (Appeals)-XII, Kolkata dated 13.06.2008.

3. The issue raised in Ground No. 1 of this appeal relates to the disallowance of Rs.1,35,14,449/- made by the Assessing Officer and confirmed by the ld. CIT(Appeals) under section 40(a)(i) on account of payment made by the assessee to M/s. Reckitt Benckiser Expatriate Services Limited, UK (in short RBESL-UK) as expatriate fees.

4. The assessee in the present case is a Company, which is engaged in the business of manufacturing and trading of household products. The return of income for the year under consideration was filed by it on 28.11.2003 declaring total income of Rs.68,78,30,020/-. During the course of assessment proceedings, it was noticed by the Assessing Officer that the assessee-company has made a payment of Rs.1.35 crores to M/s. RBESL-UK towards expatriate fees. The assessee-company was called upon by the Assessing Officer to explain the nature of this payment as well as to furnish the details of tax, if any, deducted at source therefrom. In reply, it was submitted by the assessee that the said payment was made to M/s. RBESL-UK towards reimbursement of salaries paid to Mr. Rojan Bogac and Mr. Emesto Blanch, who were deputed in India for rendering technical services. It was submitted that the said two individuals were employees of the assessee-company during the year under consideration and their remuneration was partly paid by the assessee-company in India and partly by M/s. RBESL in UK, which was subsequently reimbursed by the assessee-company to M/s. RBESL-UK. It was also submitted that tax at source was deducted on the entire compensation paid to the said employees and the same was duly deposited. It was contended that the amount of Rs.1.35 crores in question thus was paid by the assessee-company to M/s. RBESL-UK towards I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 reimbursement of salary paid by the said company on behalf of the assessee-company and it could not be treated as fees for technical services.

5. The explanation offered by the assessee was not found acceptable by the Assessing Officer for the following reasons given in the assessment order:-

> "As per the copies of Invoices submitted by the assessee company, the payment has been made for "expat fees". The payments are made in Foreign currency. The assessee company is paying to RRESL as expat fees wherein M/s. RBESL has deputed two persons in India for carrying out the job. The assessee could not produce the copy of the agreement between the assessee company and RBESL. The assessee company has produced the copy of an agreement between Rcckitt Benckiser PLC, the

holding company of the assessee and Jose Ernesto Blanch Borau and marked as Employment Agreement under which Mr. Jose Ernesto Blanch Borau was to serve in Reckitt Benckiser plc as the Regional Marketing Director, South Asia. It also contained the other terms and conditions relating to employment. Although it has been claimed by the assessee company that they have entered in to a separate Employment agreement with Mr. Jose Emesto Blanch Borau but the same could not be produced despite being given several opportunities. This agreement clearly shows that Mr. Jose Ernesto Blanch Borau is an employee of Reckitt Benckiser PLC.

There is one more agreement titled as Employment Agreement between Reckitt Benckiser India Limited, the assessee company and Bojan Rojac. In this agreement Mr. Rojac whose address is shown as c/o Reckitt Benckiser Adriatics Slovenia. As per this agreement the Executive shall serve the assessee company as Sales Director India. In all these agreement there is no mention whatsoever of M/s, RBESL U.K. As per the agreement produced in. the course of hearing M's, RBESL is neither a party to these agreements nor in any way connected with these agreements. This clearly shows that there are two limbs of this transaction. The first one is the transaction between the assessee company and RBSEL by which the assessee company was supposed to pay the expatriate fees to these company for the services to be rendered. These services can be rendered I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 either from outside India or through an employee and/or a person deputed in India to carry out the work. In this case the services have been provided by RBESL by deputing two Executives in India for which M/s. RBESL is being paid/remunerated.

It is worthwhile to mention here that M/s. RBESL is an Associate Enterprise of the assessee company. Now let us examine whether the payment to be made to RBESL are taxable in India or not as per the Income Tax Act. The tax residence certificate for RBESL clearly establishes that it is tax resident of U.K. The taxability of these payments will be determined as per the provisions of DTAA between India and UK. As per the provisions of the DTAA, the Income of RBESL is taxable in India if either it has a permanent establishment in India or it is rendering fees for technical services royalty. Let us examine whether these payments would qualify as fees for technical services.

Para 4 of Article 13 of the DTTA states that For the purposes of paragraph 2 of this Article, and subject to paragraph 5 of this Article, the term "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which (a) are ancillary and subsidiary to the application or enjoyment of the right, properly or information for which a payment described in paragraph 3(a) of this Article is received: or (b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in

paragraph 3(b) of this Article is received: or (c) make available technical knowledge, experience, skill, know how or processes, or consist of the development and transfer of a technical plan or technical design.

The services which were rendered by these two Executives clearly falls in clause (c) of article) 3 of the DTAA. These two Executives being the In-charge of Sales and Marketing function arc making available the technical knowledge, experience and skill. This clearly establishes beyond doubt that the same are taxable as fees for technical services.

There is no force in the assessee's argument that the taxes have been paid on the salaries being paid to these Executives because these: persons are clearly taxable under I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 Article 16 of the DTAA, as "dependent personal services" as they stayed in India for more than one year. In any case, these employees are taxable at individual level in individual capacity as well on their salary receipts as they stayed in India for more than one year. So the assessee has failed to pay taxes/deduct TDS on the first limb of the transaction i.e, the payment by the assessee company to RBSEL The assessee's payment of tax for the second limb of the transaction i.e. the payment from RBESL to these employees will not help because the assessee is required to deduct pay taxes on the first limb of the transaction as well as per the provisions of the Income Tax Act read with the provisions of DTAA between India and UK Since these payments were made to a non-resident, the assessee was required to deduct TDS under section 195 of the Income tax Act. The Hon'ble Supreme Court of India in the case of Transmission Corporation of India -vs.- CIT has clearly stated that assesee is bound to deduct TDS on payment to non-resident as per the provisions of section 195 until and unless they obtain a nil certificate from the department. As the assessee has failed to deduct TDS on this payment. Section 40(a)(i) comes into apply which clearly states that when the assessee has failed to deduct TDS for any sum payable outside India on which the tax has not been deducted, the same is not to be allowed as deduction while computing the income of the assessee".

The Assessing Officer thus invoked the provisions of section 40(a)(i) and disallowed the payment of Rs.1.35 crores made by the assessee to M/s. RBESL-UK towards expatriate fees.

6. The disallowance made by the Assessing Officer under section 40(a)(i) was challenged by the assessee in the appeal filed before the ld. CIT(Appeals). During the course of appellate proceedings before the ld. CIT(Appeals), it was reiterated by the assessee-company that Mr. Rojan Bogac and Mr. Ernesto Blanch were its employees, who effectively worked under its direct control and supervision. The part of their salaries was paid by M/s. RBESL-UK for and on behalf of the assessee-company and the same was accordingly reimbursed by the assessee-company to M/s.

I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 RBESL-UK. The employment agreement under which the two expartriate employees worked with the assessee-company was also produced by the assessee. It was also brought to the notice of the ld. CIT(Appeals) by the assesese-company that tax at source on the entire salaries paid to the said employees including that part which was paid by M/s. RBESL-UK and subsequently reimbursed was also duly made and deposited. It was contended that the amount in question paid to M/s. RBESL-UK thus was not in the nature of fees for technical services and the same being simply in the nature of reimbursement of salaries paid by M/s. RBESL-UK for and on behalf of the assessee-company to its expartriate employees, no tax at source was liable to be deducted and there was no question of disallowance under section 40(a)(i). This contention of the assessee was not found acceptable by the ld. CIT(Appeals) and keeping in view the reasons given by the Assessing Officer in the assessment order, he proceeded to confirm the disallowance made by the Assessing Officer under section 40(a)(i).

7. The ld. counsel for the assessee, at the outset, invited our attention to a copy of the employment agreement placed at page no. 9 to 21 of the paper book and pointed out the relevant clauses of the said agreement to show that the amount of salaries paid to the concerned two employees was to be partly paid in local currency and partly in foreign currency. He submitted that the part of salary payable in foreign currency was paid by M/s. RBESL-UK on behalf of the assessee-company and the same was subsequently reimbursed by the assessee-company to M/s. RBESL-UK. He also invited our attention to the relevant TDS certificates in Form No. 16 to show that tax at source was deducted by the assessee-company on the entire salaries paid to the two employees in local currency as well as the foreign currency. He contended that the amount in question paid to both the employees outside India by M/s. RBESL-UK and subsequently reimbursed by the assessee-company thus was already subjected to TDS I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 as salary income and there was no question of making any disallowance under section 40(a)(i) for the alleged failure of the assessee to deduct tax at source. In support of this contention, he relied on the decisions of Mumbai Bench of this Tribunal in the case of ACIT -vs.- Nagase India Pvt. Limited (ITA Nos. 7866 & 8022/Mum./2011 dated 05.03.2014) and in the case of Temasek Holdings Advisers India Pvt. Limited -vs.-DCIT [160 TTJ 556].

8 The ld. D.R., on the other hand, invited our attention to the employment agreement placed on record by the assessee and pointed out certain anomalies and shortcomings there. According to him, the said agreement was not duly signed by the concerned parties and identity of one person Mr. Frank Ruther is not proved. He submitted that even the TDS certificates filed by the assessee in Form No. 16 do not contain permanent account number. He contended that all these infirmities in the relevant documentary evidence produced by the assessee as well as other infirmities specifically pointed out by the Assessing Officer clearly show that the claim of the assessee of having paid the amount in question as reimbursement to salaries paid to its employees was not genuine and as held by the Assessing Officer, the said payment being in the nature of fees for technical services, tax was liable to be deducted which the assessee clearly failed to do. He contended that the provisions of section 40(a)(i) thus are clearly attracted and the disallowance made by the Assessing Officer and

confirmed by the ld. CIT(Appeals) by invoking the said provisions is fully justified.

9. We have considered the rival submissions and also perused the relevant material available on record. The amount in question paid by the assessee-company to M/s. RBESL-UK is claimed to be reimbursement of salary paid by the said concern on behalf of the assessee-company to its employees. Although this claim of the assessee is duly supported by an I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 employment agreement, the same has not been found to be reliable evidence by the authorities below on the basis of same infirmities and anomalies pointed out by them. At the time of hearing before us, the ld. D.R. has also taken the same stand. However, the fact, which is not in dispute, is that tax at source was duly deducted by the assessee from the entire salaries paid to the concerned two employees including that part, which was paid by M/s. RBESL-UK in foreign currency and subsequently claimed to be reimbursed by the assessee-company to M/s. RBESL-UK. This claim of the assessee of having paid and deducted tax at source from the amount in question as salary income is duly supported by TDS certificates issued in Form No. 16 and the same, in our opinion, is sufficient not only to establish that the amount in question is already subjected to TDS but also that there was employer-employee relationship between the assessee-company and the concerned two employees. In the case of Nagase India Pvt. Limited (supra), a similar fact situation was involved, inasmuch as, the amount paid by the assessee on account of reimbursement of salary was disallowed by the Assessing Officer under section 40(a)(i) for want of TDS. However, keeping in view that the assessee had already deducted tax under section 192 on entire salary reimbursed by him, it was held by the Tribunal that there was no case of disallowance under section 40(a)(i). In the said case, nothing was brought on record by the Assessing Officer to show as to how reimbursement of salary made by the assessee was in the nature of fees for technical services and keeping in view this situation, which is similar to the present case, it was held by the Tribunal that there was no element of income in the payment made by the assessee to Japanese Company so as to warrant disallowance under section 40(a)(i) for the alleged failure of deduction of tax at source. A similar fact situation was involved in the case of Temasec Holdings Advisors India Pvt. Limited (supra), wherein Mumbai Bench of ITAT held that the assessee was not liable to deduct TDS under section 194 on the reimbursement of salary of seconded I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 employees. Keeping in view these decisions of Coordinate Bench of this Tribunal in the case of M/s. Nagase India Pvt. Limited (supra) and Temasek Holdings Advisers India Pvt. Limited (supra) and having regard to all the facts of the case, we are of the view that the assessee was not liable to deduct tax at source from the amount in question paid to M/s. RBESL-UK towards reimbursement of salary paid to expatriate employees and the disallowance made by the Assessing Officer under section 40(a)(i) for the alleged failure of the assessee to deduct tax at source is not sustainable. We accordingly delete the said disallowance and allow Ground No. 1 of the assessee's appeal.

10. The issue raised in Ground No. 2 relates to the disallowance of Rs.1,69,27,615/- made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of provision made for marketing expenses.

11. As noticed by the Assessing Officer during the course of assessment proceedings, the assessee had made a provision of Rs.19.90 crores for marketing expenses. He, therefore, required the assessee to furnish the complete details showing the nature and basis of provision made for marketing expenses. In reply, the following submission was made by the assessee in writing:-

> "During the previous year relevant to the AY 2003-04, RBIL has made a provision of Rs.199,003,162/- in respect of marketing expenses. The said provision was required to be made by RBIL since it is following the mercantile system of accounting, provisions required to be made in respect of all expenses incurred during the accounting period irrespective at the time payment.
>
> Since RBIL is following mercantile system of accounting which is a permissible method of accounting as per section 145 of the Act and the accounts are audited and provision made as per the prescribed accounting policies should not be disallowed unless specifically provided in the provision of the Act.
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> I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 Further, out of the provision of Rs.199,033,162/-, a substantial amount has been paid subsequently and balance is likely to be paid in due course. Hence, no disallowance is warranted on this account.
>
> Without prejudice to the aforesaid submission, please note that in case of write back of the aforesaid provision, if it is found to be in excess or for any other reasons, the same will liable to tax in view of the provisions of section 41 of the Act. Hence, there will be no loss to the revenue on that account also.
>
> In view of the aforesaid we submit that no disallowance is warranted in respect of the impugned provision of Rs.199,003,162/-".

12. The above explanation offered by the assessee was not found acceptable by the Assessing Officer. According to him, the assessee following mercantile system of accounting, was entitled to create provision only against ascertained liabilities. In this regard, he found from the relevant details filed by the assessee that out of the provision of Rs.19.90 crores made by the assessee, the actual amount spent was only Rs.18.20 crores and the balance amount of Rs.1.69 crores was found to be excess. He held that this excess provision was liable to be disallowed not being pertinent to the year under consideration and accordingly the disallowance of Rs.1,69,27,615/- was made by him on account of provision for marketing expenses.

13. The disallowance made by the Assessing Officer out of the provision for marketing expenses was disputed by the assessee in the appeal file d before the ld. CIT(Appeals). Besides reiterating the submissions made before the Assessing Officer, it was also brought to the notice of the ld. CIT(Appeals) by the assessee that the excess provision of Rs.1.69 crores having been offered to tax in the subsequent years under section 41(1) at the same rate, there was no loss to the Revenue. The ld.

CIT(Appeals), however, did not find merit in the stand of assessee and rejecting the I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 same, he proceeded to confirm the disallowance made by the Assessing Officer on account of excess provision made for marketing expenses.

14. The ld. counsel for the assessee explained the nature of provision made for marketing expenses and submitted that such provision is required to be made in the relevant year on estimated basis. He submitted that due to the changes that take place, the actual expenditure finally incurred on marketing gets changed and depending on the quantum of expenditure actually incurred, the excess provision is written back in the subsequent years and offered to tax. He contended that since the assessee is following mercantile system of accounting, the provision for marketing expenses is required to be made for the relevant year on estimated basis and since such provision, if found to be excess, is being offered to tax in the subsequent years at virtually the same rate, the disallowance made in the year under consideration on account of such excess provision is not justified.

15. The ld. D.R., on the other hand, submitted that the provision made by the assessee for marketing expenses on estimated basis is always found to be on the higher side. He submitted that it is not clear as to why there should be difference between provision made and actual amount of expenses incurred. He contended that in the absence of any sound basis given by the assessee for making the estimate, the excess provision is liable to be disallowed as rightly held by the authorities below.

16. We have heard the arguments of both the sides and also perused the relevant material available on record. The question that arises for our consideration in the present context is whether the assessee following mercantile system of accounting is right in recognizing and making the provision for marketing expenses in the facts and circumstances of the case. In this regard, a useful reference may be made to the decision of I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 Hon'ble Supreme Court in the case of Rotork Controls Indi (Pvt.) Limited

-vs.- CIT reported in 314 ITR 62 cited by the ld. counsel for the assesese, wherein it was held by the Hon'ble Apex Court that "a provision can be recognized when (a) an enterprise has a present obligation as a result of a past event, (b) it is probable that an outflow of resources will be required to settle the obligation, (c) a reliable estimate can be made of the amount of the obligation". In the present case, the provision made by the assessee-company for marketing expenses amounting to Rs.19.90 crores is allowed by the Assessing Officer to the extent of Rs.18.20 crores thereby accepting that the assessee-company had a present obligation on account of such marketing expenses and there was requirement to make provision to settle the same. His only objection is that the provision so made was excess going by the amount actually required by the assessee subsequently to settle the obligation and accordingly a disallowance to the extent of such excess provision amounting to Rs.1.69 crores was made by him. The Assessing Officer thus finally objected to the quantum of provision made by the assessee for marketing expenses on the ground that the estimate made by the assessee of the amount of obligation is not reliable.

17. At the time of hearing before us, the ld. D.R. has also reiterated this stand by submitting that the provision made by the assesese for marketing expenses is found to be always on the higher side, which clearly shows that the estimate made by the assessee of this liability is not reliable. We find it difficult to accept this stand of the Revenue. It is pertinent to note here that out of the total provision of Rs.19.90 crores made by the assessee for marketing expenses, a sum of Rs.18.20 crores was required to settle the obligation and only the balance amount of Rs.1.69 crores, which is less than 10% of the total provision made by the assessee remained excess. Moreover, such excess provision was subsequently reversed by the assessee and offered to tax as the same rate I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 as submitted by the ld. counsel for the assessee resulting into no loss with the Revenue. Having regard to all these facts of the case, it cannot be said that the estimate made by the assessee of the provisions for marketing expenses was not reliable. In our opinion, the provision for marketing expenses was rightly recognized and made by the assessee being its liability for the expenses of its business and the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) merely on the basis that such provision is found to be finally excessive is not sustainable. We, accordingly, delete the disallowance made on this issue and allow Ground No. 2 of the assessee's appeal.

18. The issue raised in Ground No. 3 relates to the disallowance of Rs.1,76,50,483/- made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of cost of films produced by the assessee for the purpose of business promotion.

19. In the advertisement expenses debited to the Profit & Loss Account, the cost incurred on production of films was included by the assessee- company. In this regard, explanation offered by the assessee before the Assessing Officer was that the films produced for business promotion are generally concept or theme based and the same are changed quite often. It was submitted that these films are not used for more than a year and some of them are of only one time use. It was also pointed out that such films do not have any value after the promotion is over and the expenses incurred on production of such films are onetime expenses, which are revenue in nature having no enduring benefit. On further query raised by the Assessing Officer, it was also clarified by the assessee-company that the films produced for promotion are of two categories, one is audio/visuals, which are produced for small events and normally aired for not more than one month and second is the regular films, which are normally aired for not more than one year. In this regard, the Assessing I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 Officer found that the assessee has incurred expenses on production of films throughout the year including the month of February and March, 2003. According to him, even going by the assessee's submission that useful life of some films was one year, the cost incurred on production of such film could be allowed only on pro-rata basis depending on the number of months in which the films had been used in the year under consideration. He accordingly required the assessee to furnish the relevant details of expenditure incurred on production of films during the year under consideration month-wise and on that basis made a disallowance on pro-rata basis at Rs.1,76,50,483/-.

20. Before the ld. CIT(Appeals), reliance was placed by the assessee on the decision of the Hon'ble Calcutta High Court in the case of CIT -vs.- Berger Paints India Limited reported in 254 ITR 503 to contend that advertisement expenses which are normally to be treated as revenue expenses since the memory of purchasing market is short and the advertisement is needed from year to year. It was also submitted that the life span of regular Ad-films is about a year and since expenses on production of such films are required to be incurred throughout the year, there is no question of any enduring benefit arising from the expenses incurred on production of films. The ld. CIT(Appeals) did not find merit in the submissions of the assessee. According to him, the case of Berger Paints India Limited (supra) cited by the ld. counsel for the assessee was distinguishable on facts and the disallowance made by the Assessing Officer on account of cost of films on pro-rata basis was fully justified in the facts and circumstances of the case. He accordingly confirmed the disallowance made by the Assessing Officer on this issue.

21. The ld. counsel for the assessee submitted that the life of Ad-films is generally above one year and on this basis alone, the Assessing Officer held that the expenses incurred on production of films at the end of the I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 year under consideration will have its benefit even in the subsequent year. He contended that the Assessing Officer as well as ld. CIT(Appeals) however completely ignored the fact that the expenditure in question incurred by the assessee on production of films by itself is revenue in nature and the same cannot be disallowed on pro-rata basis and deferred to the next year as the concept of deferred revenue expenditure is not recognized by the Income Tax Act. He submitted that a similar expenditure incurred on production of films was allowed by the Assessing Officer himself in the earlier years and even in the immediately succeeding year, i.e. A.Y. 2004-05, the ld. CIT(Appeals) has allowed similar expenditure which is challenged by the Revenue in the appeal filed before the Tribunal. He also contended that the Assessing Officer himself has accepted the nature of expenditure in question as revenue by not treating the same as capital and this being so, there is no question of attributing the same to the next year on pro-rata basis under the Income Tax Act. In support of this contention, the ld. counsel for the assessee relied on the decision of the Ahmedabad Special Bench of ITAT in the case of ACIT -vs.- Ashima Syntex Limited reported in 170 ITD 1 and the Hon'ble Gujarat High Court in the case of DCIT -vs.- Core Health Care Limited reported in 308 ITR 263.

22. The ld. D.R., on the other hand, submitted that the matching principle should be applied while allowing the expenditure incurred by the assessee on the production of films and since the benefit of such expenditure was partly available to the assessee in the subsequent year, the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on pro-rata basis is fully justified. He also contended that such disallowance on pro-rata basis is worked out by the Assessing Officer on the basis of working given by the assessee himself and the assessee therefore, is not justified to find fault in such disallowance made by the Assessing Officer on pro-rata basis.

I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005

23. We have considered the rival submissions and also perused the relevant material available on record. It is observed that the expenditure in question incurred by the assessee on production of Ad-films is revenue in nature and as rightly submitted by the ld. counsel for the assessee, this position has been accepted even by the Assessing Officer as well as by the ld. CIT(Appeals) by not treating the same as capital expenditure. This, however, considered that the benefit of Ad-films was partly available to the assessee even in the immediately succeeding year going by the useful life of the films of one year and accordingly made a disallowance on pro- rata basis and deferred the same to the subsequent year. In this regard, the ld. counsel for the assessee has relied on the decision of Ahmedaba d Special Bench of this Tribunal in the case of Ashima Syntex Limited (supra), wherein the question relating to the treatment to be given to the deferred revenue expenditure under the Income Tax Act had come up for consideration. In this regard, it was held by the Tribunal that the deferred revenue expenditures denotes expenditure for which a payment has been made or a liability incurred which is essentially revenue in nature but is written off over a period of time for various reasons like quantum and expected future benefit. It was held that for the purpose of allowability of any expenditure for the purpose of Income Tax Act, what is material is the classification between capital and revenue and the Income Tax Act does not recognize any concept of deferred revenue expenditure. In the said case, there was nothing brought on record to suggest that any asset, tangible or intangible, had been created by incurring the expenditure in question and it was held by the Tribunal that the deferred revenue expenditure was rightly claimed by the assessee as deduction in the year in which it was incurred.

24. In the case of Core Health Care Limited (supra) cited by the ld. counsel for the assessee, a similar issue was involved inasmuch as I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 substantial expenditure was incurred by the assessee on a special advertisement campaign resulting into benefit for more than a year and while dealing with the issue of allowability of such expenditure, Hon'ble Gujarat High Court held that there is no such category of deferred revenue expenditure under the Income Tax Act. It was held that the benefit to the business cannot be termed capital or revenue only on the basis of the period for which the benefit is derived by the assessee. It was held that any benefit resulting to a business need not be confined to the year of expenditure and this is an ordinary incident of a running business. Accordingly, the advertisement expenses incurred by the assesese to create brand image was held to be allowable as revenue expenditure by the Hon'ble Gujarat High Court. In the present case also, there is no dispute that the expenditure in question incurred by the assessee on production of Ad-films is revenue expenditure and the same is disallowed on pro-rata basis by the authorities below only on the ground that the resultant benefit was not confined to the year under consideration and the same was partly available even in the subsequent year. The ratio of the decision of the Hon'ble Gujarat High Court in the case of Core Health Care Limited (supra) and that of the Ahmedabad Special Bench decision of ITAT in the case of Ashima Syntex Limited (supra) thus is squarely applicable in the facts of the present case and respectfully following the same, we delete the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of cost of Ad-films on pro-rata basis. Ground No. 3 of the assessee's appeal is accordingly allowed.

25. The issue raised in Ground No. 4 of the assessee's appeal relates to the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of assessee's claim for deduction under section 80IA to the extent of Rs.47,34,361/-.

I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005

26. In the return of income filed for the year under consideration, the assessee-company had claimed deduction of Rs.2,08,64,312/- under section 80IA being 30% of the profit of Rs.6,95,47,705/- of its Insecticides Plant at Hosur in Tamil Nadu. During the course of assessment proceedings, the claim of the assessee for deduction under section 80IA was examined by the Assessing Officer and on such examination, he was of the view that the allocation of indirect expenses made by the assessee among the different units was not on sound basis. The assessee also could not produce the product-wise details of debts written off as required by the Assessing Officer. In the absence of these details and the failure of the assessee to explain and justify and the basis adopted by it for allocation of indirect expenses, the Assessing Officer proceeded to allocate the expenses in the ratio of sales of each unit and work out the profit of the eligible unit of the assessee at Hosur at Rs.5,37,66,504/-. Accordingly, the claim of the assessee for deduction of Rs.2,08,64,312/- was restricted by him to Rs.1,61,29,951/-. On appeal, the ld. CIT(Appeals) upheld the action of the Assessing Officer on this issue for the same reasons as given by the Assessing Officer.

27. We have heard the arguments of both the sides and also perused the relevant material available on record. The ld. counsel for the assessee has very fairly and frankly admitted that the relevant details as required by the Assessing Officer to justify the allocation of indirect expenses are not available with the assessee and in the absence of the same, there is nothing to dispute the allocation of indirect expenses made by the Assessing Officer in the ratio of sales of each unit. We, therefore, find no justifiable reason to interfere with the impugned order of the ld. CIT(Appeals) confirming the disallowance made by the Assessing Officer on account of assessee's claim for deduction under section 80IA to the I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 extent of Rs.47,34,361/- and upholding the same, we dismiss Ground No. 4 of the assessee's appeal.

28. The issue raised in Ground No. 5 of the assessee's appeal relates to the addition of Rs.19,56,989/- made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of Transfer Pricing Adjustment.

29. During the course of its regular business of dealing in Core Health Care and Personal Care Products, the assessee-company had entered into international transactions with its Associated Enterprises (in short 'AE'), inter alia, of export of raw materials and finished goods for a total value of Rs.2,59,44,394/-. The assessee-company had also entered into international transactions with its AEs of import of Micro-Wax for a value of Rs.1,73,153/- during the year under consideration. In

order to ascertain the Arm's Length Price (in short 'ALP') of these international transactions, a reference under section 92CA(1) of the Act was made by the Assessing Officer to the Transfer Pricing Officer (in short 'TPO'). In the Transfer Pricing Study Report filed by the assessee, the ALP in relation to the international transactions involving export of raw materials and finished products was determined by the Assessing Officer by using Transactions Net Margin Method (in short 'TNMM') as the most appropriate method. The Operating Profit to Total Cost (OP/TC) was taken as the Price Level Indicator (in short PLI) and since the OP/TC of these transactions as worked out by the assessee at 7.96% was within the permissible range of deviation of the average OP/TC of five entities selected as comparables, the price charged to its AEs for export of raw materials and finished products was claimed by the assessee to be at Arm's Length. The TNMM adopted by the assessee to bench mark these I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 international transactions was not disputed by the TPO. He, however, noted from the working of OP/TC made by the assessee of all the relevant international transactions that the export made by the assessee to its AEs was comprising of intermediates worth Rs.1,59,00,356/- and finished goods worth Rs.1,58,85,038/-. He also found that out of the export of Rs.1,59,00,356/- of intermediates, a sum of Rs.85,85,289/- was on account of export of one product, i.e. PCMX. In this regard, he noted from the cost audit report prepared by the Cost Accountant that the assessee- company had incurred a loss on the export of PCMX in the calendar year 2002. He, therefore, required the assessee to show-cause as to why the loss shown in the cost audit report should not be taken as an actual result for the purpose of determining the ALP of the relevant international transactions by using TNMM. In reply, it was submitted by the assessee that the cost audit report was for the calendar year of 2002, while the working made by it of OP/TC of the relevant international transactions was for the financial year 01.04.2002 to 31.03.2003. The Assessing Officer, however, noted from the relevant details furnished by the assessee that all the relevant exports were made by the assessee- company till 31 s t December, 2002 except one invoice, which was raised on 31.03.2003. According to him, it was thus clear that the assesee-company had actually suffered loss in the export of PCMX as pointed out in the cost audit report. The said loss, therefore, was also taken for consideration by the Assessing Officer to re-compute the OP/TC of the relevant transactions of the assessee-company with its AE at 3.54%. He also noted that the entities selected by the assessee as comparables in the Transfer Pricing Study Report were dealing in detergent and soap and the same, therefore, were not comparables. He also noted that the assessee-company had entered into voluminous transactions with third parties during the year under consideration and the same representing internal comparables were more appropriate to adopt for the purpose of comparability analysis. He accordingly worked out the OP/TC of these I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 transactions of the assessee with third parties at 10.11% and applying the same, the arm's length price of the international transactions of the assessee-company with its AE involving export of raw materials and finished products was worked out by him at Rs.2,78,38,983/- as against the price of Rs.2,59,44,394/- charged by the assessee. The difference of Rs.18,94,589/- accordingly was worked out by him as transfer pricin g adjustment.

30. As regards the international transactions with AEs involving import of Wax, Comparable Uncontrolled Price (in short 'CUP') method was adopted by the assesese as the most appropriate method to Bench mark these transactions. In this regard, the claim of the assessee-company was that since no marking was charged by the Associated Enterprises in these transactions, the price charged was at arm's length. In this regard, it was found by the TPO that the assessee has imported the same product at Rs.184/- per Kg. from third party on 01.03.2005 as against the price of Rs.288/- per Kg. charged by its A.E. Although the said transaction dated 01.03.2005 was not in the same year, the same being the solitary CUP available, the TPO adopted it and worked out the ALP of the international transactions of the assessee with its AE for import of Wax at Rs.1,10,753/- as against the actual price of Rs.1,73,153/- charged by the AE resulting into T.P. adjustment of Rs.62,400/-. Accordingly, in the order passed under section 92CA(3) dated 17.03.2006, the total Transfer Pricing Adjustment required to be done in respect of the international transactions of the assessee with its AE was worked out by the TPO at Rs.19,56,989/- and consequently the addition to that extent was made by the assessee to the total income of the assesee in the assessment completed under section 143(3) vide an order dated 27.03.2006. On appeal, the ld. CIT(Appeals) confirmed the said addition made by the Assessing Officer.

I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005

31. The ld. counsel for the assessee took us through the Transfer Pricing Study Report submitted by the assessee to show the reasons for selectial TNMM as the most appropriate method to benchmark the transactions of the assessee-company with its AE involving export of intermediates and finished products as also the working made by the assessee of OP/TC of such transactions at 7.96%. He submitted that the TPO has neither disputed the method adopted by the assessee to benchmark these international transactions nor the working made by the assessee of OP/TC of such transactions. He submitted that the TPO, however, adjusted the OP/TC worked out by the assessee on the basis of cost audit report where the loss was shown in respect of export of one product, i.e. PCMX. He contended that the said cost audit report, however, was prepared for the calendar year of 2002 while the working made by the assesese of OP/TC of the relevant international transactions was for the financial year 2002-03. He also contended that the export of PCMX was only the part of export and the TPO wrongly focussed on the same ignoring that the overall export of the assessee-company to its AEs had resulted into operating margin of 7.96%. He further contended that the TPO has also made a mistake in comparing the export sale of the assessee with domestic sale ignoring that the product mix or product range of these two sectors was different and the assesese was entitled for incentives in respect of export sales, which was not available in case of domestic sales. He submitted that the ALP determined by the TPO thus suffers from various infirmities and mistakes and if at all the Bench- marking done by the assessee in the Transfer Pricing Study Report is also not found acceptable for any defects, the matter may be sent back to the TPO for doing the exercise of determination of ALP afresh.

I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years:

2003-2004 & 2004-2005

32. The ld. D.R., on the other hand, submitted that even though the cost audit report was for the calendar year, 2002 ending on 31.12.2012, the export of PCMX was mainly made by the assessee in the period covered by the cost audit report with only one export made on 31.03.2003 as pointed out by the TPO. He contended that the relevant figures appearing in the cost audit report and showing loss in case of export of PCMX has not been disputed by the assessee at any stage and the same, therefore, cannot be ignored. He also invited our attention to the relevant portion of the Transfer Pricing Study Report submitted by the assessee to point out that the OP/TC of the five comparables selected by the assessee was worked out by using multiple year data of three years. He also pointed out that the products dealt in by the said entities taken as comparables are not exactly similar or comparables to that of the assessee. He further contended that the export of PCMX constituted nearly 33% of the total export of the assessee-company to its AEs and the fact that the export of PCMX had resulted in loss as shown in the cost audit report is sufficient to show that the segmental financials taken by the assessee to work out the OP/TC of the relevant international transactions with AE are not reliable.

33. We have considered the rival submissions and also perused the relevant material available on record. As rightly submitted by the ld. D.R., the fact that the export of PCMX, which constituted about 1/3 r d of the export made by the assessee to its AE, resulted in a loss as shown in the cost audit report clearly creates doubt about the reliability of the segmental financials taken by the assessee to work out the OP/TC of its export with AEs at 7.96%. It is pertinent to note here that nothing has been brought on record either before the authorities below or before us to shows that the figures reported in the cost audit report showing the loss in the export of PCMX are not correct. In reply to a specific query I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 raised by us, the ld. counsel for the assessee has not been able to explain the basis on which these segmental financials showing OP/TC of the export of the assessee-company to its AE at 7.96% are taken. In our opinion, the OP/TC of the relevant transactions worked out by the assessee, therefore, cannot be taken as basis for bench marking the relevant transactions by adopting TNMM and it would be more appropriate to take the OP/TC at the entity level by taking into consideration the entire transactions of the assessee. The entity level OP/TC thus taken is required to be compared with the OP/TC of the entities which are functionally similar by taking the financial data of only the relevant year and not on the basis of multiple year data as taken by the assesese in the Transfer Pricing Study Report, which is not permissible as per the relevant Rules. We, therefore, set aside the impugned order of the ld. CIT(Appeals) on this issue and restore the matter to the file of the Assessing Officer/Transfer Pricing Officer with a direction to do afresh the exercise of determining the ALP of the relevant international transactions of the assessee-company with its AEs by following TNMM and by taking OP/TC at entity legal as PLI. While doing the comparability analysis, the TPO may consider the entities already selected as comparables by the assessee and/or select fresh/new comparables as he may think fit in accordance with the procedure laid down in the relevant rules. If the average margin of the entities finally selected is found to be beyond the deviation limit prescribed in law, the same may be applied to the relevant international transactions of the assessee-company to work out the

ALP and the TP Adjustment. As the TPO is now directed to take OP/TC at entity level to bench mark the relevant international transactions of the assessee with its associated enterprises by adopting TNMM, no separate bench marking is required to be done in case of the international transactions of the assessee-company with its AE involving import of Wax and the same can be bench marked on the same basis as the other international transactions involving export of I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 intermediates and finished products. Ground No. 5 of the assessee's appeal is accordingly treated as allowed for statistical purposes.

34. As regards the Revenue's appeal for A.Y. 2003-04 being ITA No. 1699/KOL/2008, the ld. counsel for the assessee has pointed out that the tax effect involved therein is less than the revised monetary limit recently fixed by the CBDT vide Circular No. 21/2015 dated 10 t h December, 2015 at Rs.10,00,000/- for filing the appeal by the Revenue before the Tribunal and this position clearly evident from the grounds raised by the Revenue in this appeal is not disputed even by the ld. D.R. In Circular No. 21/2015 (supra) recently issued by the CBDT, the monetary limit for filing the appeals by the Revenue before the Tribunal has been increased to Rs.10,00,000/- and as clarified in the said Circular, the said monetary limit is applicable retrospectively even to the appeals pending before the Tribunal. The CBDT has also instructed that such pending appeals below this specified tax limit of Rs.10,00,000/- may be withdrawn/ not pressed. Keeping in view the instruction given by the CBDT vide Circular No. 21/2015 dated 10.12.2015, which is squarely applicable in the present case, the appeal filed by the Revenue for A.Y. 2003-04 is treated as withdrawn/not pressed and dismissed accordingly.

35. Now we shall take up the cross appeals for A.Y. 2004-05 being ITA No. 1024/KOL/2009 (assessee's appeal) and ITA No. 973/KOL/2009 (Revenue's appeal), which are directed against the order of ld. CIT(Appeals)-XII, Kolkata dated 30.03.2009.

36. As regards the Ground No. 1 raised in the appeal of the assessee for AY 2004-05, it is observed that the issue involved therein relating to the I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 disallowance made by the Assessing Officer under section 40A(i) and confirmed by the ld. CIT(Appeals) on account of payment made by the assessee to RBESL-UK towards expatriate fees for non-deduction of tax at source by treating the same as in the nature of fees of technical services is similar to the one involved in Ground no. 1 of the assessee's appeal for AY 2003-04, which has already been decided by us in the foregoing portion of this order. Following our conclusion drawn in AY 2003-04, we delete the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on this issue and allow Ground No. 1.

37. In Ground No. 2 raised in its appeal for AY 2004-05, the assessee has challenged the disallowance of Rs.60,54,560/- made by the Assessing officer under section 40A(i) and confirmed by the ld. CIT(Appeals) on account of payment made for availing connectivity services without deduction of tax at source.

38. During the year under consideration, the assesee-company had made payment of Rs.16,54,516/- for global connectivity to Reckitt Benckiser India Limited as reimbursement. According to the Assessing Officer, the said amount paid by the assesese for use of server/connectivity was clearly taxable in India as royalty and the assessee, therefore, was liable to deduct tax at source from the same. Since there was failure on the part of the assessee to deduct such tax, a disallowance of Rs.16,54,516/- was made by the Assessing officer by invoking the provisions of section 40A(i). On appeal, the ld. CIT(Appeals) confirmed the said disallowance made by the Assessing Officer for the same reasons as given by the Assessing Officer.

I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005

39. We have heard the arguments of both the sides and also perused the relevant material available on record. The limited contention raised by the ld. counsel for the assesese is that the tax from the amount in question has been deducted and paid by the assesee in assessment year 2009-10 and the assessee, therefore, is eligible to claim deduction for the same in AY 2009-10. Since the appeal of the assessee for AY 2009-10 is pending before the Tribunal, the assessee is at liberty to raise this issue during the course of hearing of the said appeal seeking suitable direction as the Bench may think fit. With this observation, we uphold the impugned order of the ld. CIT(Appeals) confirming the disallowance made by the Assessing Officer on this issue and dismiss Ground No. 2.

40. The issue involved in ground No. 3 relating to the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of excess provision made by the assessee for marketing expenses is similar to Ground No. 2 involved in the appeal of the assessee for AY 2003-04, which has already been decided by us in the foregoing portion of this order. Following our conclusion drawn in AY 2003-04, we delete the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on this issue and allow Ground No. 3.

41. The issue involved in Ground No. 4 of the assessee's appeal for AY 2004-05 relates to the determination of rate of tax payable by the assesese on capital gain arising from the sale of flats.

42. In the year under consideration, flats owned by the assessee were sold and since the said flats were held by the assessee for more than 36 months, the capital gain arising from the sale thereof was offered to tax by the assesese at concessional rate applicable to long-term capital gain. Since the flats sold by the assessee were depreciable assets, the Assessing I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 officer invoked the provision of section 50 and brought to tax the capital gain arising from the sale thereof at normal rate applicable to short-term capital gain. On appeal, the ld. CIT(Appeals) upheld the action of the Assessing Officer on this issue by observing that the provisions of section 50 were clearly applicable to the capital gains arising on account of sale of depreciable assets not only for computation but also for the rate of tax.

43. We have heard the arguments of both the sides on this issue and also perused the relevant material available on record. Although the ld. counsel for the assessee has relied on certain judicial pronouncements, it is observed that the same are not applicable in the present context involving the issue relating to rate of tax applicable to the capital gain arising from sale of depreciable assets. On the other hand, the relevant provisions of section 50 as applicable in the present context are very clear and specific as rightly held by the ld. CIT(Appals) and as per the said provisions, which are overriding in nature, the capital gain arising from the sale of depreciable assets is chargeable to tax at the rate applicable to short-term capital gains irrespective of the holding period. We, therefore, find no merit in Ground No. 4 raised by the assesee and dismiss the same.

44. The issue raised in Ground No. 5 relates to the disallowance made by the Assessing Officer under section 14A which is confirmed by the ld. CIT(Appals) by applying Rule 8D.

45. In the year under consideration, the assesese-company had earned interest of Rs.98,26,464/- on tax-free Bonds and the same was claimed t o be exempt from tax in the return of income filed. The disallowance on I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 account of expenses incurred in relation to the said exempt income, however, was not offered by the assessee as required by the provisions of section 14A. In this regard, the claim of the assesese that no direct expenditure was incurred in relation to the exempt interest income was not found acceptable by the Assessing Officer. He estimated such expenses at 5% of the exempt income and made a disallowance of Rs.4,91,323/- under section 14A. On appeal, the ld. CIT(Appeals) held that Rule 8D of Income Tax Rules was applicable to the year under consideration with retrospective effect as held by the Hon'ble Mumbai Special Bench of ITAT in the case of Daga Capital Management Pvt. Limited (ITA No. 8057/Mum./2003 dated 20.10.2008). He accordingly directed the Assessing officer to re-compute the disallowance to be made under section 14A by applying Rule 8D.

46. We have heard the arguments of both the sides and also perused the relevant material available on record. As rightly pointed out by the ld. counsel for the assessee, the decision of the Mumbai Special Bench of ITAT in the case of Daga Capital Management Pvt. Ltd. (supra) has been subsequently overruled by the Hon'ble Bombay High Court in its decision rendered in the case of Godrej & Boycee Manufacturing Co. Ltd. -vs.- DCIT reported in 328 ITR 81 by holding that Rule 8D is applicable only prospectively from AY 2008-09. As further held by the Hon'ble Bombay High Court in the case of Godrej & Boycee Manufacturing Co. Limited (supra), disallowance under section 14A for the years prior to 2008-09 is required to be determined on some reasonable basis. In this regard, it is observed that the Coordinate Benches of this Tribunal has taken a consistent view by holding that disallowance under section 14A to the extent of 1% of the exempt income would be fair and reasonable. Following this consistent view taken by the Tribunal, we modify the impugned order of the ld. CIT(Appeals) on this issue and direct the I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 Assessing Officer to restrict the disallowance under section 14A to the extent of 1% of the exempt income earned by the assessee. Ground No. 5 is thus partly allowed.

47. As regards Ground No. 6 of the assessee's appeal for AY 2004-05, it is observed that the issue involved therein relating to the deductibility of loss suffered by the assessee on abandoned capital WIP is squarely covered in favour of the assessee by the decision of the Hon'ble Calcutta High Court in the case of Benani Services Limited -vs.- CIT reported in 233 Taxman 340, wherein it was held that expenditure incurred for construction/ acquisition of new facility, which was subsequently abandoned at work-in-progress stage is allowable in order to write off as incurred wholly and exclusively for the purpose of business. Respectfully following the said decision of the Hon'ble jurisdictional High Court, we direct the Assessing Officer to allow the loss claimed by the assessee on account of abandoned capital WIP. Ground No. 6 is accordingly allowed.

48. As regards the Ground No. 7, it is observed that the issue involved therein relating to disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) under section 80IA is similar to the one involved in Ground No. 4 of the assessee's appeal for AY 2003-04 which has already been decided by us in the foregoing portion of this order. Following our conclusion drawn in AY 2003-04, we uphold the impugned order of the ld. CIT(Appeals) on this issue and dismiss ground No. 7.

49. The issue raised in Ground No. 8 relating to the addition of Rs.2,38,356/- made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of T.P. adjustment has not been pressed by the I . T. A . N o s . 1 6 7 1 / KO L . / 2 0 0 8 & 1 0 2 4 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 & I . T. A . N o s . 1 6 9 9 / KO L / 2 0 0 8 & 9 7 3 / KO L / 2 0 0 9 Assessment years: 2003-2004 & 2004-2005 ld. counsel for the assessee at the time of hearing before us. The same is accordingly dismissed as not pressed.

50. In the additional ground raised in AY 2004-05, the assessee has raised an issue relating to its alternative claim for deduction on account of cost of advertisement films, if the same is held to be not allowable for AY 2003-04 on the ground that it pertains to AY 2004-05. Since we have allowed the claim of the assessee for deduction on account of entire expenditure incurred on production of Ad-films as made in AY 2003-04, the issue raised in additional ground has become infructuous. The same is accordingly dismissed.

51. As regards the Revenue's appeal for AY 2004-05, it is observed that the issue involved in Ground No. 1 raised therein relating to the assessee's claim for deduction on account of expenditure incurred for production of Ad-films is similar to the one involved in Ground No. 3 of the assessee's appeal for AY 2003-04, which has already been decided b y us in the foregoing portion of this order. Following our conclusion drawn for AY 2003-04, we uphold the impugned order of the ld. CIT(Appeals) allowing the claim of the assessee on this issue and dismiss Ground No. 1 of the revenue's appeal.

52. In Ground No.2 of its appeal, the revenue has challenged the action of the ld. CIT(Appals) in deleting the disallowance made by the Assessing officer on account of assessee's claim for writing off of deposit given for gas and electricity amounting to Rs.55,000/-.

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2003-2004 & 2004-2005

53. The amount of Rs.55,000/- given towards gas and electricity deposit was written off by the assessee in the year under consideration and the same was claimed as deduction. According to the Assessing officer, the said amount of deposits having not been offered by the assesese for tax in the earlier years, deduction for the same as bad debts was not allowable. On appeal, the ld. CIT(Appeals) allowed the claim of the assesese on the ground that the loss suffered by the assesese as a result of non-recovery of deposits was incidental to the business of the assessee.

54. We have heard the arguments of both the sides on this issue and also perused the relevant material available on record. It is not in dispute that the deposits towards gas and electricity were paid by the assessee during the course of its normal business and the loss suffered as a result of non-recovery of the said deposits was a loss incidental to the business of the assessee. The ld. CIT(Appeals), in our opinion, therefore was fully justified in allowing the claim of the assessee for the said loss and we find no infirmity in the impugned order of the ld. CIT(Appeals) giving relief to the assessee on this issue. Ground No. 2 of the revenue's appeal for AY 2004-05 is accordingly dismissed.

55. In the result, both the appeals of the assessee are partly allowed while both the appeals of the revenue are dismissed.

Order pronounced in the open Court on May 25, 2016.

Sd/- Sd/-

(S.S. Viswanethra Ravi) (P.M. Jagtap)
Judicial Member Accountant Member
Kolkata, the 25 t h day of May, 2016

I . T. A . N o s . 1 6 7 1 / KO L . / 2 0
Assessment years: 2003-2004 & 2004-

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