

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A .No. 1616/DEL/2017 (A.Y 2012-13)

Hero Moto Corp Ltd. 34, Basant Lok, Vasant Vihar New Delhi AAACH0812J (APPELLANT)	Vs	DCIT Circle-11(1) C. R. Building New Delhi (RESPONDENT)
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Appellant by	Sh. Ajay Vohra, Sr. Ad, Sh. Gaurav Jain, Adv. Ms. Deepika Agarwal, Adv, Mr. Neeraj Kumar Jain, Adv
Respondent by	Sh. Sanjay. I. Bara, CIT DR

Date of Hearing	19.04.2018
Date of Pronouncement	13.06.2018

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is against the assessment order u/s 143(3) read with Section 144C passed by DCIT, Circle-11(1), New Delhi vide order dated 20/1/2017.

2. Ground No. 1 to 15 relate to addition of Transfer Pricing Adjustment u/s 92CA of the Income Tax Act, 1961. The addition/disallowance for Model Fee is Rs.172.08 Crore and for royalty is Rs.3.53 crore. During the relevant previous year, the assessee, for the purpose of its' business entered into international transactions of payment of model fee amounting to Rs.1,720,872,877/- and

Royalty of Rs.35,282,665/-. Since the operating profit ratio of the assessee @ 10.99% is higher than the average of the operating profit ratio of comparables companies, i.e., 10.79%, the international transactions entered into by the assessee were considered as having been entered at arm's length price, applying TNMM. The Transfer Pricing Officer (TPO) determined the arm's length price of international transaction of payment of model fee at Nil by holding as under:-

(a) The assessee is equally responsible for the technology upgradation that has taking place in India;

(b) The assessee pays model fee and royalty for the same set of service.

The TPO determined the arm's length price of the transaction of payment of royalty at nil holding that such royalty is in respect of sales made to associated enterprises and with respect to such sales the assessee is operating as a contract manufacturer and accordingly no royalty was payable on such sales. The DRP confirmed the aforesaid adjustments made by the TPO.

3. The Ld. AR submitted that the aforesaid issues are decided in favour of the assessee by the consolidated order dated 24.10.2016 passed by the Delhi Bench of the Tribunal in assessee's own case for assessment year 2010-11 & 2011-12 [ITA No. 1545/DEL/2015 (Hero Moto Corp. Ltd. vs. JCIT A.Y. 2010-11), 2424/DEL/2015 (DCIT vs. Hero Moto Corp. Ltd. A.Y. 2010-11), 1609/DEL/2015 (DCIT vs. Hero Moto Corp. Ltd. A.Y. 2011-12) and ITA No. 914/DEL/2016 (Hero Moto Corp. Ltd. vs. DCIT A.Y. 2011-12) order dated 24.10.2016 wherein the Tribunal, following the order of the coordinate benches in assessee's own case for the Assessment Years 2006-07, 2007-08 and 2008-09 deleted the aforesaid addition. Further, the Hon'ble High Court upheld the order of the Tribunal for AY 2006-07 (ITA No. ITA 923/2015 order dated 08.05.2017) deleting the adjustment on account of payment of model fee. The Ld. AR also submitted that during the relevant previous year, the assessee has

not sold any products to the associated enterprises on which royalty was payable and the entire amount of royalty was paid by the assessee on sales made to independent enterprises.

4. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal and the Hon'ble High Court.

5. We have heard both the parties and perused the material available on record. The issue is covered in favour of the Assessee for A.Y. 2006-07 by the Hon'ble High Court's decisions in assessee's case. For A.Ys. 2006-07, 2007-08 and 2008-09, the Tribunal decided this issue in favour of the assessee. The Tribunal in immediate preceding year i.e. A.Ys. 2010-11 & 2011-12 held as under:

“43) For the subsequent year also the coordinate benches followed the similar view with respect to all the payments. Further with respect to the allowance of the model fee the Hon'ble Delhi High Court in appellant's own case for assessment year 2006-07 has not admitted the appeal of the revenue on this aspect, and further with respect to the arm's length price of payment of royalty on sales to associated enterprise the appellant has submitted that revenue has not challenged the aforesaid finding of the tribunal before the Hon'ble High Court which fact is not controverted by Ld. DRP therefore accordingly the finding of the coordinate bench has attained finality. In view of above, respectfully following the decision of the Coordinate Bench of the Tribunal in appellant's own case for AY 2006-07, 2007-08 and 2008-09, we hold that the issue is squarely covered in favour of the appellant. Therefore we reverse the finding of the lower authorities in determining the arm's length pricing of payment of export commission of Rs. 15.91 crores, model fees payment of Rs.15904 4986/- and payment of royalty on sales of Rs. 17.25 Lacs at Rs. nil. Therefore, ground no. 8 of the appeal of assessee is allowed.”

In the present Assessment Year, the assessee, for the purpose of its' business entered into international transactions of payment of model fee amounting to Rs.1,720,872,877/- and Royalty of Rs.35,282,665/-. Since the operating profit ratio of the assessee @ 10.99% is higher than the average of the operating profit ratio of comparables companies, i.e., 10.79%, the international transactions entered into by the assessee were considered as having been entered at arm's length price, applying TNMM. From the records it can be seen that the assessee has not sold any products to the associated enterprises on which royalty was payable and the entire amount of royalty was paid by the assessee on sales made to independent enterprises. Therefore, the TPO/AO as well as DRP were not correct in determining the arm's length pricing of model fees and payment of royalty. This issue is squarely covered by the earlier Assessment Years in assessee's favour. Therefore, Ground No. 1 to 15 are allowed in favour of the assessee.

6. As relates to Ground No. 16, is relating to addition of freight inward/import clearing expenses to cost of closing inventory for Rs.170.01 lacs. The Assessee purchases raw material on CIF basis and included the freight cost for delivery of goods in purchase price and are factored in the value of closing inventory. In exceptional circumstances viz. material shortage, wherein assessee has to immediately lift material, transport charges are paid, which are not included to the purchase price, but are separately debited to profit and loss account, because the invoices of transporters are received after consumption of material. Such freight amount is not included in the valuation of closing stock, as per regularly and consistently followed method of valuation of stock accepted by the Revenue in the past. The AO/DRP held that proportionate amount of Rs. 170.01 lacs out of the total amount of freight charges of Rs. 6.162.22 lacs incurred as attributable to the value of closing stock on account of above expenses. However, since the Assessing Officer had made similar addition of Rs. 177.26 lacs on account of above in the closing stock of the last year, which constituted opening stock of the year under

consideration, the Assessing Officer allowed deduction for the said amount, resulting in net reduction of Rs.7.25 lacs (i.e. Rs.170.01-177.26 lacs).

7. The Ld. AR submitted that this issue is decided in favour of the assessee by the recent consolidated order dated 24.10.2016 passed by the Delhi bench of the Tribunal in assessee's own case for assessment year 2010-11 and 2011-12, wherein the Tribunal, following the order of the coordinate benches of the Tribunal passed in assessee's own case for the assessment year 2007-08 and 2008-09, deleted the aforesaid addition on the ground that in those years it has been held that the assessee was following consistent system of accounting, which was unnecessarily disturbed by the Revenue, without change in facts. It was further held that tinkering with the accounting method was unjustified when the exercise did not materially alter the profits of the assessee company.

8. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

9. We have heard both the parties and perused the material available on record. The Tribunal in assessee's own case for A.Ys. 2010-11 & 2011-12 held as under:

"11) We have carefully considered the rival contentions. The company is a corporate entity therefore it has to value its closing stock according to the accounting standard 2 'valuation of inventories' issued by the Ministry of corporate affairs and ICAI. According to that accounting standard the closing stock of the finished goods is required to be valued including all cost of the finished goods is required to be valued including all cost of purchases, cost of conversion and other cost incurred in bringing the inventory to their present location and conditions. The contentions of the appellant is that that it's all purchases are accounted for on CIF basis and therefore the suppliers are required to provide the goods at the factory location and therefore in the closing stock of inventory there cannot be any element of freight etc., this issue has been

considered by the coordinate bench in appellant's own case for A Y 2007-08 where in it has been held that :-

“7.13. We have considered the submissions and the material filed by both the parties. The issue in question is regarding method of valuation of closing stock. The primary contention of the assessee is that it had to make emergency purchases and that these stocks so purchased were immediately consumed. In such exceptional situations, the assessee has directly accounted the freight and import clearing charges to the profit and loss account. This means that such raw material stocks are not part of closing stock at all. Further, this fact is not rebutted by the DR.

7.14 Though technically it can be argued that the value of closing inventory must include freight/ import clearing charges, the facts explained by the assessee are that the purchases in question are done under exceptional circumstances (which are well known in this type of industry) for immediate consumption. They are in fact consumed immediately i.e. as soon as raw material enters the factory premises which is not disputed by assessing officer, hence the question of such purchases being part of closing stock does not arise at all. In such a situation, when freight/ import charges are directly debited to the P& L A/c along with the value of the purchases, naturally the question of treating them as part of closing inventory does not arise. The assessee has acted and accounted in a proper and acceptable method. Therefore, the relief should be granted on this count alone.

7.15 Alternatively, the undisputed fact remains that the assessee has consistently following the said method of accounting in the last many years and the Revenue has been accepting these facts and method of accounting without any demur.

7.16 The contention of the DRP that, the principle of res-judicata does not apply in Income tax proceedings and therefore, the Assessing officer is correct

to come to independent conclusion and is not bound by past acceptance of a factual legal point by the department is untenable. Technically the principle of res judicata may not apply to the income tax proceedings as each year is an independent year, yet there ought to be uniformity in treatment and consistency as propounded by Hon'ble Supreme Court in the case of Radhasoami Satsang vs. CIT 193 ITR 321, when the facts and circumstances are identical. It is a judicially accepted principle that when the facts are same, a uniform view should be adopted for the subsequent years in the income tax proceedings. Unless there is a material change in the facts, which is neither demonstrated by assessing officer nor DRP, the view which is taken earlier, should not be changed, as held by various courts. We now discuss some of the case laws.

7.17 *The Hon'ble Supreme Court in the case of Radhasoami Satsang (supra), on the theory of consistency, has held as under:*

"....Strictly speaking, res judicata does not apply to the income tax proceedings. Though, each assessment year being a unit, what was decided in one year might not apply in the following year, where a fundamental aspect permeating through different assessment years has been found as a fact one way or the other and parties have allowed that position to ne sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

7.18 *This view has been followed by the Hon'ble Delhi High Court in the case of CIT vs. Neo Ploy Pack (P) Ltd. [2000] 245 ITR 492 and the Hon'ble Bombay High Court in the case of CIT vs. Gopal Purohit [2011] 336 ITR 287.*

7.19 *Further, the Hon'ble Supreme Court in the case of CIT vs. Realest Builders and Services Limited (2008) 307 ITR 202 held as :*

"In case where the department wants to tax an assessee on the ground of the liability arising in a particular year, it should always ascertain the method of

accounting followed by the assessee in the past and whether change in method of accounting was warranted on the ground that profit is being underestimated under the impugned method of accounting. If the Assessing Officer comes to the conclusion that there is underestimation of profits, he must give facts and figures in that regard and demonstrate to the Court that the impugned method of accounting adopted by the assessee results in underestimation of profits and is, therefore, rejected. Otherwise, the presumption would be that the entire exercise is revenue neutral. In the instant case, that exercise had never been undertaken. The Assessing Officer was required to demonstrate both the methods, one adopted by the assessee and the other by the department. In the circumstances, there was no reason to interfere with the conclusion given by the High Court.”

7.20 *The Hon’ble Supreme Court in the case of CIT vs. Bilahari Investment P. Ltd. 299 ITR 1 (SC) held as follows:*

“Every assessee is entitled to arrange its affairs and follow the method of accounting, which the Department has earlier accepted. It is only in those cases where the Department records a finding that the method adopted by the assessee results in distortion of profits that the Department can insist on substitution of the existing method.”

7.21 *In the case of CIT vs. Jagatjit Industries Ltd. (2011) 399 ITR 382 (Del.), the Hon’ble Jurisdictional High Court has held as follows:*

“If a particular accounting system has been followed and accepted and there is no acceptable reason to differ with it, the doctrine of consistency would come into play. The method of accounting cannot be rejected.

The assessee was following the mercantile system of accounting. According to past business practice, the expenditure spilled over the next year and was debited in the second year and was allowed by the Assessing Officer. The Assessing Officer for the assessment year in question disallowed

Rs.13,46,299 claimed as expenditure of prior period allowable in the current year. The Commissioner (Appeals) deleted the disallowance and this was upheld by the Tribunal. On appeal to the High Court:

Held, dismissing the appeal, that the assessee had claimed prior period expenses on the ground that the vouchers for such expenses from the employees/ branch employees were received after March 31st of the financial year. It had branch offices throughout the country. It debited the expenditure spill over the subsequent years and the Assessing officer had been allowing it in the past. The accounting practice had been consistently followed by it and accepted by the Revenue. Nothing had been brought on record to show that there had been distortion of profits or that the books of account did not reflect the correct picture. In the absence of any reason whatsoever, there was no warrant or justification to depart from the previous accounting system which was accepted by the Department in respect of the previous years.”

7.22 *In the present case, the Revenue has rejected the method of accounting which is consistently followed by the assessee on the ground that there may be chance where in a particular year, the method adopted by the assessee may result in underestimation of profits. However, the Revenue failed to demonstrate with facts and figures that the impugned method of accounting may result in material underestimation of profits. On the contrary, the assessee has demonstrated that the change in the method of accounting for year under appeal would result in loss to the revenue as the opening stock would also require similar adjustment and the cascading effect will be loss to revenue. We observe that in many of the additions made in this case by the revenue, the consistent method of accounting is unnecessarily disturbed, though it has been accepted in many years. In our view such tinkering with the method is unjustified when the exercise does not materially alter the profits. The facts and figures in many additions demonstrate that the issue raised is revenue neutral in the long run. Such petty additions should be*

avoided on the ground of materiality, as AS-1 which talks about materiality, consistency, prudence etc. is part of the I.T. Act after it is notified u/s 145(2).

7.23 *In view of the foregoing and proposition laid down by the Hon'ble Supreme Court and the Hon'ble High Courts, we are of the opinion that adjustment of Rs. 31.18 lacs made to total value of closing stock of Rs. 275 crores and consumption of stocks of Rs. 7178 crores is uncalled for. If valuation of closing stock is changed then the value of opening stock should also be changed on the same basis or method. The closing stock of a particular year is the opening stock of the subsequent year. It is not the case of the revenue that the method of valuation of closing stock is materially affecting the accounts and profits disclosed by the assessee. This adjustment sought to be made is revenue neutral and at best may result in preponment or postponement of revenue. The issue is whether such exercise is at all required on the ground of materiality. Materiality is a concept which is well recognized both in accountancy and law. Accounting standards notified by the CBDT u/s 145(2) mandate that the concept of materiality be taken into consideration when finalizing the accounts of an assessee.*

7.24 *Further, the Hon'ble Supreme Court in the case of Berger Paints India Ltd. vs. CIT (2004) 266 ITR 99 at page 103(SC), has noted with approval, the observations of the Special Bench of the ITAT in the case of Indian Communication Network Pvt. Ltd. vs. IAC (1994) 206 ITR (AT) 96 (Delhi). At page 114 it observed that:*

“Before we part with the ground, we cannot help feeling that the litigation between the parties could have been avoided since it was quite immaterial, whether full deduction was allowed in one year or partly in one year and partly in the next, since the assessee is a company and rate of tax is uniform. The gain to one and the loss to the other is illusory since what is deferred in one year, would have to be discharged in the next. In that sense, nobody has won and nobody has lost.”

7.25 *Even on this plea also, the assessee succeeds. We have dealt with this issue elaborately as, in a number of grounds, this issue would become applicable. In view of above discussion, we allow this ground of the assessee.”*

25) *Before us, the Ld. Departmental representative could not point out any changes in the facts and circumstances of the case for this year compared to the year in which the tribunal has decided this issue. He also did not point out any contrary decision and therefore, respectfully following the decision of the coordinate bench we allow ground no. 2 of the appeal of the assessee.”*

In the present Assessment Year, the AO/DRP held that proportionate amount of Rs. 170.01 lacs out of the total amount of freight charges of Rs. 6.162.22 lacs incurred as attributable to the value of closing stock on account of above expenses. However, since the Assessing Officer had made similar addition of Rs. 177.26 lacs on account of above in the closing stock of the last year, which constituted opening stock of the year under consideration, the Assessing Officer allowed deduction for the said amount, resulting in net reduction of Rs.7.25 lacs (i.e. Rs.170.01-177.26 lacs). In the earlier years this addition was deleted by the Tribunal for A.Y. 2010-11 and 2011-12, therefore, this issue is squarely covered in favour of the assessee. Therefore, Ground No. 16 is allowed in favour of the assessee.

10. As relates to Ground No. 17-17.1, regarding Addition on account of cost of rejection of semi-finished goods and obsolete items to the value of closing stock, the assessee had debited to the profit and loss account for Rs. 1469.93 lacs representing the cost of material / semi-finished goods rejected in the course of manufacturing or obsolete items. The aforesaid rejections comprised of abnormal rejections arising in the course of manufacturing, like rejections on account of obsolescence, etc. According to principles of accounting (AS-2), as also the consistent, regular and accepted method of accounting, the assessee only considers normal wastages arising

in the course of manufacturing for the purposes of allocation to closing inventory. Since, the aforesaid expenditure comprised of abnormal wastages, it was not practically feasible to segregate normal and abnormal wastages and, therefore, the assessee as per the consistent method of accounting did not consider aforesaid costs for purposes of allocation to closing inventory. It is not practically possible for the assessee to segregate normal and abnormal wastages embedded in the aforesaid costs and therefore, the assessee, as per consistent and regular method of accounting, accepted by the Revenue as such in the earlier years, did not consider the aforesaid expenditure for the purposes of valuation of closing inventory of finished goods. But the Assessing Officer disallowed this expenditure and added the same to the income of the assessee.

11. The Ld. AR submitted that the aforesaid issue stands decided in favour of the assessee by the order of the Delhi Bench of the Tribunal in the assessee's own case for the assessment year 2007-08 and 2008-09 whereby similar adjustment made in that year was deleted on the same ground. The Ld. AR pointed out that the aforesaid issue has been decided in favour of the assessee by the order of the Hon'ble Tribunal in assessment year 2010-11 and 2011-12 wherein the Tribunal held that only normal loss is to be loaded/added to the cost of closing inventory which was in consonance with the Accounting Standards issued by the Institute of Chartered Accountants of India (ICAI).

12. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

13. We have heard both the parties and perused the material available on record. The Tribunal for A.Ys. 2010-11 & 2011-12 held as under:

“16. We have carefully considered the rival contention and has also perused the relevant provisions of the accounting standard – 2 which has been relied by

the Ld. assessing officer. We have carefully perused the decision of the coordinate bench in the appellant's own case for assessment year 2007-08 wherein the identical issue is dealt with as under:-

“8.9 The issue in question is whether the cost of abnormal rejections have to be considered for the purpose of valuation of closing stock. The assessee relied on Accounting standard -2- Valuation of Inventories which is a notified accounting standard by the Companies Act which stipulates that abnormal wastages should not be considered for valuation of inventory.

8.10 It was submitted by the Ld. AR of the assessee that it is in the manufacturing of precision and quality product and in case of unfit material it has been consistently following the method of changing the abnormal rejection of material to its profit and loss account, without any allocation to the value of closing inventory.

8.11 The assessing officer's case is that cost of rejections needed to be included in the value of closing stock. Assessing officer worked out an amount of Rs. 9.24 lacs as attributable to closing stock out of total expenditure of Rs. 12.49 crores and closing stock value of Rs. 275 crores. The assessee as a consistent accounting policy has been claiming the cost of abnormal rejections as revenue expenditure for the previous years and this has been regularly accepted by department in past.

8.12 The amount of Rs. 9.24 lacs attributed by the assessing officer, in our view, is materially inconsequential so as to warrant disturbing the regular method of valuation of closing stock being followed by the assessee company. The quantum of the addition of Rs. 9.24 lacs is less than 0.74% of the value of abnormal rejections. As a percentage of total stocks / turn over / profits declared, this figure is miniscule.

8.13 Accounting Standard-2 stipulates that abnormal wastages should not be considered for valuation of inventory. It reads as follows:

“16. Examples of costs excluded from the cost of inventories and recognized as expenses in the period in which they are incurred are: a) Abnormal amounts of wasted materials, labour or other production costs; storage costs, unless those costs are necessary in the production process before a further production stage; administrative overheads that do not contribute to bringing inventories to their present location and condition; and selling costs.”

8.14 Keeping in view the treatment prescribed under AS-2 and the fact that the assessee has been regularly following the same method of accounting for valuation of charging such rejection to P&L A/c and its closing inventory, we are of the view the addition in question is uncalled for. The adjustment is not material adjustment. Further, for the reasons staged by us on the issue of consistency, while disposing around no. 2 to 2.2, we allow this ground of the assessee.”

Both the parties have admitted that there is no difference in the facts and circumstances of the case of the appellant in the assessment year before us as well as the year for which the order of the coordinate bench pertains to. On reading of the assessment order as well as the direction of the Ld. dispute resolution panel it was not found that how the loss of the assessee was found to be normal when the assessee submitted that it is an abnormal loss incurred by it during the course of manufacturing process. Further the Ld. dispute resolution panel has also stated that both the cost of normal and abnormal losses have to be loaded to the value of the closing stock is devoid of any merit as it is contrary to the accounting standard issued by the Institute of chartered accountants of India which has been mandated by the Ministry of corporate affairs, which only says that, only normal losses are required to be included and abnormal losses are required to be excluded for the purpose of the valuation of the closing stock of the finished goods and semi finished goods. In view of the above, we respectfully

following the decision of the coordinate bench in the appellant's own case for the previous year allow ground no. 3 of the appeal of the assessee.

It is pertinent to note that it is not practically possible for the assessee to segregate normal and abnormal wastages embedded in the aforesaid costs and therefore, the assessee, as per consistent and regular method of accounting, accepted by the Revenue as such in the earlier years, did not consider the aforesaid expenditure for the purposes of valuation of closing inventory of finished goods. The AO/DRP was not correct in making this addition. The issue is squarely covered in assessee's favour by the order of earlier assessment years. Therefore, Ground No. 17-17.1 are allowed in favour of the assessee.

14. As relates to Ground No. 18-18.2 regarding disallowance of provision for increase in price of material for Rs. 60.64 crores, the assessee appointed various vendors for supply of material to be used in the process of manufacturing of vehicles. The assessee, at the time of issuing of purchase order, negotiates the price at which the particular component/ components shall be supplied by the vendor. Subsequently, vendors are provided supply of component schedule annually. In the business of manufacturing vehicles, the assessee purchases raw material from vendors with the express understanding that the rates would be revised, if there is substantial increase/decrease in cost of materials, at the agreed interval. In the assessment order, the assessing officer held that the aforesaid provision of Rs. 60.64 crores is not allowable business expenditure. The assessing officer held that provisions emanating from retrospective price amendments are contingent in nature and thus, not an allowable business expenditure.

15. The Ld. AR submitted that the provision for the material is worked out as under:-

(1) Provision for price increase of Rs. 2,936.22 Lacs in respect of which

price amendments were already issued on 31.03.2012: The aforesaid provision was made on the basis of actual supplies made upto the end of the year as per price amendments actually issued as on 31.03.2012. Therefore, the assessee has made provision of Rs.2,936.22 Lacs on the basis of actual PO issued to vendors for the change in prices during the year and it involved no estimation.

- (2) Provision made on best estimate basis of Rs.3,128 lacs of which price amendments were not finalized by the end of the year: The provision for price increase of Rs. 3,128 Lacs was made on the basis of per vehicle increase / decrease in metal cost during 3rd/ 4th Quarter multiplied by actual dispatch during the corresponding period. In assessment year 2008-09, the Tribunal deleted the disallowance holding that similar disallowance of provision was made by the assessing officer in complete disregard of the findings of the assessing officer in the preceding assessment year, viz. Assessment Year 2007-08 as also the consistent method followed by the assessee. In that year, the Delhi bench of the Tribunal, vide order dated 13.06.2014 passed in the assessee's own case for assessment year 2008-09 was pleased to delete the disallowance made by the assessing officer keeping in view the principle of materiality and consistency followed by the assessee.

Further, the Ld. AR submitted that the Delhi bench of the Tribunal, vide consolidated order dated 24.10.2016 passed in assessee's own case for assessment year 2010-11 and 2011-12, has decided the aforesaid issue in favour of the assessee, holding that the provisions was made on scientific basis and the transaction is revenue neutral.

16. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

17. We have heard both the parties and perused the material available on record. The Tribunal for A.Ys. 2010-11 & 2011-12 held as under:

“20) We have carefully considered the rival contentions and also perused order of the coordinate bench in the appellant’s own case for earlier years. We have also perused the page no. 1130 to 1140 of the paper book volume 3 submitted by the assessee before the Ld. assessing officer in pursuance of direction of the Ld. dispute resolution panel. The parties before us have confirmed that there is no change in the facts and circumstances of the case for this year compared to the year for which the tribunal has decided this issue in favour of the appellant. The coordinate bench in assessee’s own case for assessment year 2007-08 has decided this issue as under:-

“12.11 The addition in question is on account of provision for increase in price of material. When there is an excess provision on account o price revision made during the year, the assessee reversed the same in subsequent year i.e. when the actual figures are known. Similarly, when there is a short provision for increase in price of raw material supplied in immediately preceding year, the balance is recognized as expenditure during the year. A claim is made based on ascertainment of actual liability. The assessing officer disallowed the reversals of provision on ground that this was a prior period expenditure.

12.12 When provisions are made, what is to be seen is whether the assessee has done a bona fide and genuine exercise to estimate its liability with reasonable certainty. The term reasonable certainty means that the provision in question might be slightly higher or lower than the actual figure.. When the provision is higher, it is reversed in subsequent year, when the actual figures are known. Similarly, when the provision is lower, the same is claimed in the latter assessment year. It cannot be said that these are prior period expenditure. The actual liability in question is ascertained only during the year and hence the liability crystallizes during the year. Estimation of an

expense has to be considered in contradiction to actual ascertainment of the expenses. Once the actual expense has been ascertained, the liability accrues in that year to the extent not provided in the earlier year and is to be allowed as revenue expenditure in the year of crystallization. Concepts of going concern, accrual and consistency have to be taken into account by the revenue authorities while evaluating such provisions and making such adjustments. The assessee is disputing the figures of disallowance and the DRP is also expressing its inability to correct the figures. In our view the DRP is not helpless and could have directed the assessing officer to verify the figures and correct the mistakes, if any. In view of the above discussion, we allow this ground of assessee for statistical purpose and direct the assessing officer to properly verify the figures and allow the claim of the assessee.”

Subsequently for the assessment year 2008-09 when the similar disallowance was made by the Ld. assessing officer the coordinate bench vide its order dated 13.04.2014 has held deleted the disallowance made by the assessing officer keeping in view the principle of materiality and consistency followed by the appellant. On the ground that the mention has been made in the purchase order that there cannot be any revision of the prices subsequently and the prices mentioning the purchase order of final based on which the Ld. assessing officer has relied very heavily we are of the view that that these are the general terms and conditions of the purchase order claimed by the appellant upon its various vendors and there is no prohibition in the said purchase orders that subsequently the prices cannot be revised. Many times the prices are dependent upon the cost of the raw material such as metal etc of the vendors which is highly fluctuating, which may result into subsequent price revision. Further when the actual payments are made to the vendors on the basis of such retrospective increase in price of material supplied, which is accepted and allowed as revenue expenditure, the provision made for such are revenue neutral. Accordingly there is no justification in sustaining the aforesaid disallowance. Accordingly, we

reverse the action of the assessing officer and allow the ground no. 4 of appeal raised by the appellant.”

It is observed that it is common trade practice to contract with vendors on such express terms for payment of arrears in the event of substantial increase/decrease in cost, in order to maintain continuous supply of raw materials without being affected by market fluctuations, especially in light of the volume of purchases made by the assessee. In the absence of such understanding/contract with the vendors, the assessee would not be able to operate and continue manufacturing operations without disruption. This same process is followed when there is reduction in cost elements of component prices, company informs the vendors for reduction in price of components. Accordingly, while price revisions are pending or negotiations are on, the vendors keep on supplying the material provisionally at the agreed rates, with the understanding that pursuant to negotiations being finalized, the arrears of the amount due to them would be paid to them retrospectively. Such price revisions, being an accrued liability at the time of purchase of raw materials, are recorded in the books of accounts by the assessee. At the year end, the company estimates the additional liability on account of price revision under negotiation and makes upward/downward provision, as the case may be, in relation to material supplied until the end of the relevant year. Thus, the Assessing Officer was incorrect in disallowing this claim. Therefore, Ground No. 18 to 18.2 are allowed in favour of the assessee.

18. As relates to Ground No. 19 regarding disallowance of cost of scrap material for Rs. 6.73 lacs, in the course of the business of manufacturing, the process generates some scrap on account of rejection of components, obsolescence of components, etc. In the course of manufacturing process, scrap is generated mainly on account of grinding scrap in machining process of various components. Such scrap generated in the course of manufacturing is not separately debited to the profit and loss account but is claimed as the

part of cost of material consumed in the course of manufacturing. The wastage generated in the manufacturing process is negligible compared to the overall consumption of material during the year. Further, such wastage is normal and inherent in the manufacturing process and, in any case, within tolerable limits. Scrap generated in the aforesaid manner is transferred to scrap yard with proper approval of respective 'Shop head' and 'Process. Planning & Control department' in the manufacturing unit and sold after necessary processing (e.g. crushing of components), if any. The sale proceeds from sale of scrap is directly credited to the profit and loss account and shown as income. Having regard to the nature of scrap/wastage generated during the course of business i.e. empty oil drums, corrugated wooden boxes, plastic bags, etc., it is not possible to maintain scrap register at the shop floor containing item wise details of scrap generated. However, the assessee maintains record/register of each item of scrap sold during the year. The sale proceeds from sale of scrap is directly credited to the assessee's P&L A/c and shown as income. The assessee realized Rs. 7.96 crores from sale of scrap generated in the course of manufacturing, which was credited to the profit and loss account and shown as income. In the assessment order, the assessing officer has observed that the assessee has erred in not estimating the value of scrap lying in the factory premises as on the last date of the previous year viz. 31.3.2012 which should have been credited to profit and loss account as part of the closing stock. The assessing officer estimated the value of such scrap at an amount of Rs. 6,73.880 (computed on the basis of average scrap sales in the last 15 days of the relevant year and first 15 days of next year, vis-a-vis, after reducing the scrap sale as on the last days of the relevant year) and made addition of the same to the closing stock and consequently to the income of the assessee.

19. The Ld. AR submitted that the aforesaid issue has been decided in favour of the assessee passed by the Tribunal in assessee's own case for the assessment year 2010-11 and 2011-12, wherein the Tribunal accepted the method as followed by the assessee of accounting income on sale of scrap on a

consistent basis and deleted the impugned addition on the ground that the assessee was not dealing in scrap and/or holding the scrap as inventory, and thus was not required to value the closing stock after taking into account the value of scrap. The Tribunal, in coming to the aforesaid conclusion, laid emphasis on the fact that such transaction was revenue-neutral and held that considering the size of the assessee company, it could not be expected to keep quantitative tally of miniscule items. The Ld. AR pointed out that the Tribunal in assessee's own case for the AY 2007-08 and 2008-09 had restored the matter back to the file of the assessing officer to compute the value of closing stock on consistent basis, as per method to be followed by the assessing officer in the set-aside order. The assessee had filed an appeal against the aforesaid order of the Tribunal, which was admitted by the High Court vide order dated 19.1.2015 as involving substantial question of law. The AO in the set aside proceedings for AY 2007-08 vide order dated 31.10.2014, confirmed such disallowance on an ad- hoc basis by estimating the average of scrap lying in the closing stock as a proportion of scrap sales for the last 15 days for the ended 31.03.20007 and the first 15 days of the subsequent CIT(A) vide order dated 01.02.2018 deleted the disallowance made by the AO in the set aside order. However, the Ld. AR pointed out that the aforesaid disallowance sustained by the Tribunal in assessment years 2007-08 and 2008-09 has been categorically distinguished by the ITAT in the AY 2010-11 (referred supra), wherein the Tribunal held that the earlier orders were passed without due consideration of AS-2 and application thereof to scrap generated during manufacturing process has not been examined.

20. The Ld. DR relied upon the Assessment Order and Order of the TPO as well as the Tribunal decision for A.Y. 2007-08 and 2008-09.

21. We have heard both the parties and perused the material available on record. The Tribunal for A.Y. 2010-11 and 2011-12 held as under:

“24. We have carefully considered the rival contentions. Accounting standard 2 notified by the Ministry of corporate affairs it provides that inventory is required to be valued at the end of the year for determining the true and fair profit or loss of the financial period of an enterprise. According to that the inventory is required to be valued according to accounting standard 2 in case it is held for the sale in the ordinary course of the business. In the present case the assessee is not holding scrap as an inventory in the ordinary course of its business. It is also not the dealer in scrap. The inventory that it holds in the ordinary course of its business at the raw materials semi finished goods and they finished goods of the company. Therefore, it is incorrect to hold that assessee should have valued the scrap at the end of the year. Furthermore the accounting policy of the company also states that the scrap is accounted for at the time of its disposal. Therefore, according to us it is not mandatory for an assessee to value scrap as at the end of financial period for working out the true and fair profit or losses of the company. More so as in the previous year this accounting policy of the company has been accepted by the revenue without disturbing the profit on this count. Further, while rendering our decision in the preceding ground of appeal, following the decision of honourable High Courts and Supreme Court, we have held that adjustment should not be made in the assessment order on issues, which are revenue-neutral. The impugned addition under consideration is purely revenue-neutral in as much as addition of the estimated value of the scrap to closing stock would be debited as opening stock in the profit and loss account of immediately succeeding year. Further, the assessing officer will need to carry out the similar exercise in the last year, to estimate stock of scrap which would become opening stock of this year. There is, thus, no escapement of Revenue on the basis of the impugned addition made by the assessing officer in the assessment order. We have already held in multiple grounds supra that no adjustment should be made to returned income on issues, which are revenue neutral. Having held as above, it is difficult to take any different view

for the issue under consideration, which is also purely revenue neutral, especially considering that if similar adjustment (which has not been carried out by the assessing officer) is made to the opening stock, no additional tax liability would delve upon the appellant It could also be seen that the addition of Rs.3.02 lacs is miniscule having regard to the size of the company, which has declared turnover of Rs.16,000 crores (approx.) during the year under consideration and net profit of Rs.2232 crores. The aforesaid renders force in the arguments taken by the Ld. Counsel that an assessee engaged in the business of manufacturing, especially that of the size of the appellant, cannot be expected to keep quantitative tally of miniscule items like nuts and bolts lying in the scrap yard. In view of the aforesaid, keeping in mind the principle of materiality, we find that there is no error in the system and regular practice followed by the appellant of not estimating the value of scrap lying in the scrap yard and accounting for sale as and when such scrap is sold and removed from the factory premises. For the aforesaid cumulative reasons we do not find any justification in sustaining the addition of Rs.3.02 lacs made by the assessing officer in the assessment order. As regards the decision of the Tribunal in the earlier two assessment years, we draw support from the various decisions, wherein it has been held that since doctrine of res judicata is not applicable to income tax proceedings, the Tribunal can deviate from earlier orders passed in the assessee's own case as in those earlier decisions the provisions of the accounting standard A-S to with respect to valuation of inventories were not considered and whether they apply to the scrap generated in a manufacturing process by the company. Furthermore there is no evidences brought on record by the Ld. assessing officer that the assessee has sold scrap out of the books. Furthermore the amount of addition working out by the Ld. assessing officer was also on the estimate basis without any quantitative details of the scrap. It is also not the case of the assessee that compared to the earlier years the scrap sold by the assessee is lesser during the year. In view of the above, the addition made by the Ld. Assessing officer

on account of estimating the value of scrap lying in closing stock amounting to Rs. 3.02 lakhs is deleted and ground No. 5 of appeal raised by the assessee is allowed.”

In the present Assessment Year also the assessee is not dealing in scrap, and/or holding the scrap as inventory, and thus was not required to value the closing stock after taking into account the value of scrap. The Tribunal for A.Y. 2010-11 and 2011-12 while coming to the aforesaid conclusion, laid emphasis on the fact that such transaction was revenue-neutral and held that considering the size of the assessee company, it could not be expected to keep quantitative tally of miniscule items. The facts are identical in the present year as well. Therefore, Ground No. 19 is allowed in favour of the assessee.

22. As relates to Ground No. 20 to 20.1, regarding disallowance of prior period expense amounting to Rs. 18.01 crores, it can be seen that the assessee is a large size manufacturing company which receives services from several vendors, running into hundreds. The assessee made reasonable attempt to quantify the liability incurred towards expenses during the relevant previous years and provide for it. It is not humanly possible to consider and provide for all expenses, in absence of relevant details/material/information for various reasons like, non-receipt of bills/invoices from the vendors, the contract terms with vendors not being settled, disputes in relation to bills received, services contracted by zonal/regional/branch officer not intimated to the head office, etc. Accordingly, the assessee claimed deduction for miscellaneous expenses aggregating to Rs. 18,01,39,937 pertaining to prior period. In the assessment order, the assessing officer has disallowed the aforesaid expenses, on the ground that same pertained to prior period and are not allowable revenue expenditure against income of the relevant year. The assessing officer further made following observations:

- The practice/method of accounting of expenses in the succeeding year at the time of receipt of bills/claims is not a correct method of accounting.

Since the time period of six months from end of the relevant year, was available to the assessee for filing the return, the assessee could have considered claiming such expenses in the computation of income.

23. The Ld. AR submitted that the aforesaid issue is covered by the order passed by the Tribunal in the assessee's own case for Assessment Year 2008-09, wherein, the Tribunal had taken into consideration the finding of the DRP deciding the issue in favor of the assessee and remanded the matter to the file of the Assessing Officer for correcting calculation errors. Further, the aforesaid issue has been decided in favour of the assessee by the order of the Tribunal for assessment year 2010-11 and 2011-12.

24. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

25. We have heard both the parties and perused the material available on record. The Tribunal in A.Y. 2010-11 and 2011-12 held as under:

"201. We have heard the rival contentions. We note that similar issue relating to disallowance of prior-period expenses was deleted by the Tribunal in the assessee's own case for assessment year 2008-09. The relevant observations of the Tribunal for assessment year 2008-09 are as under:

"5. On careful consideration of above contention and submissions of both the parties and careful perusal of the record placed before us, inter alia decision in assessee's own case for AY 2007-08 (supra), we observe that the same issue was decided by coordinate bench of this Tribunal in favour of the assessee with following findings and conclusions:-

"61.10. The issue herein is year of deductibility. Additional ground of appeal was filed for A. Y. 2006-07 before the Tribunal and this additional ground was not disposed of Misc. application is pending. The assessee's contention is that the correct amount is Rs. 23.86 lakhs and not Rs. 643.05 lakhs as mentioned by the A.O. Details are given in the paper book we find that the D.R.P. has directed the assessing officer to verify the price. This

working given by the assessee is not properly verified by the A.O. The AO should have verified the claim of the assessee. We direct the assessing officer to verify the claim of the assessee. Be it as it may, the genuineness of the expenditure is not in doubt and as it is a question of excess/ short provision of discount in respect of sales effected, we are of the considered opinion that method of accounting followed by the assessee need not to be disturbed as it is being consistently followed over the years and as the revenue has accepted the same. The assessee's claim that the amount of Rs. 23.86 lakhs is not prior period expenses is not seriously disputed by the revenue. As to the balance amount Rs. 90,000 under the festival offer scheme, it was marginal variation that arose due to estimation of liability towards sales discount to be given to dealers. Thus the disallowance cannot be sustained both on the grounds of materiality as well as consistency. Similar issues were dealt by us while disposing of ground nos. 7 and 7.1. Consistent with the view taken therein, we allow this ground of the assessee for statistical purposes.”

6. During the argument, both the parties fairly agreed that the assessee claimed deduction for following miscellaneous expenses aggregating to Rs.7,09,31,076 but in the assessment order, the amount of Rs.7,15,91,826 has been incorrectly reported on account of totaling expenses. From page no. 14-16 of DRP order, we observe that the DRP has also pointed out mistake of totaling. At the outset, we observe that the Assessing Officer has nowhere disputed the genuineness of the expenditure claimed by the assessee and if assessee is denied deduction, then it would never get deduction for such expenses. From DRP Order, we also observed that the DRP has followed its decision in respect of immediately preceding year. At the same time, we observe that the mistake of totaling and the working given by the assessee has not been properly verified at the end of Assessing Officer and the same should have been verified by the Assessing Officer. Under above circumstances, we hold that the issue is squarely covered in favour of the assessee by the decision of Hon'ble ITAT 'C' Bench in assessee's own case for AY 2007-08 (supra) and we direct the Assessing Officer to allow the claim of the assessee after proper examination and verification. Accordingly, going

consistent with the view taken by this Tribunal in assessee's own case for the immediately preceding year to the year under consideration in this appeal, we hold that ground no. 1 of the revenue being devoid of merits deserves to be dismissed and we dismiss the same.”

The Ld. departmental representative could not point out any change in the facts and circumstances of the case of the appellant as compared to the assessment year in which the above issue is decided by the coordinate bench. No other contrary decision was also pointed out therefore, respectfully following the decision of the coordinate bench in the appellant's own case for the earlier years. We dismiss ground No. 3 of the appeal of the revenue.”

It can be seen that the assessee is a large sized manufacturing company which receives services from several vendors, running into hundreds. The assessee made reasonable attempt to quantify the liability incurred towards expenses during the relevant previous years and provide for it which was not doubted by the Assessing Officer. It is not practically possible to consider and provide for all expenses, in absence of relevant details/material/information for various reasons like, non-receipt of bills/invoices from the vendors, the contract terms with vendors not being settled, disputes in relation to bills received, services contracted by zonal/regional/branch officer not intimated to the head office, etc. Therefore, the assessee in our opinion has rightly claimed deduction for miscellaneous expenses aggregating to Rs. 18,01,39,937 pertaining to prior period. The facts are identical in the previous Assessment Year 2010-11 & 2011-12 and squarely covered in favour of the assessee. Therefore, Ground No. 20 to 20.1 are allowed in favour of the assessee.

26. As relates to Ground No. 21 to 21.2, regarding Advertisement provisions of Head Office for Rs. 22.84 crores, it can be seen that at the end of year, the assessee made provision for various expenses incurred during the year on the basis of reasonable estimate, since in the absence of receipt of bills/invoices

from the vendors, which are received in the succeeding year, the exact amount payable thereagainst was not ascertainable. In the succeeding year, on receipt of bills from vendors, exact amount payable to vendors was ascertained. The amount of provision in excess of actual amount payable was reversed in the books of account. In case of shortfall, the profit and loss account was debited with the amount of shortfall. The aggregate provision for advertisement expenses incurred at the head office made at the end of the relevant previous year, which was reversed in succeeding year amounted to Rs. 22,84.11.653. In the assessment order, the Assessing Officer disallowed the provisions made at the end of the year, to the extent of Rs.22,84.11,653/- which were reversed in the succeeding year on receipt of bills from the vendors on conclusion of negotiations with the vendors, on the ground that the provisions to that extent were excessive and represented contingent liability, which was not allowable deduction.

27. The Ld. AR submitted that the provision for advertisement expenses, in the year under consideration as well, has been made on the basis of actual Purchase orders and agreements and thus, has been made on reasonable and scientific basis. Detail of provisions for advertisement was submitted before the authorities. It would be pertinent to point out that the Tribunal, in the immediately preceding assessment years, viz. AY 2010-11 and 2011-12, has decided the issue in favour of the assessee by following the order for assessment year 2008-09 holding that the provision was made on rational and scientific basis, and thus the same was to be allowed as business deduction, notwithstanding that part thereof was reversed in the succeeding year. The Tribunal, in coming to the aforesaid conclusion, also held that the disallowance cannot be made on the issues which are revenue neutral. The aforesaid issue, it would be noted, is also covered in favour of the assessee by the decision of the Tribunal in assessee's own case for the assessment year 2008-09, wherein the Tribunal reversed the action of assessing officer in disallowing provision on the ground that the amount reversed there against in

the succeeding year exceeded 15% of the amount of provision. The Tribunal held that the said approach followed by the AO had no valid basis and was purely ad-hoc. The Tribunal also held that the Assessing Officer was bound to follow the practice and stand taken by the Department on this issue in the earlier years and, accordingly, restored the matter back to the file of the Assessing Officer to reconsider the issue, having regard to the method of making provisions followed by the assessee and accepted by the Revenue in preceding years. The Assessing Officer, in the set-aside proceedings, vide order dated 26.02.2015, accepted the claim of the assessee and allowed relief on the aforementioned identical issue by observing that the assessee had computed the provision on the basis of actual Purchase Orders, which was scientific and logical in nature.

28. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

29. We have heard both the parties and perused the material available on record. The Tribunal for A.Ys. 2010-11 and 2011-12 held as under:

1) *“33. We have heard the rival contentions. We agree with the submissions of the Ld. Counsel of the appellant, which, in fact, have even been agreed by the DRP and endorsed by Tribunal in the order for AY 2008-09, that a provision made for expenses on a scientific and rational basis is allowable business deduction. The provisions so made cannot be disallowed merely because; part thereof was reversed in the subsequent year at the time of actual quantification of the liabilities. We also find that the appellant had given complete details in respect of the method followed in creating the aforesaid provisions, which were made on the basis of details / information available with the company as at the end of the relevant year. We further reiterate and follow the finding given in the preceding ground of appeal that the Revenue should not make adjustment on the issues which are revenue-neutral, having no impact on the overall tax liability of an assessee. While*

following the aforesaid principles, we observe that the present disallowance is also revenue-neutral, since the impugned amount of provision, as also admitted by the assessing officer itself, was reversed in the succeeding year and consequential offered to tax in that year. If such provision is disallowed in this year, the corresponding reduction would need to be made in the return of the succeeding year, neutralizing the entire tax liability on the appellant company. For the aforesaid cumulative reasons, we hereby delete the disallowance made by the by the Ld. Assessing officer of Rs. 1 9658 1820/- in respect of provision for advertisement expenses incurred at the head office made at the end of the relevant previous year which were reversed in the succeeding year and allow the ground No. 7 of appeal raised by the assessee.”

In the present Assessment Year also, the provision for advertisement expenses, has been made on the basis of actual Purchase orders and agreements and thus, has been made on reasonable and scientific basis. Detail of provisions for advertisement was submitted before the lower authorities. Further, The Assessing Officer, in the set-aside proceedings for A.Y. 2008-09, vide order dated 26.02.2015, accepted the claim of the assessee and allowed relief on the aforementioned identical issue by observing that the assessee had computed the provision on the basis of actual Purchase Orders, which was scientific and logical in nature. Thus the issue is squarely covered by the order of the Tribunal in A.Ys. 2010-11 & 2011-12. Therefore, Ground No. 21 to 21.2 are allowed in favour of the assessee.

30. As relates to Ground No. 22 to 22.3 regarding disallowance of alleged excessive purchases from related parties as per AS-18 for Rs. 47.17 crores, it can be seen that in the course of business of manufacturing two-wheelers, the assessee, inter alia, procures certain critical components like shock absorbers, carburetors, etc., which are fitted in the two- wheelers manufactured by the assessee, from a single vendor, having the requisite technology to manufacture the same, in accordance with the specifications given by the assessee. The

assessee, does not procure such components from any other vendor. The purchase price of components which are purchased from various suppliers are based upon negotiations with such vendors and are different due to various factors, like level of automation of vendor, amount of investment by vendor, age of the plant, capacity utilization (impacting fixed cost recovery), volume of supply, geographical differences (which could impact cost of freight, labour, power), lead time, indirect tax Costs (CST Vs VAT) etc. Further, the assessee also prefers purchasing material from certain suppliers, due to business/commercial expediency, viz., de-risking the supply chain to reduce dependence, inability of existing supplier to meet demand increase, etc. The said parties are not related to assessee, in terms of the provisions of section 40A(2)(b) of the Act. In addition to above, the assessee in the course of manufacturing two wheelers, places purchase orders on vendors of certain customized intermediary products like wheel assembly, seat assembly, etc. The assessee, while placing aforesaid purchase orders to the vendors, also specifies the specifications of the raw materials/components to be used in manufacture of customized intermediary products as also the name of suppliers from whom the former vendor would purchase such materials/components at prices predetermined by the assessee. During the relevant previous year, the assessee made total purchases of various raw materials, etc. aggregating to Rs. 17,791.60 crores. Out of the aforesaid total purchases, purchases from related parties, i.e., parties related to the assessee, in accordance with definition given in AS-18 issued by the Institute of Chartered Accountants of India (ICAI) and as disclosed in the notes to accounts of the audited accounts of the relevant previous year, but admittedly not related in terms of definition provided in section 40A (2) of the Act, amounted to Rs. 1886.15 crores. The AO after comparing purchase price of certain products, which were purchased from the aforesaid related parties as also from unrelated parties, held that the purchase price from related parties was excessive in order to reduce the taxable income. The AO also held that the assessee has conducted itself in such a manner that

the parties do not qualify as 'related party' under section 40A(2) of the Act, even though said parties were related to assessee in terms of AS- 18. Accordingly, the AO computed excessive purchase price at Rs. 24.15 crores in respect of purchases from related parties for which internal comparable of similar products purchased from related parties were available. In respect of other category of purchases from related parties for which no internal comparable was available, the AO worked out an amount of Rs. 23.02 crores. in the same proportion as that of purchases for which internal comparable were available alleging the same to be excessive. Thus, AO made total disallowance of Rs. 47.18 crore out of purchases.

31. The Ld. AR submitted that the aforesaid issue is squarely covered in favour of the assessee by the decision of the Delhi Bench of Tribunal in the assessee's own case for Assessment Year 2007-08 and 2008-09, wherein identical disallowance made in that year was deleted on the ground that since in the first place, the parties were not related to the assessee company in terms of section 40A (2), disallowance on ground of excessive purchase price could not have been made under that section. Further, the Tribunal held that the transactions were entered by the assessee on account of commercial expediency and when the recipients had paid tax on payments received from the assessee company, disallowance could not be made by applying provisions of section 40A(2) of the Act. The Ld. AR pointed out that similar disallowance made in the immediately preceding two Assessment Years, viz. AY 2010-11 and 2011-12 was also reversed by the Tribunal, following the aforementioned order of the Tribunal for assessment years 2007-08 and 2008-09.

32. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

33. We have heard both the parties and perused the material available on record. The Tribunal for A.Ys. 2010-11 and 2011-12 held as under:

“55. We have carefully considered the rival contention and perused the relevant records placed before us. It was submitted by the parties that there is no change in the facts and circumstances of the case in the present assessment year compared to the assessment year for which the coordinate bench is decided this issue in the favour of the appellant for assessment year 2007 – 08 and 2008 – 09 wherein this issue has been decided by the coordinate bench as under:-

“13.14. The basic requirement for the applicability of section 40A(2) of the Act is that the payment should be made to a related person i.e. to a person referred to in clause (b), of sub-section (2) of section 40A of the Act.

13.15. In the present case, it is an undisputed fact that the payments are not made to a person mentioned in clause (b) of section 40A (2) of the Act.

13.16. Clause (a) of sub-section (2) of section 40A of the Act provides that where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of the sub section and the Assessing Officer is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate

needs of the business or profession of the assessee or the benefit derived by or accruing to him there from, so much of the expenditure as it so considered by him to be excessive or unreasonable, shall not be allowed as a deduction.

The object of section 40A (2) is to prevent diversion of income. An assessee who has large income and is liable to pay tax at the highest rate prescribed under the Act often seeks to transfer a part of his income to a related person who is not liable to pay tax at all or liable to pay tax at a rate lower than the rate at which the assessee pays the tax. In order to curb such tendency of diversion of income and thereby reducing the tax liability by illegitimate means, section 40-A was added to the Act by an

amendment made by the Finance Act, 1968. Clause (b) of section 40A (2) gives the list of related persons.

13.17. In the present case, it is an undisputed fact that none of the parties fall within the persons specified as defined under clause (b) of section 40A (2) of the Act. Related parties are to be considered in terms of provisions of sec. 40A (2) of the Act and not as mentioned in AS-18 issued by the Institute of

Chartered Accountant. Thus, we are of the view that the provisions of section 40A (2) do not apply to the present case. Further, there is no provision under the Act which authorizes the Assessing Officer to lift the corporate veil and disallow an expenditure on the ground of reasonableness and commercial expediency unless it is established that the transaction is primarily devised to evade tax.

13.18. In the present case, it was submitted by the learned AR of the assessee that the related parties are profit-making companies and are subject to tax to at some less or the same rate of tax. Thus, there is no loss of Revenue. This submission of the assessee has not been controverted before us by the learned DR. Tax benefit alleged is factually wrong as the other compared assesses are profit making companies/ assesses. There is no loss to the revenue if only the excess payment of price is taken, but this situation is not considered by the Revenue. Except for allegation that excess price is paid to reduce profit, no other evidence is gathered by assessing officer to prove that the assessee had in fact evaded or saved tax by such exercise. The argument of the Revenue fails. The allegation that the assessee has structured his associate concern so as to avoid sec. 40A (2) is also devoid of merit, as the revenue has failed to demonstrate as to how it has come to such a conclusion. The allegation means that profit is transferred to third parties, where the share holding of the assessee is not a major share holding. The allegation means that the assessee is distributing profits to companies with majority holding by

unrelated parties for the purpose of reducing taxes. Such wild allegation cannot be endorsed by us.

13.19. The assessee does not dispute the fact that certain purchases are made at a rate higher than the rate paid to certain other parties for the same periods. The assessee at pages 1523 to 1523.18 of the paper book also furnished instances where purchases were made from these parties at price lower than the purchases made from unrelated parties. Further, the disallowance was made on adhoc basis without setting any benchmark for the disallowance.

13.20. Notwithstanding the above view, even assuming for a moment that the provisions of the section 40A (2) would apply to the present case, then the following propositions laid down by various courts have to be considered.

13.21. The Hon'ble Bombay High Court in the case of CIT v. Indo Saudi Services (Travel) (P.) Ltd. [2009] 310 ITR 306 relying on CBDT Circular No. 6-P, dated 6-7-1968 held that no disallowance should be made under section 40A(2) of the Income-tax Act in respect of the payments made to the relatives and sister concerns where there is no attempt to evade tax.

13.22. Having held that the provisions of section 40A (2) of the Act does not apply to the facts of the case. We now proceed to answer whether the action of the Assessing Officer in disallowing the expenditure on the ground of commercial expediency is justified.

13.23. The Hon'ble Supreme Court in the case of CIT vs Walchand & Co [1967] 65 ITR 381 in the context of deductibility of expenditure under Section 37(1) of the Income-tax Act, 1961 [Corresponding to section 10(2)(xv) of the Indian Income-tax Act, 1922] held as under:

“In applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the revenue”.

13.24. Further, reference is also drawn to the decision of the Hon'ble Supreme Court in the case of *S.A. Builders Ltd. v. CIT (Appeals) [2007] 288 ITR 1 (SC)*, where in it was held as under:

"....that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profit. The income-tax authorities must put themselves in the shoes of the assessee and see how a prudent business man would act. The authorities must not look at the matter from their own view point but that of a prudent businessman...."

13.25. It is a well settled principle that Commercial expediency cannot be judged by the Revenue from its point of view. In the present case, we are of the view that the assessing officer has made this disallowance based on

surmises and conjectures without properly examining the facts on record and without bringing any evidence that the purchases were made at an excessive price compared to fair market value to evade tax.

13.26. In view of the above discussions, and bearing in mind entirety of the case, we are of the considered view that the impugned disallowance was indeed uncalled for on the facts of this case. Hence, we uphold the grounds of the assessee."

In view of the above about decision of the coordinate bench in appellant's own case and further failure on part of the revenue to controvert any of the findings in the earlier order of the tribunal or pointing out any contrary decisions on this issue, the respectfully following the order of the coordinate bench to not inclined to uphold the disallowance made by the Ld. assessing officer on account of the purchases of Rs. 7 2.40 crores made from the parties

who are related parties in terms of accounting standard 18 issued by the Institute of chartered accountants of India but not in terms of provisions of section 40A (2) of the income tax act. In the result ground No. 11 of the appeal of the assessee is allowed.”

The purchase prices of components which are purchased from various suppliers are based upon negotiations with such vendors and are different due to various factors. The assessee also prefers purchasing material from certain suppliers, due to business/commercial expediency. The said parties are not related to assessee, in terms of the provisions of section 40A(2)(b) of the Act. During the relevant previous year, the assessee made total purchases of various raw materials, etc. aggregating to Rs. 17,791.60 crores. Out of the aforesaid total purchases, purchases from related parties, i.e., parties related to the assessee, in accordance with definition given in AS-18 issued by the ICAI and as disclosed in the notes to accounts of the audited accounts of the relevant previous year, but admittedly not related in terms of definition provided in section 40A (2) of the Act, amounted to Rs. 1886.15 crores. Thus, the issue is squarely covered by the order of the Tribunal for A.Ys. 2010-11 and 2011-12. Therefore, Ground Nos. 22 to 22.3 are allowed in favour of the assessee.

34. As relates to Ground No. 23- 23.2, the same are regarding payment received on behalf of Hero Honda Fin Corp. Ltd. (HFCL) deemed as dividend under Section 2(22)(e) of the Act amounting to Rs.3.55 crore. Hero Fin Corp. Ltd. (HFCL) is a related company in which the assessee holds 30% (approximately) of the share capital, which is engaged primarily in the business of financing of vehicles. In pursuance of the said business HFCL extends to the dealers of the assessee company, facility of financing vehicles purchased by the dealers from the assessee company. The dealers on purchase of vehicles from the assessee, get the bill of purchase raised by the assessee, discounted from HFCL and remit payment to the assessee. The dealers are required to make

payment of aforesaid discounted bills to HFCL on maturity thereof. Subsequently, when payments by dealers to HFCL are due to the dealers, due to convenience of facility of collection centers of the assessee available all over India, make payment into the assessee's bank account, for and on behalf of HFCL, which is in turn remitted by the assessee to HFCL in 2-3 days. The Assessing Officer held that the aforesaid amount received by assessee from dealers as loan/advance given by HFCL to assessee and consequently deemed the same as dividend under section 2(22)(e) of the Act. It was further observed that the aforesaid advances were not given by HFCL to the assessee in the ordinary course of business since the aforesaid payments were given by customers of HFCL and not by HFCL directly.

35. The Ld. AR submitted that in AY 2007-08, the Tribunal decided the issue in favour of the assessee by holding that assessee's intention did not reflect that the amount was received as loan or advance so as to attract the provisions of section 2(22)(e) of the Act. The Tribunal further held that the assessee was holding the money as a custodian and the amount would be exempted in terms of clause (ii) section 2(22)(e) since the amount was given in the ordinary course of business. In assessment year 2008-09, 2010-11 and 2011-12, the Tribunal followed the order for Assessment Year 2007-08 which dealt with the disallowance.

36. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

37. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

"214) We have heard the rival contentions. We note that similar issue relating to addition of deemed dividend was deleted by the Tribunal in the assessee's own case for assessment year 2007-08 which was followed in

assessment year 2008-09. The relevant observations of the Tribunal for assessment year 2007-08 are as under:

16.27. Section 2(22)(e), is a deeming section and it is well settled that it should be strictly interpreted. In the present case, the intention of the parties did not reflect that it was an advance or loan so as to attract section 2(22)(e). The assessee in this case was holding the money received from dealers as custodian of HHFL. There is no privity of contract between the assessee and HHFL. There is no positive act of granting loan or advance given by HHFL to the assessee. There is neither a stipulation for payment of interest or period of repayment. Further, the assessee has not used the funds for its own purposes, as admittedly the assessee is a cash rich company, not requiring loans. This fact is not disputed by the Revenue. The assessee was used as channel for remittance of money by the dealers to HHFL for the purpose of convenience and from assessee's a standpoint this is business expediency. We are unable to appreciate the conclusions drawn by the assessing officer that this is a deemed loan. In our view, by no stretch of imagination it can be said that there was any amount of advance or loan given by HHFL to the assessee. 16.28. Even assuming that the transaction is in the nature of loan, we have to agree with the arguments of the Ld. AR of the assessee that the transaction cannot be deemed as dividend in terms of exemption provided in clause (ii) of section 2(22)(e) of the Act, since the loan would be considered as given by HHFL, which is engaged in the business of money lending, in the ordinary course of its business. Therefore, the amount cannot be deemed as dividend in the hands of the assessee. The arguments of the Ld. DR that since no interest was charged/ chargeable thereon from the assessee, the aforesaid loan cannot be said to be given in the ordinary course of business of HHFL is taken to its logical conclusion, supporting our view that this is not a loan or advance.

16.29. Considering the decision of the Hon'ble Delhi High Court and the intent of the Legislature in introduction of Section 2(22)(e) of the Act, we are of the view that the transaction in question would not fall within the provisions of section 2(22)(e) of the Act. Accordingly, this ground of the assessee is allowed."

The Ld. departmental representative could not point out any change in the facts and circumstances of the case of the appellant as compared to the assessment year in which the above issue is decided by the coordinate bench. No other contrary decision was also pointed out therefore, respectfully following the decision of the coordinate bench in the appellant's own case for the earlier years. We dismiss ground No.6 of the appeal of the revenue."

It is pertinent to note that when payments by dealers to HFCL are due to the dealers, due to convenience of facility of collection centers of the assessee available all over India, make payment into the assessee's bank account, for and on behalf of HFCL, which is in turn remitted by the assessee to HFCL in 2-3 days. Thus, the assessee is mere custodian of the said amount. Thus, Section 2(22)(e) will not be applicable in the present case. The issue is squarely covered by the order of the Tribunal for A.Ys. 2010-11 and 2011-12. Therefore, Ground Nos. 23 to 23.3 are allowed in favour of the assessee.

38. As relates to Ground No. 24- 24.1 regarding disallowance of payments made for advisory services availed from Hero Corporate Services Ltd. (HCSL) amounting to Rs.2 Crores, it can be seen that during the relevant previous year, the assessee paid retainership fee of Rs. 2 cr. (Rs. 50 lacs payable quarterly) to Hero Corporate Services Ltd (HCSL) in connection with availing advisory services for the purposes of business. In the assessment order, the Assessing Officer observed that the assessee has not explained the business expediency of such expenditure incurred by the assessee.

39. The Ld. AR submitted that the aforesaid issue is squarely covered by

the decision of the Delhi bench of the Tribunal in the assessee's own case for the assessment year 2007-08 and 2008-09, wherein the ad-hoc disallowance made out of total expenditure incurred in that year was deleted on the ground that services were rendered by HCSL to the assessee and the Assessing Officer could not sit in the arm chair of a businessmen to decide reasonableness of an expenditure. The aforesaid findings of the Tribunal had been followed and reiterated by the Tribunal in assessee's own case for the immediately preceding assessments years, viz. Assessment Year 2010-11 and 2011-12. It is also pertinent to mention that no appeal has been filed by the department before the High Court.

40. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not refute the decision of the Tribunal and the Hon'ble High Court.

41. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

"56) We have carefully considered the rival contentions. We have also noted the documents in relation to various services provided by HCSL, the necessity thereof was explained by the appellant in his submissions discussed above. We have also gone through the order of the Tribunal for AY 2007-08, wherein while following the settled legal propositions that an assessing officer cannot sit in the arm chair of the business man and decide the reasonableness of expenditure incurred or commercial expediency thereof, deleted the impugned disallowance made by the assessing officer as under :-

"15.12. The assessing officer in this case made an ad hoc disallowance by allowing an amount of Rs. 20 lacs as expenditure for the services availed by the assessee from HCSL and disallowing the rest. The assessing officer has by observing in his order that various reports have been provided by HCSL admitted the fact that certain services were rendered in this case. His only doubt is how these services were needed in the business of the

assessee. We also note that the parties are not related to each other in terms of sec. 40A(2)(b). While it is so, the action of the Revenue in disallowing the certain portion of the expenditure is not justified unless the revenue demonstrates that the transaction is primarily a device to evade tax.

15.13. The Hon'ble Supreme Court in the case of CIT v. Walchand & Co. (P.) Ltd. [1967] 65 ITR 381 held that the Income-tax authorities have to decide whether the expenditure claimed as an allowance was incurred voluntarily and on grounds of commercial expediency. In applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of the business, the Supreme Court laid down that the reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the Revenue.

15.14. The Hon'ble Supreme Court in the case of CIT v. Dharamraj Giriji Riya Narsingiriji 91 ITR 544 held that "it is not open to the Department to prescribe what expenditure an assessee should incur and in what circumstances he should incur that expenditure. Every businessman knows its interest best".

15.15. It is well settled that the assessing officer cannot place himself in the arm chair of businessman and decide the amount of expenditure that is to be incurred for the purpose of running of the business. The expenditure in question cannot be disallowed for the reason that the expenditure was incurred for business and was in the revenue field and was not a personal

expenditure. In the result, this ground of the assessee is allowed."

Having regards to the facts and circumstances of the case under consideration, and in absence of any contrary decision pointed out by the Ld. departmental representative and any changes in the facts and circumstances

of the case in the present assessment year we respectfully following the aforesaid finding given by the coordinate bench in appeal order for AY 2007-08 in case of appellant. Direct the assessing officer to delete the disallowance made of Rs. 2 crores on account of advisory services expenditure incurred on payment to hero corporate services Ltd. Therefore ground nos. 12 of the appeal of the assessee is allowed.”

From the records it can be seen that the assessee made elaborate submissions explaining the nature of services received from Hero Corporate Services Ltd. and nexus of same with the business of the assessee. This fact is identical with the earlier Assessment Years. The issue is squarely covered in favour of the assessee by the Tribunal's order for A.Ys. 2010-11 & 2011-12. Besides this the Revenue has accepted this issue and has not challenged the same in Hon'ble High Court. Thus, this issue attains finality. Therefore, Ground No. 24 to 24.1 are allowed in favour of the assessee.

42. As relates to Ground No. 25- 25.7 regarding disallowance of purchase u/s 40a(ia) for alleged failure to deduct TDS u/s 194C of the Act amounting to Rs. 5063.08 crores, it can be seen that in the course of business of manufacturing two wheelers, the assessee places purchase orders on vendors of certain customized intermediary products like wheel assembly, seat assembly, etc. While placing the aforesaid purchase orders to the vendors, the assessee also provides the specifications of the products to be purchased, as also the name of suppliers, from whom the vendor is required to purchase raw materials/components to be used in manufacture of customized intermediary products at the price negotiated by the assessee with such suppliers. The Assessing Officer held that the assessee by specifying the name of vendors of raw material along with purchase price thereof, was controlling the supply of raw material to the vendors, which was to be deemed as supply of raw-material by the assessee itself, and hence the contract with vendors constituted 'work contract' under section 194C, as amended by Finance (No. 2) Act. 2009. The

Assessing Officer further observed that the vendors are not operating as independent business entities but as captive units and working under the directions and dictation of the assessee, thereby having no independent decision making. In assessment order, the Assessing Officer further observed that the assessee, while arranging the transactions in the aforesaid manner, viz., routing the supply of material through parties, has hoodwinked the Revenue in order to evade liability to deduct tax at source. For the aforesaid cumulative reasons, the Assessing Officer held that the aforesaid transaction of purchase from vendors was in the nature of contract for carrying out work, which was subject to TDS under section 194C and in view of assessee's failure to deduct tax at source under the aforesaid section, the entire purchases aggregating to Rs. 5.063.00 crores made from the aforesaid vendors was disallowable under section 40(a)(ia) of the Act.

43. The Ld. AR submitted that the aforesaid issue is squarely covered by the decision of Delhi bench of Tribunal in the assessee's own case for the assessment year 2007-08 and 2008-09, wherein after exhaustive consideration of the facts, it was held that the impugned transactions are in the nature of contract of sale and not contract for carrying out work to be covered within the scope of section 194C of the Act. The Tribunal also found force in the arguments of the assessee that, where recipients have paid tax, no disallowance under section 40(a)(ia) was warranted. Further, it would be pertinent to point out that similar disallowance made by the assessing officer in assessment years 2010-11 and 2011 -12 has been deleted by the Tribunal vide order dated 24.10.2016 following the aforesaid orders for earlier years, viz. AY 2007-08 and 2008-09. Even otherwise and without prejudice to the above, the Ld. AR submitted that second proviso to section 40(a)(ia) provides if the recipient has considered the payments received as part of income and paid tax thereon, then the payer cannot be considered as "assessee in default" and no part of the expenditure can be disallowed under the said section. The said provision was inserted w.e.f. 1-4-2013, i.e., A.Y. 2013-14 and onwards. The

Delhi High Court in the case of CIT vs. Ansal Land Mark Township (P.) Ltd. 377 1TR 635 held that the aforesaid amendment to be retrospective in nature and applicable in earlier year(s). Accordingly, in the present case since the recipient have discharged their tax liability and certificate of CA to that effect have been provided by the parties, no disallowance is even otherwise warranted under section 40(a)(ia) of the Act.

44. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decisions of the Tribunal and the Hon'ble High Court.

45. We have heard both the parties and perused the material available on record. The Tribunal for A. Ys. 2010-11 and 2011-12 held as under:

“65) We note that the Ld. assessing officer had adopted the findings and reasons given in the assessment order for AY 2007-08, while repeating the disallowance in the assessment year under consideration. The Tribunal in the order for AY 2007-08 in appellant's own case has reversed the aforesaid findings of the assessing officer. The coordinate bench has held that impugned transaction is not covered within the scope of section 194C of the Act. The relevant observations of the coordinate bench are as under:

“14.58. The issue before us for adjudication is whether on the facts and circumstances of the case, the customized intermediatery products like wheel assembly, seat assembly etc. sourced by the assessee from the vendors is a contract of sale by the vendors or a contract of work.

14.59. The assessing officer issued summons u/s 131 to nine vendors and recorded their statements. This exercise resulted in the assessing officer gathering information from the vendors that they have procured material from the sources specified by the assessee and at rates specified by the assessee. Based on the statements from nine vendors, the assessing officer came to the conclusion that the assessee

has termed the “contract of work” as “contract for sale”. The reasons in details for arriving at such conclusion by the Assessing officer and as confirmed by the DRP are discussed in the above paragraphs (supra).

14.60. With the above background, we examine the legal position in this regard.

.....

14.73. On perusal of the above mentioned CBDT Circulars, it can be appreciated that the fact that the goods sold are manufactured according to specifications of the buyer is not relevant in determining whether the contract is a contract of sale or works contract. What is relevant to determine the stage of passing of property/title in the goods from the vendor to the buyer. Where title to the goods passes to the buyer at the time goods are manufactured and transported, the contract would be one for sale of goods, notwithstanding that the goods are manufactured according to the specifications of the buyer.

14.74. The principal test to be applied to determine whether the contract is works contract or contract for sale is examined whether title to the goods passes to the purchaser at any time anterior to the manufacture and delivery of goods to the purchaser. If the answer to the aforesaid query is in the negative, then, the contract is one of sale, when the vendor manufactures goods in his own right, as principal, and not as job worker.

14.75. The legal position is well settled that in case title/ownership in goods passes to the buyer on transfer of goods by the vendor, even though goods are manufactured according to the specifications and design supplied by the purchaser, the contract cannot be regarded as contract for carrying out work falling under section 194C of the Act.

.....

14.86. *Whether a particular contract constitutes “contract for sale” or “contract for work” is based on facts of each case. The same would depend upon the intention and conduct of the parties as evidenced by the terms of the contract. It is a settled judicial preposition that the substance and not the form of the contract is material in determining the nature of transactions.*

14.87. *Applying the principals laid by the Courts to the facts of the present case, we now proceed to examine whether the contract in the case on hand is “contract for sale” or “contract for work”.*

(1) All the nine parties are independent legal establishments engaged in the manufacturing of finished products and are not captive units of the assessee.

(2) The vendors have their own manufacturing establishments, employing huge labour; utilize the raw materials purchased by them, for producing customized finished goods for the assessee.

(3) The assessee has issued purchase orders for supply of components as per the assessee’s specification. The assessee has filed copies of the purchase orders/ invoices. The same finds place in the paper book filed by the assessee.

(4) The raw materials are delivered to the vendors by the suppliers and are at the risk and title of the vendors. The suppliers collect from the vendors, sales tax, VAT etc. on sale of raw material and the vendor paid the same.

(5) Excise duty is paid by the vendors in their own right, as an independent manufacturer and not as a job worker in respect of goods manufactured and sold to the assessee.

(6) The assessee has paid sales tax/VAT, as the case maybe, for the goods purchased from the vendors.

14.88. Further on perusal of the sample purchase orders produced before us and the terms and conditions on which the purchase order is placed, we observe that the transaction is on a principal to principal basis.

.....

14.90. Combined reading of all the terms and conditions of the purchase order takes us to the conclusion that the vendors supply finished goods to the assessee at their risk and cost. Title to the finished goods was transferred to the appellant when the supplier/ vendor completed production of the finished goods and dispatched the same to the assessee and only when the assessee approves and accepts the said goods i.e. title passes on acceptance of goods. Until that stage of acceptance on delivery, there is no transfer of title as per the intention of the parties gathered from the purchase order. The transfer of title at the stage of acceptance of deliveries by the purchaser would be, in our opinion, only a sale of goods but not work contract.

14.91. The test laid down by the courts is to examine the intention of the parties as to the point of time when they want to transfer of title in the goods. In this case, the title in the goods vests in the assessee on delivery of the goods. The assessee never acquired any title prior to the point of delivery.

14.92. We are unable to appreciate the conclusion drawn by the assessing officer as approved by the DRP that the assessee has made a deemed purchase of the raw material and in turn made a deemed supply of the same to the vendors. This is nothing but a presumption unsupported by facts. The assessing officer accepts that all the vendors purchase raw material and components from their supplier after paying sales tax, excise duty etc. wherever applicable. The purchases are made on a principal to principal basis. Title in the goods

passes to the vendors from the supplier on delivery of the raw material and the assessee does not in any way acquire any title to the goods i.e. raw material. The argument of the Ld. DR that the nature of arrangement of the assessee is that of indirect supply of material to the vendor, which is in the nature of contract for carrying out work is farfetched, devoid of merit and not supported by evidence. It is not the case of revenue that there are any financial transactions between the assessee and the raw material suppliers of the vendors. The test is to see the fact whether the assessee acquired any title to the raw material purchased by the vendors from the suppliers. The answer to this is no. We are unable to understand as to how the assessing officer as well as the DRP has considered this as a deemed purchase by the assessee. The reason enunciated by the assessee w.r.t identifying the suppliers of the material along with the determination of price of the raw material fixing of payment terms etc., clearly constitutes a matter of business expediency for the assessee.

14.93. *Further, in the statement recorded from the vendors after summoning them u/s 131 of the Act, the vendors have confirmed that this is a case of sale of goods and not a works contract. Mr. Yogesh Kumar Jindal has explained the purpose for which the assessee specifies the suppliers and the rate.*

14.94. *We have carefully gone through the decision of the Karnataka High Court in the case of Nova Pharma Ltd. (supra) relied by the Ld. DR and are of the view that the fact of the case is clearly distinguishable and cannot be applied to the facts of the present case. The assessee has rightly distinguished the case. As the same is brought out in the earlier part of the order, for sake of brevity we do not repeat the same.*

14.95. *In this case, there is no supply of raw material by the assessee to the vendors either directly or indirectly. In laying down the quality specification of the products, the assessee is ensuring the required quality of its purchases which in turn ensures the quality of its two wheelers. Considering the magnitude of the total requirements, the assessee was able to negotiate the price and hence is controlling its input costs. The low price enjoyed by the vendors, in turn would be passed on to the assessee. This is a case where the vendors were purchasing raw material on their own account by payment of excise duty, VAT etc. The goods were manufactured by the vendors to the specification and other terms and conditions spelt out in the purchase orders and in their own right as independent manufactures. On this factual matrix, we have no hesitation in holding that it is a case of contract of sale and not contract of work. Hence, in our view, the provision of Sec. 194C are not applicable and consequently the disallowance made u/s 40(a)(ia) is to be deleted.*

14.96. *It would be pertinent to point that section 194C was amended by the Finance (2) Act, 2009 w.e.f. 1.10.2009, whereby the definition of "work" was enlarged to include contract for manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer. The said amendment also provided that contract for carrying out work shall not include contract for manufacturing or supplying of product according to the requirement or specification of a customer by using material purchased from a person other than such customer.*

14.97. *In case of the assessee, the finished goods are manufactured by the supplier as per the prescribed specifications of the assessee. The raw material and other ingredients required for manufacture are specified by the appellant, in order to ensure proper quality of the finished products. The rates are negotiated to achieve economy of scale and to leverage the position of the assessee, which leads to reduction in*

cost of production. Such raw-materials are however acquired by the vendor on their own account and not on behalf of the assessee.

14.98. *The right of ownership passes to the assessee only after the goods come into existence, on manufacture and are supplied to the assessee as finished goods. Prior thereto, the risk in the goods vests with the vendor/supplier. All the other terms of purchase/sale between the vendor and supplier, like payment terms, period of delivery etc. is for acquisition of ascertained goods – the contract is thus one of sale and not a contract for carrying out work.*

14.99. *In view of the above finding, we are not adjudicating on the other arguments raised by the assessee on this issue, though we find force in the argument of the assessee that since all the vendors have filed their returns of income and paid taxes on the receipts from the assessee, no disallowance under section 40(a)(ia) is warranted. Hence the additional evidence and additional argument is not adjudicated as it would be an academic exercise. In the result, this ground of the assessee is allowed.”*

66) *In absence of any contrary decision pointed out by the Ld. departmental representative and the facts and circumstances of the case remaining the same was the assessment years , We follow the aforesaid findings given in the appeal order for 2007-08 and therefore, we hold that the transaction entered by the appellant for purchase of material from vendors is outside the scope of section 194C of the Act. Accordingly, for the aforesaid cumulative reasons, we delete the impugned disallowance made by the assessing officer on account of purchases of Rs. 3 828.78 crores disallowed for failure to deduct tax under section 194C of the income tax act. In the result ground No. 13 of the appeal of the assessee is allowed.”*

The issue is squarely covered in favour of the assessee by the Tribunal's order for A.Ys. 2010-11 & 2011-12. In the present case the recipient have discharged their tax liability and certificate of Chartered Accountant to that effect was

provided by the parties, therefore, no disallowance can be made under Section 40(a)(ia) of the Act. Thus, this issue is squarely covered by the Hon'ble Delhi High Court decision in case of Ansal Land Mark Township P. Ltd.(supra). Therefore, Ground No. 25 to 25.7 are allowed.

46. As relates to Ground No. 26- 26.5 regarding TDS on quarterly target and turnover discount and Sales Discount of Rs. 31.44 crore (Quarterly 40.80 crores (trade), it is seen that during the relevant year, the assessee incurred expenditure of Rs. 72.25 crores on account of various incentives/discounts offered to dealers under various schemes on purchase of spare parts/vehicles from the assessee. The aforesaid expenditure, aggregating to Rs. 31.44,26,681 relates to amount of discounts offered by the company in various stockists/dealers, on purchase of spare parts made by the latter in accordance with sales incentive/discount scheme prevalent during the relevant previous year. The assessee has further given trade discount amounting to Rs. 40,80,92,460 to the dealers on the sales invoice at the time of sales. The Assessing Officer held that the assessee was liable to deduct tax from aforesaid discounts/incentives under section 194H of the Act since the payments made were on the basis of performance of dealers and targets achieved by dealers which was not in the nature of "discount" as the same was not given at the time of taking delivery of goods by the dealers but was given subsequently. The Assessing Officer held that incentive paid by the assessee to dealers was not in the nature of discount, but fell within the meaning of the term 'commission' as defined in section 194H of the Act and thus disallowed the entire expenditure under section 40(a)(ia) of the Act. Further, the Assessing Officer disallowed trade discount given to dealers on sales invoice at the time of sale while alleging that the same was based on achievement of turnover targets which represented commission on which TDS under section 194H was liable to be deducted.

47. The Ld. AR submitted that the Tribunal in Assessment Year 2007-08

decided the issue in favour of the assessee relying on the decision of Hon'ble Delhi High Court in the case of CIT vs. Mother Dairy Ltd. (ITA No. 1925/2010) and Jai Drinks Pvt. Ltd. (336 ITR 383), holding that the discount in question is not in the nature of commission but an incentive for higher sale targets. The Ld. AR further submitted that the aforesaid finding was followed by the Tribunal in the AY 2010-11 and 2011-12 wherein similar disallowance made by the Assessing Officer was deleted.

48. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal and the Hon'ble High Court.

49. We have heard both the parties and perused the material available on record. The Tribunal for A.Ys. 2010-11 and 2011-12 held as under:

“75) We have heard the rival contentions. As dealership agreement entered between the appellant and dealers is on a principal-to-principal basis and dealers do not act as agents of the appellant while purchasing and further selling the vehicles. Accordingly, the incentives offered at the time of purchase of vehicles do not fall within the meaning of commission u/s 194H of the Act. Further, the issue is squarely covered by the decision of the ITAT in assessee's own case in AY 2008-09 wherein following the ITAT decision in assessee's own case for the year AY 2007-08, it was observed as under –

“148. From the bare reading of the decision of the Tribunal in assessee's own case for AY 2007-08 (supra), we observe that after dealing with rivals submissions and contentions of both the parties, the tribunal reached to the following finding and conclusion deciding the issue in favour of the assessee. The relevant operative part of the order of the Tribunal for AY 2007-08 in assessee's own case (supra) read as under-

“45.11. The facts of this case clearly demonstrate that what is given to the stockiest/ dealers is discount on the purchase price and not any commission. The stockiest/ dealers purchase spare parts/ vehicles

from the assessee. They are not commission agents. Sale consideration is paid by these parties to the assessee. As a matter of incentive for higher sale the assessee grants discount if the stockiest/ dealers achieve a particular volume of transaction. Thus, in our view the discount in question is not in the nature of commission or the brokerage which attracts sec. 194H. In the case of CIT Vs. Mother Dairy Ltd. (ITA no. 1925/2010(Del) the Hon'ble Delhi High Court was considering similar case and held as follows:

“3. The assessee explained in writing that it sold the products to the concessionaires on a principal to principal basis, that the concessionaires buy the products at a given price after making full payment for the purchases on delivery, that the milk and other products once sold to the concessionaires became their property and cannot be taken back from them, that any loss on account of damage, pilferage and wastage is to the account of the concessionaires and that in these circumstances the payment made to the concessionaires cannot be treated as “commission” for services rendered and consequently there was no liability on the part of the assessee to deduct tax.

It is irrelevant that the concessionaires were operating from the booths owned by the Dairy and were also using the equipment and furniture provided by the Dairy. That fact is not determinative of the relationship between the Dairy and the concessionaires with regard to the sale of the milk and other products. They were licensees of the premises and were permitted the use of the equipment and furniture for the purpose of selling the milk and other products. But so far as the milk and the other products are concerned, these items became their property the moment they took delivery of them. They were selling the milk and the other products in their own right as owners. These are two separate legal relationships. The income tax

authorities were not justified or correct in law in mixing up the two distinct relationships or telescoping one into the other to hold that because the concessionaires were selling the milk and the other products from the booths owned by the Dairy and were using the equipment and furniture in the course of sale of the milk and other products, they were carrying on the business only as agents of the Dairy.”

45.12. *The Hon’ble High Court held that in such circumstances S.194H is not attracted.*

45.13. *In the case of Jai Drinks (P) Ltd. 336 ITR 383 (Del.), the Hon’ble Delhi High Court has held as follows:*

“Held, dismissing the appeal, that a perusal of the agreement showed that the assessee had permitted the distributor to sell its products in a specified area. The distributor was to purchase products at a pre- determined price from the assessee for selling them. Both the assessee and the distributor had been collecting and paying their sales tax separately. The CIT(A) and also the Tribunal rightly held that the payments being made by the assessee to the distributor were incentives and discounts and not commission.”

45.14. *Respectfully following the propositions laid down in the aforementioned cases we allow this ground of the assessee.”*

76) *In that view of the matter, the Ld. departmental representative could not point out any decision contrary to the above finding of the coordinate bench or change in the facts and circumstances of the case, therefore respectfully following the decision of the coordinate bench in the appellant’s own case for assessment years 2007-08 and 2008-09 discussed supra, we delete the disallowance made by the Ld. assessing officer on account of expenditure of Rs. 3 6880 2598 towards the quarterly target on turnover discount on trade discount of Rs. 2 7744 7608 given to the dealers. In the result ground No. 15 of the appeal of the assessee is allowed.”*

This issue is covered in favour of the Assessee by the Tribunal order for A.Ys. 2010-11 and 2011-12 as well as, the decision of the Hon'ble High Court in case of Mother Dairy Ltd. (supra). Therefore, Ground No. 26 to 26.3 are allowed in favour of the assessee.

50. As relates to Ground No. 27- 27.4 regarding disallowance of legal and professional expenses u/s 40(a)(ia) of Rs.3.60 lacs, it is seen that during the relevant year, the assessee incurred legal and professional expenses, amounting to Rs. 3,60,396. The details of said expenses were submitted before the authorities. The Assessing Officer disallowed the aforesaid expenses, invoking section 40(a)(ia), for the failure of the assessee to deduct tax at source there from under section 194J of the Act.

51. The Ld. AR submitted that the aforesaid issue is squarely covered in favour of the assessee by the decision of Delhi Bench of Tribunal in the assessee's own case for the Assessment Years 2007-08 and 2008-09, wherein disallowance of expenditure on account of re-imbursment of out-of-pocket expenses incurred by professionals/vendors under section 40(a)(ia) was deleted on the ground that same did not have any element of income in the hands of the recipient. It would also be pertinent to point out that similar disallowance made in the draft AO order, but subsequently deleted by the DRP, was challenged in Revenue's appeal for AY 2010-11 and 2011-12. However, the Tribunal upheld the order of the DRP and confirmed the deletion of disallowance on account of non-deduction of tax on reimbursement of expenses following the order for assessment years 2007-08 and 2008-09.

52. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

53. We have heard both the parties and perused the material available on record. The Tribunal held in A.Ys. 2010-11 and 2011-12 as under:

“222) We have heard the rival contentions. We note that similar issue relating to disallowance relating to re-imbursement of professional expenses was deleted by the Tribunal in the assessee’s own case for assessment year 2007-08 which was followed in assessment year 2008-09. The relevant observations of the Tribunal for assessment year 2007-08 are as under:

“35.8. It is the case of the assessee that it had reimbursed the expenses incurred by various consultants and vendors on travelling and out of pocket expenses. It is also claimed that out of an amount of Rs. 10.68 lacs expenses to the extent of Rs. 6.01 lacs were made after verifying the supporting vouchers for claims raised by the vendors. Balance amount of Rs. 4.66 lacs were based on self certification. In our view such reimbursement of expenditure has no element of income embodied in it. Thus, we apply the following decisions wherein it is held that payer is not obliged to deduct tax at source from reimbursement of expenses:

- *United Hotels Ltd. Vs. ITO 93 TTJ 822;*

- *Karnavati Co-op. Bank Ltd. Vs. DCIT 134 TTJ 486 (Ahd.).*

35.9. Respectfully following the same, the ground is allowed in favour of the assessee.”

The Ld. departmental representative could not point out any change in the facts and circumstances of the case of the appellant as compared to the assessment year in which the above issue is decided by the coordinate bench. No other contrary decision was also pointed out therefore, respectfully following the decision of the coordinate bench in the appellant’s own case for the earlier years, We dismiss ground No.8 of the appeal of the revenue.”

In the present Assessment Year, the Assessing Officer disallowed the aforesaid expenses, invoking section 40(a)(ia), for the failure of the assessee to deduct tax at source there from under section 194J of the Act. But it is pertinent to note

here that the Assessing Officer did not doubt that the payment was made by assessee towards reimbursement of expenses, it was still held that assessee was liable to deduct tax at source under section 194J of the Act. Thus, the issue is squarely covered by the order of the Tribunal for A.Ys. 2010-11 and 2011-12. Therefore, Ground Nos. 27 to 27.4 are allowed in favour of the assessee.

54. As relates to Ground No. 28- 28.5 regarding TDS at lower rate or wrong provision (Payment made to M/s. G2 RAMS India Pvt. Ltd. for event organization) of Rs. 44.85 Crores, it is seen that the assessee had incurred expenditure on account of display of hoardings for advertisements and arrangement of various events for publicity. All arrangements for this event were done by M/s G2 RAMS India Pvt. Ltd. which included arrangement for transfer to hotels from airport, refreshments, F&B etc along with arrangement of various artists, sound & light, decoration, ambulance, live band, etc. The said company was also responsible for staging green rooms, set and pros for theatres, light and sound for theatre, projection systems etc. The said company was entrusted with the overall responsibility for organizing the event. The contract entered into with the said company was a composite contract for organizing an event, involving various arrangements for carrying out work of organizing the event. In view of the above, tax was deducted at source u/s 194C of the Act before remitting the payment under that Section. The Assessing Officer held that by organizing an event, M/s G2 RAMS India Pvt. Ltd. had rendered to the assessee service in the nature of professional or technical, which was covered within the provisions of section 194J of the Act. Accordingly, the Assessing Officer held that since the assessee failed to deduct tax at source under the aforesaid section, the total expenditure of Rs. 44.85.21.644, incurred on payments made to G2 RAMS India Pvt. Ltd. was disallowable under section 40(a)(ia) of the Act.

55. The Ld. AR submitted that the aforesaid issue is squarely covered in favour of the assessee by the decision of the Delhi bench of the Tribunal in the assessee's own case for the assessment year 2007-08 and 2008-09, wherein disallowances made in that year for alleged short deduction of tax at source were deleted by the Tribunal, by following the decision of Calcutta High Court in the case of S.K. Tekriwal (361 ITR 432) holding that if tax has been deducted under any provision then section 40(a)(ia) cannot be applied for default of TDS in a different provision. The Ld. AR relied upon the following decisions:

- i) CIT vs. Kishore Rao & Others(HUF) (Kar.): 387 ITR 196
- ii) Dish TV India Ltd. vs. ACIT: 190 TTJ 537

Further, in AY 2010-11 and 2011-12, identical disallowance made by the Assessing Officer were reversed by the Tribunal holding that the contract involved predominantly physical activities for carrying out work and was entered into for availing composite services relating to organization of event, and thus, the same would be covered under Section 194C and not as professional/technical service under Section 194J of the Act. While holding as above, the Tribunal elaborately discussed the meaning of 'work contract' u/s 194C vis-à-vis the expression 'technical service' referred in Section 194J of the Act.

56. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

57. We have heard both the parties and perused the material available on record. The Tribunal for A.Ys. 2010-11 and 2011-12 held as under:

"132) We have carefully considered the rival contentions. The facts are not in dispute that the contract entered by the appellant with G2RAMS India Pvt. Ltd. involved composite services in relation to organizing an event, viz., arrangement of hotels, airport transfers, engagement of various artists, staging of events, etc.

*The issue that arises is whether such composite services fall within the meaning of contract for carrying out work u/s 194C or within the meaning of technical or professional services u/s 194J of the Act. Firstly, dwelling upon the applicability of section 194J, the words “professional or technical services” used in section 194J have been defined in Explanation thereto. The aforesaid Explanation provides an exhaustive definition of the word “professional services” as services provided in the course of carrying on legal, medical, engineering, architectural, accountancy, technical consultancy, interior decoration, advertising or any other notified profession. The service under consideration is clearly not prescribed in the aforesaid list of certified professions, nor the assessing officer or the ld. DR has pointed out so. Accordingly, the question of the services under consideration falling within the meaning of “professional services” does not arise. As regards ‘fee for technical services’, which borrows the meaning from Explanation to section 9(1)(vii) of the Act has been explained by Courts in several decisions. The meaning of words ‘managerial, technical and consultancy’ used in the aforesaid section has been explained by the Hon’ble Delhi High Court in the case of *DIT v. Pan Alfa Auto Elekrik Ltd.*: 227 Taxman 351 in the following words:*

“ 14. The expressions "managerial, technical and consultancy services" have not been defined either under the Act or under the General Clauses Act, 1897. The said terms have to be read together with the word 'services' to understand and appreciate their purport and meaning. We have to examine the general or common usage of these words or expressions, how they are interpreted and understood by the persons engaged in business and by the common man who is aware and understands the said terms. The expression "management services" was elucidated upon by this Court in *J.K. (Bombay) Ltd. v. CBDT*, [1979] 118 ITR 312/1 Taxman 537 in the following terms:—

'6. It may be asked whether management is not a technical service. According to an Article on "Management Sciences", in 14 Encyclopedia

Britannica 747, the management in organisations include at least the following:

- "(a) discovering, developing, defining and evaluating the goals of the organization and the alternative policies that will lead toward the goals,*
- (b) getting the organization to adopt the policies,*
- (c) scrutinizing the effectiveness of the policies that are adopted,*
- (d) initiating steps to change policies when they are judged to be less effective than they ought to be."*

Management thus pervades all organisations. Traditionally administration was distinguished from management, but it is now recognised that management has a role even in civil services. According to the Fontana Dictionary of Modern Thought, page 366, management was traditionally identified with the running of business. Therefore, management as a process is practised throughout every organization from top management through middle management to operational management.'

Recently this Court in CIT v. Bharti Cellular Ltd., [2009] 319 ITR 139/[2008] 175 Taxman 573 had observed:—

'The word "manager" has been defined, inter alia, as: "a person whose office it is to manage an organization, business establishment, or public institution, or part of one; a person with the primarily executive or supervisory function within an organization, etc., a person controlling the activities of a person or team in sports, entertainment, etc."

It is, therefore, clear that a managerial service would be one which pertains to or has the characteristic of a manager. It is obvious that the expression "manager" and consequently "managerial service" has a definite human element attached to it. To put it bluntly, a machine cannot be a manager.'

Reference can be also made to the decision of the Authority for Advance Rulings in Intertek Testing Services India (P.) Ltd., In re [2008] 307 ITR 418/175 Taxman 375, wherein it was elucidated:—

'First, about the connotation of the term "managerial". The adjective "managerial" relates to manager or management. Manager is a person who manages an industry or business or who deals with administration or a person who organizes other people's activity [New Shorter Oxford Dictionary]. As pointed out by the Supreme Court in R. Dalmia v. CIT [1977] 106 ITR 895, "management" includes the act of managing by direction, or regulation or superintendence. Thus, managerial service essentially involves controlling, directing or administering the business.'

"18. It would be incongruous to hold that the non-resident was providing technical services. To quote from Skycell Communications Ltd. v. Dy CIT [2001] 251 ITR 53/119 Taxman 496 (Mad), the word 'technical' has been interpreted in the following manner:—

'Thus while stating that "technical service" would include managerial and consultancy service, the Legislature has not set out with precision as to what would constitute "technical" service to render it "technical service". The meaning of the word "technical" as given in the New Oxford Dictionary is adjective 1. of or relating to a particular subject, art or craft or its techniques: technical terms (especially of a book or article) requiring special knowledge to be understood: a technical report. 2. of involving, or concerned with applied and industrial sciences: an important technical achievement. 3. resulting from mechanical failure: a technical fault. 4.

according to a strict application or interpretation of the law or the rules: the arrest was a technical violation of the treaty.

Having regard to the fact that the term is required to be understood in the context in which it is used, "fee for technical services" could only be meant to cover such things technical as are capable of being provided by way of service for a fee. The popular meaning associated with "technical" is "involving or concerning applied and industrial science".'

19. The said term was also interpreted by this Court in case of Bharti Cellular Ltd. (supra) where emphasis was laid on the element of human intervention, but we are not concerned with the said aspect in the present case. The non-resident had not undertaken or performed "technical services", where special skills or knowledge relating to a technical field were required. Technical field would mean applied sciences or craftsmanship involving special skills or knowledge but not fields such as arts or human sciences (see paragraph 24 below)."

"24. The OECD Report on e-commerce titled, Tax Treaty Characterisation Issues arising from e-commerce: Report to Working Party No.1 of the OECD Committee on Fiscal Affairs dated 01st February 2001, has elucidated:—

'Technical services

39. For the Group, services are of technical nature when special skills or knowledge related to a technical field are required for the provision of such services. Whilst techniques related to applied science or craftsmanship would generally correspond to such special skills or knowledge, the provision of knowledge acquired in fields such as arts or human sciences would not. As an illustration, whilst the provisions of engineering services would be of a technical nature, the services of a psychologist would not.

40. The fact that technology is used in providing a service is not indicative of whether the service is of a technical nature. Similarly, the delivery of a service via technological means does not make the service technical. This

is especially important in the e-commerce environment as the technology underlying the internet is often used to provide services that are not, themselves, technical (e.g. offering online gambling services through the internet).

41. In that respect, it is crucial to determine at what point the special skill or knowledge is used. Special skill or knowledge may be used in developing or creating inputs to a service business. The fee for the provision of a service will not be a technical fee, however, unless that special skill or knowledge is required when the service is provided to the customer. For example, special skill or knowledge will be required to develop software and data used in a computer game that would subsequently be used in carrying on the business of allowing consumers to play this game on the internet for a fee. Similarly, special skill or knowledge is used to create a troubleshooting database that customers will pay to access over the Internet. In these examples, however, the relevant special skill or knowledge is not used when providing the service for which the fee is paid, i.e. allowing the consumer to play the computer game or consult the troubleshooting database.

42. Many categories of e-commerce transactions similarly involve the provision of the use of, or access to, data and software (see, for example, categories 7, 8, 9, 11, 13, 15, 16, 20 and 21 in annex 2). The service of making such data and software, or functionality of that data or software, available for a fee is not, however, a service of a technical nature. The fact that the development of the necessary data and software might itself require substantial technical skills is irrelevant as the service provided to the client is not the development of that data and software (which may well be done by someone other than the supplier) but rather the service of making the data and software available to that client. For example, the mere provision of access to a troubleshooting database would not require more than having available such a database and the necessary software

to access it. A payment relating to the provision of such access would not, therefore, relate to a service of a technical nature.

Managerial services

43. The Group considers that services of a managerial nature are services rendered in performing management functions. The Group did not attempt to give a definition of management for that purpose but noted that this term should receive its normal business meaning. Thus, it would involve functions related to how a business is run as opposed to functions involved in carrying on that business. As an illustration, whilst the functions of hiring and training commercial agents would relate to management, the functions performed by these agents (i.e. selling) would not.

44. The comments in paragraphs 40 to 42 above are also relevant for the purposes of distinguishing managerial services from the service of making data and software (even if related to management), or functionality of that data or software, available for a fee. The fact that this data and software could be used by the customer in performing management functions or that the development of the necessary data and software, and the management of the business of providing it to customers, might itself require substantial management expertise is irrelevant as the service provided to the client is neither managing the client's business, managing the supplier's business nor developing that data and software (which may well be done by someone other than the supplier) but rather making the software and data available to that client. The mere provision of access to such data and software does not require more than having available such a database and the necessary software. A payment relating to the provision of such access would not, therefore, relate to a service of a managerial nature.

Consultancy services

45. For the Group, "consultancy services" refer to services constituting in the provision of advice by someone, such as a professional, who has special qualifications allowing him to do so. It was recognized that this type of services overlapped the categories of technical and managerial services to the extent that the latter types of services could well be provided by a consultant.'

We broadly agree with the aforesaid observations. However, in the case of selling agents, we add a note of caution that taxability would depend upon the nature of the character of services rendered and in a given factual matrix, the services rendered may possibly fall in the category of consultancy services. Paragraphs 41 and 42 do not emanate for consideration in the present case, and effect thereof can be examined in an appropriate case [However, see CIT v. Estel Communication (P.) Ltd. [2009] 318 ITR 185 (Del) and Skycell Communications Ltd. (supra)]."

Further Hon'ble Delhi tribunal has also explained the word 'consultant' in the same decision as under as under:-

"21. The word "consultant" refers to a person, who is consulted and who advises or from whom information is sought. In Black's Law Dictionary, Eighth Edition, the word "consultation" has been defined as an act of asking the advice or opinion of someone (such as a lawyer). It may mean a meeting in which parties consult or confer. For consultation service under Explanation 2, there should be a provision of service by the non-resident, who undertakes to perform it, which the acquirer may use. The service must be rendered in the form of an advice or consultation given by the non-resident to the resident Indian payer."

The word 'technical services' under section 9(1)(vii) read with section 194J has also been recently explained by the apex Court in the case of CIT v. Kotak Securities Ltd.: 383 ITR 1, in the following words:

“Technical services” like “Managerial and Consultancy service” would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would therefore stand out in distinction to the former.”

On analysis of the aforesaid cases, the aforesaid three words used in section 9(1)(vii) can be understood in the following manner:

(i) Managerial - Services essentially involving controlling, directing or administering the business of the service recipient

(ii) Consultancy - Advisory services involving rendered by someone who has special skills and expertise in rendering such advisory

(iii) Technical – Services provided through human intervention, involving or concerning applied and industrial science

*In other words, in short, the services provided by the vendors should predominantly involve specialized skills. Having reached the aforesaid conclusion, it would be pertinent to understand the meaning of contract for carrying out work used in section 194C of the Act. The decision of Hon’ble Delhi High Court in the case of *SRF Finance Ltd. v. CBDT : 211 ITR 861*, wherein the Court explained the meaning of ‘contract for carrying out any work’ and distinguished the same with a ‘service contract’. The relevant observations of the Court are as under:*

“The two words convey different ideas. In the former (i.e., ‘work’) the activity is predominantly physical; it is tangible. In the activity referred as ‘services’, the dominant feature of the activity is intellectual, or at least, mental. Certainly, ‘work’ also involves intellectual exercise to some extent. Even a gardener has to bestow sufficient care in doing his job; so is the

case with a mason, carpenter or a builder. But the physical (tangible) aspect is more dominant than the intellectual aspect. In contrast, in the case of rendering any kind of `service', intellectual aspect plays the dominant role. The vocation of a lawyer, doctor, architect or a Chartered Accountant (there are other similar vocations also) involves deep intellectual exercise and physical skill involved in their vocational activities is minimal. A dancer's performance no doubt involves physical movement; but all the movements are projections of the talent which is natural, or acquired by training. A surgery certainly involves physically visible and tangible work; but, inherently, it is the mental skill developed by the intellectual exercise that permeates the operation.

“Word ‘work’ may have different and wider meanings. But, here, we have to find out the real meaning of the word in the context of its setting in section 194C. The meaning attributable should fit into the clause "for carrying out any work". An architect is not engaged to carry out the work of drawing a sketch. A lawyer is not engaged to carry out the work of arguing a case; he is engaged, to `argue' a case or to `conduct' a case; he is paid `fee' for the services rendered by him and not any `price' for the work done by him..”(emphasis supplied)

In light of the aforesaid decisions, the contract for carrying out any ‘work’ would refer to contract, where the activity is predominantly physical and not intellectual. If the contract involves mental or intellectual attributes of the vendor, the same may qualify as a service contract. In the present case, the services provided by the vendor, in our opinion, are predominantly physical or, in other words, predominantly not based on mental or intellectual attributes, being that of organizing an event involving booking of hotel, organizing airport transfers, organizing various artistes and professionals to stage the show, etc. The vendor has acted as a ‘one-stop shop’ for the appellant for coordinating with all the other thirty- party professionals or service providers. In our opinion, the predominant attributes in the service so

provided by the vendor is that of contract for carrying out work, which would more appropriately be covered u/s 194C instead of section 194J of the Act. Accordingly, we hold that there was no error on the part of the appellant in deducting tax at source u/s 194C, instead of section 194J of the Act. In view of above, ground No. 28 of the appeal of the assessee is allowed holding that the Ld. assessing officer has wrongly held that take should be deducted on this payment under the provisions of section 194J of the act and according to us, the assessee has rightly rejected the tax under section 194C of the income tax act. Therefore, these expenditures are not Delhi is disallowable under the provisions of section 40(a) (ia) of the income tax act .In the result ground No. 28 of the appeal of the assessee is allowed.”

It is pertinent to note that the assessee had incurred expenditure on account of display of hoardings for advertisements and arrangement of various events for publicity. All arrangements for this event were done by M/s G2 RAMS India Pvt. Ltd. The said company was entrusted with the overall responsibility for organizing the event. The contract entered into with the said company was a composite contract for organizing an event, involving various arrangements for carrying out work of organizing the event. In view of the above, tax was deducted at source u/s 194C of the Act before remitting the payment under that Section. Thus, the facts are identical to that of the A.Ys. 2010-11 and 2011-12 and therefore, the order of the Tribunal is applicable in the present case. Therefore, Ground Nos. 28 to 28.5 are allowed in favour of the assessee.

58. Ground No. 29- 29.2 is regarding disallowance of additional depreciation of computers installed at Supervisory Officer of Rs. 70.39 lacs. During the relevant previous year, the assessee claimed additional depreciation of Rs. 70.40 lacs, on computers installed at supervisory offices located in the compound of factory at Gurgaon/Dharuhera, on the ground that such offices formed integral part of the factory. The Assessing Officer denied the plea of the assessee that administrative/supervisory offices located in the factory premises

forms integral part of the factory. The Assessing Officer observed that since computers installed in such offices located within the compound of factory cannot be said to be directly involved in carrying out the manufacturing activity, additional depreciation u/s 32(1)(ia) of the Act shall not be eligible on same. Accordingly, the Assessing Officer disallowed additional depreciation of Rs. 70,39,799 claimed by the assessee.

59. The Ld. AR submitted that similar disallowance of additional depreciation on computers installed in factory premises made in the preceding assessment years, viz. AY 2010-11 and 2011-12, was set aside by the Tribunal to the file of assessing officer to determine if the computers were used for data processing at industrial premises. In coming to the aforesaid conclusion, the Tribunal laid reliance upon the decision of the Hon'ble Gujarat High Court in the case of CIT v. Stratronics Enterprises Pvt. Ltd. 288 ITR 455. In all fairness, it is pointed that the aforesaid issue was decided against the assessee by the Delhi Tribunal in the assessee's own case for the assessment year 2007-08 and 2008-09. It would, however, be pertinent to point out that the aforesaid disallowance sustained by the Tribunal was challenged by the assessee in further appeal before the High Court, which has been admitted by the High Court, vide order dated 19.11.2015 in ITA No. 341/2014, as involving substantial question of law.

60. The Ld. DR relied upon the Assessment Order and Order of the TPO.

61. We have heard both the parties and perused the material available on record. Similar disallowance of additional depreciation on computers installed in factory premises made in the preceding assessment years, viz. AY 2010-11 and 2011-12, was set aside by the Tribunal to the file of assessing officer to determine if the computers were used for data processing at industrial premises. The Tribunal held as under:

“90) We have heard the rival contentions. We find that there is no dispute to the effect that the computers on which additional depreciations have been claimed during the year under consideration are not installed on the shop floor or such computers directly facilitate in the manufacturing process, but have been installed in the administrative / supervisory offices located in the compound of the factory premises. The plea of the appellant has been that for the purpose of additional depreciation, distinction has to be drawn between the computers installed in the supervisory offices of the manufacturing plant with the computers installed at the head office / corporate office, which is involved in the overall supervision of the business function. It has been argued that in the former case, although the computers are not directly involved in the manufacturing operations, but are indirectly facilitating the manufacturing activity as opposed to the computers installed at head office / corporate office. It was the submission that the exclusion of “machinery or plant installed in any office premises” under clause (b) of the proviso to section 32(1)(iia) of the Act is applicable to office premises like head office / corporate offices where there is no direct or indirect nexus with the manufacturing operations. The plant and machinery installed in the offices supervising the manufacturing operations should be viewed distinctly and are outside the ambit of exclusion provided in the aforesaid section. We have, however, found that the aforesaid plea was not accepted by the Tribunal in the appeal orders for AY 2007-08, which was followed in appeal for AY 2008-09. However during the course of hearing before us, the Ld. authorized representative has placed reliance on the decision of the Hon’ble Gujarat High Court in the case of CIT versus startronics enterprise is private limited 288 ITR 455, which was not raised before the coordinate bench in the earlier orders of the appellant for earlier assessment year, wherein the Hon’ble high court has considered the identical issue with respect to the computer installed in the office premises and under:-

"8. Placing reliance upon section 32(1)(iia) of the Act, it is submitted that if the plant or machinery is installed in any office premises or in residential accommodation, then, no deduction shall be allowed under clause (iia) of section 32(1). Section 32(1)(iia), with its proviso, for the purposes of this case, would read as under :

32.(1) In respect of depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession, the following deductions shall, subject to the provisions of section 34, be allowed— . . .

(iia) in the case of any new machinery or plant (other than ships and aircraft) which has been installed after the 31st day of March, 1980, but before the 1st day of April, 1985, a further sum equal to one-half of the amount admissible under clause (ii) (exclusive of extra allowance for double or multiple shift working of the machinery or plant and the extra allowance in respect of machinery or plant installed in any premises used as a hotel) in respect of the previous year in which such machinery or plant is installed or, if the machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year :

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

(a) any machinery or plant installed in any office premises or any residential accommodation ; . . . "

9. It is submitted that even if the computers and data processing machines are taken to be plant and machinery and are entitled to investment allowance, because of their location in the office, additional depreciation would not be allowable. The thrust of the argument is on the words " office premises" .

10. The submission is that the computers and the data processing machines are always kept in the office and in this case, when the computer and the data processing machines are used in the office, then, the additional depreciation would not be allowable.

11. It is to be noted that the words "office premises" have not been defined in the Income-tax Act. The word "office" would partake its character with the activities carried on in the said premises. In a given case, a doctor's clinic would be his office, but, would also be his clinic and if he installs a computer or some machine for the purposes of pathology, then, his office would be taken to be industrial premises for the purposes of depreciation and investment allowance. In a given case, a computer kept in the office of a manager for his personal use or for some other purpose, then, such computer would not be entitled to investment allowance and/or additional depreciation. In the present case, the words "office premises" though would be covering office but, industrial premises would not come within the office premises if the said premises are used for data processing. In the present case, undisputedly, the office premises are used as industrial premises for production of the data processors. The submission of learned counsel is based on a narrow interpretation of the words "office premises", which we are unable to concede."

91) Accordingly, following the aforesaid decision of Hon'ble Gujarat High Court , we set aside this issue to the file of the Ld. assessing officer to decide the issue afresh in accordance with the ratio laid down by the Hon'ble Gujarat High Court about the liability of additional depreciation on computers installed at the factory premises, needless to say that the proper opportunity of hearing may be granted to the assessee to substantiate its claim. In the result ground No. 18 of the appeal of the assessee is decided accordingly."

Thus, in the present year as well we are remanding back the matter to the file of the Assessing Officer to determine if the computers were used for data

processing at industrial premises or not. We direct the Assessing Officer that after taking cognizance of the same pass appropriate order. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Therefore, Ground No. 29 to 29.2 are partly allowed for statistical purpose.

62. Ground No. 30- 30.2 is in regard to gains from sale of investments income treated as business income of Rs. 278 Crores. The assessee invests surplus funds arising in the course of business under various modes of investment like mutual funds/PMS, shares, etc. The gains realized from sale of such various instruments, amounting to Rs.278.54 crores during the relevant previous year, were disclosed under the head 'capital gains.' The Assessing Officer held that, having regard to the magnitude/volume of total turnover from sale of investments, the aforesaid income was taxable under the head 'business income'.

63. The Ld. AR submitted that the aforesaid issue is squarely covered in favour of the assessee by the decision of the Delhi bench of the tribunal in the assessee's own case for the AY 2007-08 and 2008-09, wherein after considering the legal position and intention of the assessee company, the Tribunal came to the conclusion that income from sale of shares/mutual funds/PMS etc. would be taxable as capital gains, instead of business income brought to tax by the assessing officer on the basis that the assessee (a) was not a trader in stock; (b) had no intention of holding the shares as stock; (c) sales were effected by delivery (d) that the department had itself in earlier years taxed such transactions under the head capital gains. The Ld. AR pointed out that the Tribunal, vide order dated 24/10/2006 passed in the assessee's own case for AY 2010-11 and 2011-12, reversed the action of AO in changing the head of income and held that in cases where an assessee treats investments made in shares as capital assets, in view of Circular 6/2016 of the Board, gains/profits on sale of such investments shall be treated as capital gains and not income

from business/profession.

64. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

65. We have heard both the parties and perused the material available on record. The Tribunal for A.Ys. 2010-11 and 2011-12 held as under:

“99) We have heard the rival contentions. We have gone through the order passed by the Tribunal for the assessment year 2007-08, which was followed in appeal order for AY 2008-09. The Tribunal in that year went through the entire facts, which are similar to the year under consideration, and the legal position before coming to the conclusion that the gains arising from investment of surplus funds in shares/mutual funds/PMS as part of cash management policy cannot lead to the conclusion that the appellant was carrying on business to bring to tax such income under the head “business” as against ‘capital gains’ offered by the appellant. The Ld. departmental representative could not point out any change in the facts and circumstances of the case of the current assessment year compared to the assessment year for which the tribunal is decided in the appellant’s own case for earlier years. No other judicial precedent was also cited by which we could deviate from the order of the coordinate bench in the earlier years in the appellant’s own case. The relevant observations in the appeal order for AY 2007-08 are as under:

“65.20. The issue that emerges for consideration is whether the gains that arose to the assessee from investment in debt mutual funds/PMS/ shares are to be taxed under the head “business income” or under the head “capital gains”.

.....

65.28. Now, we proceed to analyze the facts of the present case in the light of the principles laid down by the Courts (Supra) for determining the nature of the transaction vis a vis capital gains vs. business income:

Intention of the assessee at the time of the purchase of shares:

65.29. *The business of the assessee is not to deal in shares and securities. The investment was made with a view to earn capital appreciation and to use the spare fund optimally instead of keeping it in the banks. For the year under appeal, the assessee earned dividend income of Rs.22.61 crores from investments held in shares and mutual funds.*

Treatment in the books of accounts:

65.30. *It is an undisputed fact that the assessee had treated the transaction as investment in its books of accounts and not as stock in trade. The assessee has shown the investments in shares both at the beginning and closing of the year as an investment only and not as stock in trade.*

65.31. *The assessee has valued the investments at cost as per Accounting standard 13- Accounting for Investments and not in accordance with Accounting Standard -2 which deals with valuation of inventories.*

65.32. *The assessee has been holding the securities/ shares as investments from year to year and consistently following the same method of accounting for the purpose of disclosure and valuation. This treatment by the assessee was accepted by the Revenue for the past years.*

65.33. *The assessee had earned income from both long term and short term capital gains which means the assessee has also held shares for a period of more than 12 months.*

Whether the investments are made out of borrowed funds

65.34. *The investments were made from surplus funds of the assessee and there were no borrowings. The investments were made to optimally utilize the spare funds instead of keeping the same idle in the bank accounts. The investments were made in mutual funds (debt and liquid funds) and through portfolio management schemes/ IPOs.*

65.35. *The co-ordinate bench of the Delhi ITAT in the case of Narendra Gehlaut vs. JCIT [ITA No 1648/ Del/ 2010] held that despite borrowing, gains on shares assessable as Short term capital gains and not business profits. The decision is rendered considering the CBDT Circular No 4/ 2007 and various judicial precedents on the subject.*

Frequency of the transactions

65.36. *Out of the total sale value of Rs 13,690.84 crores realized from the investments, an amount of Rs 12,330.33 crores relates to sale of short term debt mutual funds and liquid funds in which the transactions are effected on daily basis (i.e. surplus amounts are invested and the withdrawals are made in a short span depending on the business needs of the assessee). These funds were invested mainly into money market instruments, short-term corporate deposits and treasury. Most schemes have a lock-in period of a maximum of three days to protect against procedural (primarily banking) glitches, and offer redemption proceeds within 24 hours.*

65.37. *The Assessing officer has brought the transaction to tax under the head "Business income" mainly on the ground that the volume of the transaction of such investments was high and the assessee is undertaking the trading of stocks and mutual funds regularly and systematically. However, we observe that there is not much frequency in sale/purchase of investments, from analysis carried out at page 526 of objections in Form 35A. It is not the case that the assessee has indulged in regular trading in shares on day to day basis.*

65.38. *The Mumbai Bench of the ITAT in the case of Janak S. Rangwala (11 SOT 627) observed that mere volume and magnitude of transaction will not alter the nature of transaction if the intention was to hold the shares as investment and not in stock in trade.*

Investments in mutual funds –

65.39. *Out of the total income earned from mutual funds, almost 67.34% of the total income earned from investments made in mutual funds was for a period of more than one year.*

Investments in shares –

65.40. *Investment in shares was primarily made either through PMS or under Initial Public Offer. Under PMS, the company advances funds to the Portfolio Manager, who in turn makes investment in various shares. In substance the investments under PMS are similar to investment in mutual funds. The assessee, reiterated that it is only interested in the return on funds invested and does not act as a dealer/trader, so as to be regarded as being engaged in business activity.*

65.41. *In view of the above factual matrix it emerges that assessee is:*

- (i) not a trader in stocks*
- (ii) Intention of holding the shares as investment/ stock is manifest.*
- (iii) Sales are effected by delivery.*
- (iv) Department has itself in earlier years taxed such transactions under the head “Capital Gains”.*

65.42. *Considering these facts and applicable judicial precedents on the issue, we are of the considered opinion that the income in question can be taxed only under the head “Capital Gains” and not under the head business income. This ground of the assessee is allowed.”*

100) *In addition to the aforesaid observations, the appellant in this year also has benefit of the recent Circular No.6 of 2016 dated 29.2.2016 issued by the CBDT, wherein with an idea to reduce litigation on this issue of classification of the head of income arising from sale of shares / mutual funds, etc., the CBDT has opined that gains arising from sale of such*

shares/securities held for a period of more than 12 months and shown as capital gains by the assessee should not be disputed by the assessing officer. Having regard to the aforesaid intent of the Circular where a consistent method has been followed by an assessee to treat the investment as on capital account corroborated with disclosure in balance sheet as investment, the same consistent stand should not be disputed by the assessing officer. It is also not disputed by the Ld. assessing officer that the capital gains arising on the various investments are held for less than 12 months and are not long-term capital gain. In view of the aforesaid reasons also, while respectfully following the appeal orders for AY 2007-08 and 2008-09, we reverse the action of the assessing officer in changing the head of income surplus arising from sale of shares/mutual funds, etc. therefore ground No. 20 of the appeal of the assessee is allowed.

It is pertinent to note that the assessee invested surplus funds arising in the course of business under various modes of investment like mutual funds/PMS, shares, etc. The gains realized from sale of such various instruments, amounting to Rs.278.54 crores during the relevant previous year, were disclosed under the head 'capital gains.' The issue is identical in the AY 2010-11 and 2011-12 wherein the Tribunal allowed this issue in favour of the assessee. Therefore, Ground No. 30 to 30.2 are allowed in favour of the assessee.

66. Ground No. 31 to 31.2 is regarding disallowance u/s 14A as per Rule 8D for Rs. 62.30 lacs. During the relevant previous year, the assessee company earned dividend/interest income of Rs. 11.02 crores from investments in shares, bonds, and mutual funds, which was exempt under section 10(34)/10(35)/10(15)(iv)(h) of the Act. In view of the provisions of section 14A of the Act, the assessee suo moto disallowed Rs. 70.76 lacs in the return of income, being salary of two employees of the company who were involved in treasury function along with portfolio management fee. In the assessment

order, the Assessing Officer, did not accept the method of disallowance computed by the assessee under section 14A and made further disallowance of Rs. 62.30 lakhs (disallowing interest expense of Rs. 38.91 and administrative expense of Rs. 94.16 lacs) invoking provisions of Rule 8D of the Rules after reducing the suo moto disallowance of Rs. 70.77 lakhs made by the assessee in the return of income.

67. The Ld. AR submitted that as per section 14A(2), disallowance under that section as per Rule 8D can be made only if the Assessing Officer records satisfaction/finding as to the incorrectness in the method of disallowance followed by the assessee. In the absence of any satisfaction recorded in the assessment order, the disallowance as per Rule 8D needs to be deleted. Reliance in this regard is placed on the following decisions:

- Godrej & Boyce Manufacturing Company Ltd. VS. DCIT: 394 ITR 449(SC)
- Maxopp Investment Ltd: 347 ITR 272 (Del.)
- H.T. Media Limited v. PC1T: ITA No.548/2015 (Del.) dated 23.8.2017
- Eicher Motors Ltd. vs. CIT: ITA No. 136/2017 dated 15.09.2017

Even otherwise, there is no nexus of expenses, like interest expenditure and other administrative expenses with investments, warranting disallowance u/s 14A.

68. On interest expenditure, the Ld. AR submitted that the assessee is a cash rich company, which does not borrow funds for making investment. The marginal interest expenditure of Rs. 2.10 crores was incurred on other temporary loans/dealers deposit, having nexus with main business function. Further, no direct nexus of interest expenditure with investments or earning of dividend income was established by the assessing officer, for which the initial burden was on the assessing officer. The Ld. AR submitted that the assessee

had substantial free reserves of Rs. 3760.81 crores at the beginning of the relevant previous year and had also generated substantial surplus/interest free funds of Rs. 2686.64 crores during the year, which were sufficient to make net investment of Rs. 527.63 crores during the year. In such circumstances, it is to be presumed that only interest free funds have been utilized for making investments during the year. Reference, in this regard, is made to the following decisions:

- East India Pharmaceutical Works Ltd. v. CIT: 224 ITR 627 (SC)
- Woolcombers of India Ltd. v. CIT: 134 ITR 219 (Cal.)
- Indian Explosives Ltd. V. CIT: 147 ITR 392 (Cal.)
- Alkali & Chemicals Corp of India Ltd. v CIT: 161 ITR 820 (Cal)
- -CIT v Radico Khaitan Ltd : 274 ITR 354 (All)
- CIT v Dhampur Sugar Mills Ltd : 274 ITR 370 (All)
- CIT v. United Collieries Ltd. : 49 Taxman 227 (Cal)
- CIT v. Enamour Investment Ltd.: 72 Taxman 370 (Cal)
- CIT v. Caroline Investment Ltd.: 87 Taxman 238 (Cal)
- CIT v. Kanoria Investment (P) Ltd.: 232 ITR 7 (Cal)
- CIT vs. Hotel Savera: 239 ITR 795 (Mad)
- Smt. Chanchal Katyul v. CIT: 298 ITR 182 (All.)
- CIT v. Reliance Utilities and Power Ltd.: 313 ITR 340 (Bom)

Reliance is also placed on the following cases, wherein, the Courts have repeatedly held that interest expenditure cannot be disallowed under section 14A of the Act, where the assessee had sufficient surplus funds and there was no finding by the assessing officer of any direct nexus of borrowed funds with investments:

- Godrej & Boyce Manufacturing Co. Pvt. Ltd. VS DCIT 394 ITR 449(SC)

- Pr. CIT vs. GMM Pfaulder Ltd.: ITA No. 506 of 2017 dated 31/7/2017(Guj)
- CIT v. Max India Ltd.: 388 ITR 81 (P&H)
- CIT vs. Suzlon Energy Ltd.: [2013J 215 Taxman 272 (Gujarat) CIT v. Reliance Utilities and Power Ltd.: 313 ITR 340.
- CIT vs. M/s. Ashok Commercial Enterprises: ITA No. No.2985 of 2009 (Bom)
- Lubi Submeribles Ltd.: ITA No.868 of 2010 (Guj)
- CIT vs. K. Raheja Corporation Pvt. Ltd: ITA No.1260 of 2009/
- Gujarat State Fertilizers and Chemicals Ltd : Tax Appeal No. 82 of 2013 (Guj HC)
- Hero Honda Finlease Ltd vs. ACIT: ITA No. 3726/Del/2012 (Del)
- Eimco Elecon (India) Ltd. v. Addl. CIT: 142 ITD 52 (Ahd.)

69. As regards to Administrative expenses, the Ld. AR submitted that all the expenses, other than the suo-moto disallowance by the assessee, related to main business function of manufacturing of vehicles. In the absence of any proximate nexus having been established by the Assessing Officer, the Ld. AR pointed out that the Tribunal in the assessee's own case for the assessment year 2007-08 and 2008-09 set aside the matter to the file of the Assessing Officer to be decided afresh as per law, having regard to the satisfaction to be recorded qua correctness of the suo-moto disallowance made by the assessee in the return of income. The AO, in the set aside proceedings for assessment year 2007-08, vide order dated 30.10.2014 passed under section 254/143(3) of the Act did not make any disallowance in respect of interest expenses since there was no nexus between the income and such expenditure. The AO, however, made disallowance of such administrative expenses under section 14A in the proportion the total profit before tax bears to tax free income, which is upheld by the CIT(A) vide order dated 01.02.2018. The Tribunal, vide consolidated order dated 24/10/2016 passed in ITA Nos. 1545/del/2015 and

914/Del/2016 in assessee's own case for the immediately preceding assessment years AY 2010-11 and 2011-12 decided the issue in favor of the assessee on the ground that there was no reason/satisfaction recorded by the Assessing Officer under section 14A(2)/(3) of the Act while proceeding with disallowance made under section 14A of the Act. The Tribunal also held that there was nothing to demonstrate that any additional expenditure had been incurred by the assessee for earning exempt income and the assessee had surplus funds/idle funds for making investment.

70. The Ld. DR relied upon the Assessment Order and Order of the TPO.

71. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

“108) We have heard the rival contentions. We find that the appellant year after year is following a consistent method of computing disallowance u/s 14A by attributing expenditure incurred at the Treasury Department towards earning of exempt dividend income. The appellant has also given justification of nexus of such expenditure incurred at Treasury Department with portfolio management activity considering that the portfolio management is not the main business function of the appellant. The appellant is a company whose core business function is that of manufacturing and selling two-wheelers, having a turnover of Rs.16,000 crores approximately. The investments are made by the appellant as part of its cash management policy in order to better utilize the idle / surplus funds. We have also decided on the aforesaid aspect in ground of appeal no. 20 that the investment activity as part of its cash management function does not constitute business. In view of the same, we are of the view that no additional expenditure is required to be incurred more specifically of the management in investing surplus funds as per the cash management policy. The assessing officer has also not, on the basis of any tangible evidence/findings, pointed out incurrance of such expenditure. The legal position qua recording of satisfaction or coming to a finding qua

inaccuracy in the method of disallowance followed by an assessee before making resort to the provisions of Rule 8D of the Rules, in terms of sub-section (2) / sub-section (3) of section 14A, has been repeatedly endorsed by the Hon'ble jurisdictional High Court. Reference in this regard can be made to the decision of Maxopp Investment Ltd. : 347 ITR 471. In view of the aforesaid legal position, we find that no valid satisfaction was recorded by the assessing officer in the assessment order to reject the method followed by the appellant in computing disallowance u/s 14A, before mechanically resorting to and applying the provisions of Rule 8D of the Rules. In view of such findings, the additional disallowance made by the assessing officer u/s 14A stands deleted on the aforesaid ground at the threshold. That apart, we also agree with the submissions of the appellant that, since the appellant is a cash-rich company, which, in fact, is investing surplus/idle funds in various modes of investments, there could be no nexus of interest-bearing borrowed funds with such investments. The appellant is having substantial free reserves of Rs.3760.81 crores at the beginning of the relevant year and has generated surplus interest free funds of Rs.268.64 crores during the year. The assessing officer, too, in the set-aside proceedings for the AY 2007-08 had accepted the aforesaid cash flow position and deleted the disallowance of interest expenditure. In view of this we reverse the finding of the Ld. assessing officer about disallowance of Rs. 145.62 lakhs under section 14 A of the income tax act applying the rule 8D of the income tax rules 1962. He in the result ground No. 22 of the appeal of the assessee is allowed.”

It is observed in the present case that the assessee has suo moto disallowed expenses under Section 14A of the Act. The Hon'ble Apex Court in case of Maxopp Investment Ltd. vs. CIT (2018) 402 ITR 640 (SC) held that

“40) We note from the facts in the State Bank of Patiala cases that the AO, while passing the assessment order, had already restricted the disallowance to the amount which was claimed as exempt income by applying the formula contained in Rule 8D of the Rules and holding that section 14A of the Act

would be applicable. In spite of this exercise of apportionment of expenditure carried out by the AO, CIT(A) disallowed the entire deduction of expenditure. That view of the CIT(A) was clearly untenable and rightly set aside by the ITAT. Therefore, on facts, the Punjab and Haryana High Court has arrived at a correct conclusion by affirming the view of the ITAT, though we are not subscribing to the theory of dominant intention applied by the High Court. It is to be kept in mind that in those cases where shares are held as 'stock-in-trade', it becomes a business activity of the assessee to deal in those shares as a business proposition. Whether dividend is earned or not becomes immaterial. In fact, it would be a quirk of fate that when the investee company declared dividend, those shares are held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits. The situation here is, therefore, different from the case like Maxopp Investment Ltd. where the assessee would continue to hold those shares as it wants to retain control over the investee company. In that case, whenever dividend is declared by the investee company that would necessarily be earned by the assessee and the assessee alone. Therefore, even at the time of investing into those shares, the assessee knows that it may generate dividend income as well and as and when such dividend income is generated that would be earned by the assessee. In contrast, where the shares are held as stock-in-trade, this may not be necessarily a situation. The main purpose is to liquidate those shares whenever the share price goes up in order to earn profits. In the result, the appeals filed by the Revenue challenging the judgment of the Punjab and Haryana High Court in State Bank of Patiala also fail, though law in this respect has been clarified hereinabove.

41) Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the AO."

Though the Assessing Officer did not accept the method of disallowance computed by the assessee under section 14A and made further disallowance of

Rs. 62.30 lakhs (disallowing interest expense of Rs. 38.91 and administrative expense of Rs. 94.16 lacs) invoking provisions of Rule 8D of the Income Tax Rules, 1962 after reducing the suo moto disallowance of Rs. 70.77 lakhs made by the assessee in the return of income. But the Assessing Officer has not given the proper calculation to that effect. Therefore, the matter is restored back to the file of the Assessing Officer. We direct the Assessing Officer that after taking cognizance of the the Apex Court decision, pass the appropriate order. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Therefore, Ground No. 31 to 31.2 are partly allowed for statistical purpose.

72. Ground No. 32 to 32.6 is regarding disallowance of Royalty expenditure on the ground of being capital in nature and disallowance on account of cess on model fee out of amounting to Rs. 15.34 crores (10.29 – Royalty/TGF + 180.67 – Model fee) – Out of these - 3.53 + 172.09 (already disallowed in TP). The facts are that the assessee company has been manufacturing two wheelers in India since 1985 on the basis of technology provided by M/s. Honda Motors Co. Ltd., Japan ("HM") and has thus far launched various models of motorcycles by obtaining the technology provided by that company. However, during AY 2011-12, on account of commercial considerations, HM decided to exit the joint venture. Consequently, a Memorandum of Understanding ('MOU') dated 16.12.2010 was entered into between the assessee and HM and the license agreement was mutually terminated. Further, in terms of the MOU two new license agreements dated 22.01.2011, License 'A' agreement and License 'B' agreement, were entered into between the assessee and HM. In terms of the license agreement for License 'A' Products, the assessee received the following rights:

- Rights to use the technology, design and drawings for manufacture of 18 specific models of motor cycles till perpetuity
- Right to make modifications to the technology, design and drawings

- Unrestricted right to export such products in the overseas markets.

Since the aforesaid right/license was acquired by the assessee in perpetuity, compensation by way of Royalty and License fee paid under the aforesaid agreement was suo motu capitalized by the assessee. In terms of License B Products Agreement the assessee was provided right to manufacture 4 new models (namely (a) Passion XPRO, (b) Ignitor, (c) Maestro and d) Impulse) using the technology provided by HM on payment of lump sum model fee and royalty. The assessee after separation from Honda Motors Corporation, Japan, was not in a position to independently develop and launch new models of motorcycles immediately. Therefore, in order to survive in a highly competitive market the assessee requested HM to provide right and technology for manufacture of four new models of motor cycles, for which the assessee had limited rights. During the relevant previous year, in terms of the aforesaid License B agreement, the assessee incurred expenditure of Rs. j 3.70 crores (Rs. 3.53 cr + Rs. 0.17 cr towards cess) towards royalty and Rs. 6.58 crores towards technical guidance fees, which was claimed as revenue deduction. The assessee further made the following payments by way of model fees for certain License A products and all License B products in terms of Model fee agreement(s) dated 07.06.2011, entered separately for both set of products towards limited license to use the know-how provided by Honda for manufacture of various models of motorcycles:

Agreement	Amount (in Rs.)
Model fee License B Products	1,288,662,713/-
Tech Assistance-License B Products	170,469,093/-
Model Fee License A products	170,762,584/-
Model Fee License B products	90,978,487/-
	1,720,872,877/-

Further, the assessee incurred expenditure of Rs. 8.58 crores towards cess on the aforesaid model fee. Accordingly, the assessee company claimed total deduction of Rs. 190.96 crores (Rs. 3.70 cr. + Rs. 6.58 cr. + Rs. 172.08 cr. + Rs. 8.58 cr.) during the relevant year on account of royalty/technical guidance fee/model fee including cess on royalty /model fee. In the assessment order, the AO treated the aforesaid expenditure incurred by way of royalty, technical guidance fee and model fees paid to Honda as capital expenditure, by following the orders for the earlier year(s). On the ground that

- The assessee had received benefit of enduring
- nature inasmuch as exclusive right was available with the assessee to manufacture and sell the products within the territory of India;
- The assessee was entitled to continued use of information supplied by Honda even after termination of agreement;
- The benefit under the agreement had a degree of perpetuity since the agreement was renewed and was extended year after year and did not, therefore, remain a short term agreement.
- The assessee had acquired asset in the nature of intellectual property rights and patents from Honda.

The assessing officer, accordingly, disallowed the entire expenditure of Rs. 190.96 crores (including cess) incurred towards royalty/technical guidance fee/model fee. However, since the assessing officer had considered expenditure to the extent of Rs. 3.53 crores towards royalty and Rs. 172.09 crores incurred towards model fee, to be not at ALP while making transfer pricing adjustment, challenged in GOA 1 supra, the assessing officer made the disallowance of the balance amount of Rs. 6.75 crores incurred towards royalty and TGF and Rs. 8.58 crores incurred towards cess on model fee, by treating the same to be

capital expenditure. The AO observed that the assessee is to be allowed depreciation @ 25% on the expenditure treated as capital expenditure, but failed to allow depreciation while computing the amount of disallowance.

73. The Ld. AR submitted that Royalty/Technical Guidance Fees and Model Fees are not capital expenditure. There are no ownership rights but only limited right to use in License B Products Agreement. During the currency of the agreement, the assessee only had a limited right to use the technology of Honda. Ownership/proprietary rights in the technical know-how continued to vest in Honda and the assessee was not authorized to transfer, assign or convey the know-how/technical information to any third party as the assessee only acquired limited right to use and exploit the know-how. As regards to Non-exclusive license, the Ld. AR submitted that the said right vested with the assessee was not exclusive in as much as, in terms of Article 2 and article 9 of License B agreement. Honda reserved the right to provide technology to its affiliates to manufacture motorcycles. The Ld. AR further submitted that aforesaid limited right were available to the assessee and the fact of such rights being not exclusive can be gathered from the following clauses of the agreement:-

- i) ARTICLE 2 - Grant of License and Exclusivity
- ii) ARTICLE 3-No sublicense
- iii) ARTICLE 9 - Use and Disclosure of Technical Information
- iv) ARTICLE 13 - Terms of agreement (upto 30.06.2007)
- v) ARTICLE 21/22 Termination/Effect of Expiry and Termination
- vi) ARTICLE 25/26 Certain Prohibitions/Maintenance of Secrecy

To the same effect are the following clauses placing restrictions on use of knowhow by the assessee under License A Products Agreement in the context of model fee:

- i) ARTICLE 2 - Grant of License and Exclusivity

- ii) ARTICLE 4 - No sublicense
- iii) ARTICLE 10 - Use and Disclosure of Technical Information
- iv) ARTICLE 13 - Terms of agreement (upto 30.06.2014)

- v) ARTICLE 21/22 - Termination/Effect of Expiry and Termination

- vi) ARTICLE 25/27 - Certain Prohibitions/Maintenance of Secrecy.

The Ld. AR further submitted that payment under the agreement is allowable revenue expenditure. As per the various clauses of the agreement, it would be appreciated that the royalty/TGF/model fee payable to Honda is only for the purpose of use of technical assistance in the manufacture and sale of products and the assessee has not, acquired any capital asset, much less in the nature of intellectual property rights or patents belonging to Honda, which, in unequivocal terms, as provided in the agreement vested in absolute ownership of Honda at all times. Further, on perusal of Article 22 of the License B product agreement, it would be appreciated that on termination/expiration of the agreement, the assessee was required to return all the documents and materials to Honda and promptly discontinue the use of trademarks licensed by Honda and the assessee did not have any right to continue using such know-how. It is thus clear that there is no explicit or implied intention to transfer or create ownership in the technical know-how/technical information to the assessee. On the contrary, it is unequivocally agreed to between the parties that the know-how should at all times remain the property of Honda. Further, the conditions in the agreement as to non-assignability, confidentiality and the secrecy of the know-how also indicate that the assessee merely obtained the right to use the know-how during the currency of the agreement. Reliance in this regard is placed on the following decisions wherein it has been held that where payment is made to simply use the technical know-how/knowledge provided by the foreign collaborator as opposed to acquisition of ownership rights therein, the payment made would be

regarded as revenue expenditure.

CIT v. Ciba India Ltd.: 69 ITR 692 (SC)

CIT vs. British India Corp. Ltd. [1987] 165 ITR 51 (SC) Alembic

Chemical Works Co. Ltd. v. CIT: 177 ITR 377 (SC)

Shriram Refrigeration Industries Ltd. v. CIT: 127 ITR 746 (Del HC)

Triveni Engineering Works Ltd. vs. CIT : 136 ITR 340 (Del)

Addl. CIT vs. Shama Engine Valves Ltd. : 138 ITR 217 (Del)

CIT vs. Bhai Sunder Dass & Sons P. Ltd. : 158 ITR 195 (Del)

CIT vs. Lumax Industries Ltd. : 1'73 Taxman 390 (Del) Shriram Pistons

& Rings Ltd. vs. CIT : 171 Taxman 81 (Del)-"

CIT vs. Shri Ram Pistons and Rings Ltd. : 220 CTR 404 (Del)

Goodyear India Ltd. vs. ITO : 73 ITD 189 (Del)(TM)

ITO vs. Shivani Locks : 118 TTJ 467 (Del)

Since no proprietary rights in the know how is vested in the assessee, the assessee being a mere licensee with limited rights to use the technical assistance during the currency of the agreement, there is no explicit or implied intention to transfer or create ownership in the technical know-how /technical information in the assessee. In view of the aforesaid, expenditure by way of royalty, technical guidance fee and model fees incurred by the assessee was allowable revenue deduction since-

- payment was made for limited license to use the know-how provided by Honda, as the proprietary and ownership rights in the same continued to remain vested with Honda at all times and. therefore, there was no absolute parting of knowhow in favour of the assessee resulting in acquisition of any asset.
- no benefit of enduring nature in the capital field accrued to the assessee, even if the license to manufacture and sell products in India is assumed to be exclusive, except for grant of license to HMSI,

- the subject payment made did not cover consideration paid for setting up of the manufacturing facility in India

The aforesaid issue is covered in favour of the assessee by the decision of Tribunal in the assessment years 2000-01, 2001-02, 2002-03, 2006-07, 2007-08, 2008-09, 2010-11 and 2011-12 wherein the Tribunal has held that annual payment of royalty/technical guidance fee was allowable revenue expenditure. It would be pertinent to note that the aforesaid orders of the Tribunal relating to assessment years 2000-01 to 2002-03 have been affirmed by the Delhi High Court in the assessee's own case reported as CIT v. Hero Honda Motors Ltd. 372 ITR 481.

74. The Ld. AR submitted that the Model fees has allowed as revenue expenditure in preceding years. In the assessee's own case for A.Y. 1996-97, the Tribunal allowed model fee paid to Honda under section 37(1) of the Act as revenue expenditure on the ground that payment was only for right to use the technical know-how and there was no ownership of any intellectual property, which continued to remain with Honda. The said decision is reported as Hero Honda Motors Ltd. v. JCIT: 95 TTJ (Del) 782. The Delhi High Court did not entertain the appeal filed by the department on the same issue. The decision of the High Court was accepted by the Department and has become final, as no SLP has been filed there against. The Ld. AR further submitted that the Tribunal in the assessment years 1997-98 and 1999-00 allowed similar expenditure on payment of model fee, following the decision of the Tribunal for assessment year 1996-97. The Revenue's appeal against the said orders has been dismissed by the High Court. In the assessment year 1999-00, appeal filed by the Revenue against the order of the High Court has been dismissed by the Hon'ble Supreme Court. The Delhi Bench of the Tribunal in assessee's own case for assessment year 2001-02. vide order dated 27.03.2009 in ITA No. 2067/Del/2006 allowed the payment of model fee following the same order for

assessment year 1996-97. The same treatment has been given by ITAT in respect of AY 2006-07, AY 2007-08, AY 2008-09, AY 2010- 11 and AY 2011-12. The High Court has affirmed the order passed by the Tribunal in assessment year 2000-01 to 2002-03 in 372 ITR 481. The Ld. AR submitted, that when model fees, payment for which is made through the same agreement is accepted as revenue expenditure, the nature of royalty cannot be given any different treatment and therefore, no portion thereof needs to be disallowed as being capital in nature. Thus, the Ld. AR submitted that for the aforesaid cumulative reasons, no portion of the royalty expenditure or Technical Guidance fees incurred by the assessee calls for being disallowed.

75. The Ld. DR relied upon the Assessment Order and Order of the TPO but could not distinguish the order of the Tribunal for A.Ys. 2010-11 and 2011-12.

76. We have heard both the parties and perused the material available on record. The Tribunal for A.Y. 2010-11 and 2011-12 held as under:

“95) We have heard the rival contentions. We have gone through the orders in the appellant’s case for the earlier assessment years as was pointed out by the Ld. Counsel. Both the parties admitted before us that there is no change in the facts and circumstances of the case as well as the agreement under which the payments have been made by the assessee. The Ld. departmental representative also could not point out any other judicial precedent on this issue of the higher forum. In this event we are duty bound to follow the order of the coordinate bench passed in the case of the appellant for the beer years. For the sake brevity, we reproduce hereunder the finding in the appeal order for AY 2007-08, which was followed in the order for AY 2008-09 as under:

“57. The issue whether the expenditure in question is in the capital field or the revenue field has been decided in favour of the assessee by the ITAT in assessee’s own case for earlier assessment years 2000-01, 2001-02,

2002-03 and 2006-07. The ITAT Delhi Bench 'C' in assessee's own case for A.Y. 2006-07 in ITA no. 5130/Del/2010 vide order dated 23-11-2012 has held that the annual payment of royalty was a revenue expenditure. In doing so the ITAT has relied on various judicial pronouncements including the decision of Jurisdictional High Court in the case of Climate Systems India Ltd. and Sharda Motors Industrial Ltd. No change in facts and circumstances has been pointed out by the ld. DR. Therefore, respectfully following the same, we allow this ground of the assessee."

Therefore respectfully following the above decisions of the Tribunal and High Court in the appellant's own case, we reverse the order of the Ld. assessing officer in holding the above 3 payments as capital expenditure. In the result ground No. 19 of the appeal of the assessee is allowed."

It is pertinent to note that no proprietary rights in the know how vested in the assessee, the assessee being a mere licensee with limited rights to use the technical assistance during the currency of the agreement, there is no explicit or implied intention to transfer or create ownership in the technical know-how /technical information in the assessee. In view of the aforesaid, expenditure by way of royalty, technical guidance fee and model fees incurred by the assessee was allowable revenue deduction as held in the decision given by the Tribunal for A.Ys. 2010-11 and 2011-12. The issue is squarely covered by the said decision. Therefore, Ground No. 32 to 32.6 are allowed.

77. Ground No. 33, is regarding depreciation on Model Fee of Rs. 66.84 lacs. The assessee manufactures two-wheelers under technical collaboration agreement entered into with Honda Motor Co. Ltd., Japan ('Honda'). In accordance with the above collaboration agreement, the assessee pays model fee to Honda to obtain design / know-how to manufacture a new model of two-wheeler. The said expenditure is incurred prior to commencement of production of the new model. The assessing officer held that expenditure

incurred by the assessee towards model fee is directly related to manufacture of new models of two-wheelers and, therefore, needs to be attributed to the value of closing stock of finished goods of two-wheelers. Accordingly, the assessing officer on proportionate basis, worked out a sum of Rs.66,84,000/- out of depreciation on model fee debited to the profit and loss account, as attributable to the value of closing stock and made addition of the said amount to the income of assessee.

78. The Ld. AR submitted that the aforesaid issue is squarely covered in favour of the assessee by the decision of the Delhi Bench of the Tribunal in assessee's own case for assessment years 2010-11 and 2011-12 wherein following the order for assessment year 2008-09, similar disallowance of depreciation on model fee was deleted by the Tribunal on the ground that expenditure was incurred on new model fees prior to commencement of production of new models of two wheelers, and even otherwise this exercise would be revenue neutral in a broader perspective as the same adjustment would be required to be made to the opening stock of finished goods for the year under consideration.

79. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

80. We have heard both the parties and perused the material available on record. The Tribunal held in A.Ys. 2010-11 and 2011-12 as under:

“112) We have carefully considered the rival contentions. In absence of any change in the facts and circumstances of the case or any contrary decision, We have heard the rival contentions. We find that the similar issue was raised in the assessment order for AY 2008-09, which was decided in favour of the appellant by the Tribunal in appeal order for that year by observing as under-

“219. On careful consideration of above submissions of both the parties, we are of the view that if the closing stock of the year under consideration is to be varied, then similar adjustments would need to be made in the opening stock also and corresponding adjustments would also need to be carried out in the opening stock of the succeeding year and if any addition is made in this regard, would be revenue neutral if seen in a macro perspective. From the orders of the authorities below, we clearly observe that the AO has not disputed the mode of valuation of inventory made by the assessee during preceding years and if any kind of adjustment is held to be attributable to the value of finished closing stock, then the said corresponding amount/adjustment would need to be made in the opening stock of the succeeding year and in a broader sense, such kind of adjustment/addition would be revenue neutral. On specific query from the Bench, the DR submitted that the treatment given by the revenue authorities on the issue in the preceding year is not known to him and in this situation, we hold that the / department has not disputed the claim of the assessee in the preceding years.

220. It is well accepted legal proposition that when the department has taken a particular stand on a particular issue, then the department cannot take a deviated stand on the issue in the succeeding year without any sound, justifiable and cogent reason. The department has not disputed the fact that impugned expenditure was incurred prior to commencement of production of new model and the same was neither incurred during the manufacturing of new model nor model fee expenditure is directly related to manufacture of new models. In this factual aspect and circumstances, we hold that the assessee incurred expenditure on new model fees prior to commencement of production of new models of two wheelers, even otherwise this exercise would be revenue neutral in a broader perspective as the same adjustment would be required to be done in the opening stock of finished goods for the year under consideration. More so, when the

assessee has followed a particular mode of accounting for this expenditure which was accepted by the Revenue, then the department cannot take a different stand in the succeeding year to make an addition in this regard. We are unable to see any valid ground to 'accept' a deviated stand of the Revenue on the issue, which in a broader sense, is revenue neutral, then no adjustment is called for in this regard. We hold that findings of the AO are not sustainable and we set aside the same. Hence, we allow ground no.58 to 58.1 of the assessee.”

Accordingly, respectfully following the aforesaid decision, we decide the issue in favour of the appellant. Accordingly, the ground number 23 of appeal stands allowed.”

The facts of the present Assessment Year and the earlier Assessment Year are not different. In the present year also , the expenditure was incurred on new model fees prior to commencement of production of new models of two wheelers, thus, this action is revenue neutral in a broader perspective as the same adjustment would be required to be made to the opening stock of finished goods for the year under consideration. Thus, this issue is covered by the decision of the Tribunal for A.Ys. 2010-11 and 2011-12. Therefore, Ground No. 33 is allowed in favour of the assessee.

81. Ground No. 34, is regarding disallowance of reimbursement of foreign travelling expenses to directors/employees, on the ground of no evidence/proof of actual expense incurred by employees of Rs. 2.07 crores. In the course of discharge of official duties, the employees of the company are required to travel abroad and incur incidental expenses in foreign currency like local conveyance, boarding and lodging expenses, telephone expenses etc. The assessee had introduced a policy fixing per diem allowance payable to employees, depending upon the grade/category of the employees and the place/country of travel. The employees are not entitled to any extra allowance in the event actual expenditure incurred by the employee is in excess of such per diem allowance.

For payment of per diem allowance, as per policy, the assessee does not require the expenses to be necessarily supported / backed by bills considering the practical difficulties/impossibilities in producing invoices for petty expenses like local conveyance, telephone bills, etc. The employees are only required to submit details of expenditure incurred in specified form, on basis of which travel bill is settled. In the draft assessment order, the AO made disallowance of Rs.2,07.97,233/- (comprising of Rs. 1,08,29,708- in respect of Dharuhera. Gurgaon and Haridwar plants and Rs. 99,67,525/- in respect of head office expenses) out of expenditure incurred towards re-imburement of foreign travel expenses incurred by employees, on the ground that declaration furnished by the employees was not a sufficient evidence to establish incurrence of actual expenses, which were required to be supported with bills/invoices of factual expenditure incurred by the employees.

82. The Ld. AR submitted that the aforesaid issue is squarely covered in favour of the assessee by the decision of Delhi bench of tribunal in the assessee's own case for the AY 2007-08 and 2008-09, wherein the Tribunal held that disallowance cannot be made merely on the basis that vouchers were not produced by the employees, which has been reaffirmed by the Tribunal in the order dated 24.10.2016 passed for the assessment years 2010-11 and 2011-12.

83. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

84. We have heard both the parties and perused the material available on record. The Tribunal held in A.Ys. 2010-11 and 2011-12 as under:-

“226) We have heard the rival contentions. We note that similar issue relating to disallowance relating to re-imburement of foreign travelling expenses to directors/employees was deleted by the Tribunal in the assessee’s own case for assessment year 2007-08 which was followed in

assessment year 2008-09. The relevant observations of the Tribunal for assessment year 2007-08 are as under:

“51.15. The assessing officer in this case has not doubted the fact that employees/ directors of the company travelled abroad and the fact that they have incurred incidental expenses in foreign currency. The reason for disallowance is that employees have not furnished to the assessee evidence in support of the fact that they have incurred conveyance, boarding and lodging expenses etc. When reasonable amount of daily allowance is fixed as per the rules of the company and when these D.A. rules are followed by the assessee, in our view, the incurring of expenditure by the employees is not to be doubted. Even in cases where officers of the government of India travel abroad, daily allowance is given and vouchers for such expenditure are not insisted because of practical difficulties in submitting bills/ vouchers of petty expenses. In such circumstances, what is to be examined by the assessing officer is the reasonableness of the expenses incurred as compared to the general rates of expenses and allow the same. The assessee submits that the fixed per diem allowance payable to employees depending on the grade is reasonable. When such rates are reasonable the question of disallowance does not arise unless the revenue demonstrates that the rates are excessive. In this case it is not that the expenses are not incurred for the stated purpose nor is it that the rates are unreasonable. The disallowance in question in our view on the sole ground that vouchers are not produced by the employees cannot be sustained. In the result this ground of the assessee is allowed.”

The Ld. departmental representative could not point out any change in the facts and circumstances of the case of the appellant as compared to the assessment year in which the above issue is decided by the coordinate bench. No other contrary decision was also pointed out therefore, respectfully

following the decision of the coordinate bench in the appellant's own case for the earlier years, We dismiss ground No. 9 of the appeal of the revenue."

It is pertinent to note that for payment of per diem allowance, as per policy, the assessee does not require the expenses to be necessarily supported / backed by bills considering the practical difficulties/impossibilities in producing invoices for petty expenses like local conveyance, telephone bills, etc. The employees are only required to submit details of expenditure incurred in specified form, on basis of which travel bill is settled. The Tribunal in A.Ys. 2010-11 and 2011-12 and earlier years held that disallowance cannot be made merely on the basis that vouchers were not produced by the employees, Thus, the facts have not changed in this year as well, therefore, the issue is squarely covered by the decision of the Tribunal for earlier Assessment Years. Therefore, Ground No. 34 is allowed in favour of the assessee.

85. As relates to Ground No. 35, regarding Expenses incurred on advertisement on death anniversary of Late Shri Raman Munjal of Rs. 38.92 lacs. The assessee incurred expenditure of 38.92 lacs for advertisement in newspaper given to remember the death anniversary of Late Raman Munjal, being the founder of the assessee-company. The A.O disallowed aforesaid expenditure claimed by assessee on the ground that same was personal expenditure being related to promoters' family and was not incurred for the purpose of business.

86. The Ld. AR submitted that the aforesaid disallowance made by the Assessing Officer in the preceding years, viz. Assessment Year 2010-11 AY 2011-12 has been deleted by the Tribunal vide consolidated order dated 24.10.2016, wherein the Tribunal held that such expenditure incurred by the assessee on death anniversary of Sh. Raman Kant Munjal was not personal expenditure of the promoter family and satisfied the tests of 'commercial and business expediency' and thus was an allowable business deduction under Section 37(1) of the act. It is also pertinent to mention that no appeal has been

filed by the department before the High Court.

87. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

88. We have heard both the parties and perused the material available on record. The Tribunal held in A.Ys. 2010-11 and 2011-12 as under:

“116) We have considered rival contentions. Under section 37(1) of the Act, expenditure is allowable as deduction if the same is incurred for the purpose of business out of commercial expediency. An expenditure which is personal in nature, is not an allowable business deduction. In the present case, the assessing officer has disallowed the expenditure incurred for making advertisement in newspapers to commemorate the death anniversary of late Shri Raman Munjal, being the founder and ex-managing director of the appellant, on the ground that he was family member of the promoters family, losing sight of the fact he was also ex-employee of the company who served in the capacity of managing director during his lifetime. He was, thus, simply not a distant family member of the promoters, but had strong nexus with the business of the appellant company. The expression “for the purpose of business” used in section 37(1) is not limited to earning of profit alone and involves incurrance of several expenses out of commercial expediency, which may not directly result in the earning of profit. Celebration of functions with employees in order to keep them motivated and build cordial relations amongst the staff is a universally accepted practice and cannot, in any eventuality, be said to be not an allowable expenditure. The Ld. Counsel of the appellant has also cited several decisions wherein similar expenses incurred to celebrate various festivals, anniversaries, etc. with the employees have been upheld to be allowable business deduction. To the same effect is the expenditure incurred for paying tribute to an ex-employee, who had assumed substantial roles and responsibilities to foster the business of the appellant company. Accordingly, any expenditure incurred by the company to

pay him homage satisfies the test of business / commercial expediency and, thus, cannot be said to be not incurred for the purpose of business. More so when in past assessment years the similar expenditure have been incurred by the assessee but have not been disallowed by the Ld. assessing officer and this fact has not been controverted by the Ld. departmental representative even on the principle of consistency also we are not inclined to upheld the disallowance. In that view of the matter, we do not agree with the findings of the assessing officer in disallowing the expenditure of Rs. 3 465552/- incurred for giving advertisements in newspaper to commemorate Mr. Munjal's death anniversary. In the result ground No. 24 of the appeal of the assessee is allowed."

The aforesaid disallowance made by the Assessing Officer in the preceding years, viz. Assessment Year 2010-11 and 2011-12 has been deleted by the Tribunal vide consolidated order dated 24.10.2016, wherein the Tribunal held that such expenditure incurred by the assessee on death anniversary of Sh. Raman Kant Munjal was not personal expenditure of the promoter family and satisfied the tests of 'commercial and business expediency' and thus was an allowable business deduction under Section 37(1) of the act. It is also pertinent to mention that no appeal has been filed by the department before the High Court. Thus, the Tribunal decision has attained the finality. Therefore, Ground No. 35 allowed in favour of the assessee.

89. Ground No. 36 to 36.3 is regarding disallowance of commission paid to Managing Director & CEO, Shri Pawan Munjal and Joint Managing Director, Shri Sunil Kant Munjal u/s 36(1) (ii) of the Act. Sh. Pawan Munjal has been appointed as Managing Director & CEO of the assessee company and Sh. Sunil Kant Munjal as Joint Managing Director in the Annual General Meeting of the shareholders and continued to render services in that capacity. The consideration in lieu of services to be rendered by Executive Directors was payable, inter alia, as basic salary per month along with commission payable

with reference to profits subject to the condition that the amount of commission shall not exceed 1 % of the net profits of the company in a particular financial year as computed in the manner provided in section 198 of the Companies Act, 1956. The assessee incurred expenditure of Rs.47.98.25,000/- on account of commission paid to Managing Director and CEO. viz.. Shri Pawan Munjal and Joint Managing Director Shri Sunil Kant Munjal. The same was claimed as revenue deduction while computing the income for the relevant assessment year. AO disallowed the aforesaid total amount of commission paid to Shri Pawan Munjal under section 36(1)(ii) of the Act on the ground that commission was paid in lieu of distribution of dividend to him. who was also shareholder of the assessee company. The assessing officer further contended that dividend paid actually reduced the corpus available for distribution as dividend with the intention of avoiding dividend distribution tax by paying commission to the Director.

90. The Ld. AR submitted that the aforesaid disallowance made by the assessing officer in the preceding years, viz. AY 2010-11 and AY 2011-12 has been deleted by the Tribunal vide recent consolidated order dated 24.10.2016. In the said order, the Tribunal held that the commission paid to directors with reference to percentage of profits of the company for the services rendered as per the terms of appointment, constitutes part of the remuneration package, and in the absence of any disallowance on other components of remuneration paid to such director, the commission cannot, *ipso facto* be classified as payment of profit/dividend covered within the exception provided under Section 36(1)(ii) of the Act. It is also pertinent to mention that no appeal has been filed by the department before the High Court. The issue is also squarely covered in favour of assessee by the order of Delhi Bench of the Tribunal in the case of group concern of the assessee company, viz. Hero Honda Finance Ltd. v. Addl. CIT: ITA No 4329/Del/2010 (Del) relating to assessment year 2005-06, which has been further affirmed by the Delhi High Court, vide order dated 12.08.2014 passed in ITA No. 305/2014

wherein the appeal of the Revenue was dismissed.

91. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

92. We have heard both the parties and perused the material available on record. The Tribunal held in A.Ys. 2010-11 and 2011-12 as under:

“120) We have heard the rival contentions. We notice that the year under consideration was not the first year of payment of such commission to Mr. Pawan Munjal. The same terms and conditions of his employment, comprising salary, perquisites and commissions not exceeding 1% of the net profit was agreed/prevalent in the earlier years, which was approved by the Board of Directors (comprising of independent directors as well) and ratified by the shareholders. The aforesaid total remuneration package, including commission, is in lieu of services rendered by him in the capacity of Managing Director. There is no quarrel or doubt that Mr. Munjal had not been rendering services to the appellant company in the capacity as Managing Director. More so, since the other part of his remuneration package, i.e., basic salary and other benefits given to him have been accepted and allowed as revenue expenditure, there is no valid reason to differently treat the other part of his remuneration package given by way of 1% of net profit. It is not the case of the assessing officer that the total remuneration package comprising of 1% of net profit is unreasonable, having regard to the nature of services provided by Mr. Munjal in his capacity as Managing Director. Having not doubted the same, the assessing officer cannot disallow any part of the total remuneration package agreed between the assessee and an employee/director. Coming back to the provision of section 36(1)(ii), the said section, in fact, enabled deduction of any sum paid to an employee as bonus or commission for services rendered. The exception carved out in the aforesaid section for allowability of bonus or commission is, where such sum was otherwise payable to the employee, as profit or dividend. In other words, the aforesaid

section provides for disallowance of expenditure incurred as bonus or commission, which otherwise constituted share of profit or dividend of the recipient. In the present case, as we have observed (*supra*) and also explained by the appellant, the commission constitutes part of Mr. Munjal's remuneration package, the computation whereof is simply based on the percentage of net profit. The computation of remuneration with reference to profit does not, *ipso facto*, classify the same as payment of profit or dividend, covered within the exception provided in section 36(1)(ii) of the Act. In the case of a company, recipient is entitled to dividend with reference to percentage of his/her shareholding in the company. In the present case, Mr. Munjal held 0.02% of shares in the appellant company, for which separate dividend was received as per the total amount of dividend declared by the company to its all shareholders. The provisions of section 36 provides that "36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—

- ii) any sum paid to an employee as bonus or commission³² for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission;'

In the present case the assessee has paid Rs. 29.50 crores to the managing director of the company as commission whereas the managing director is just holding shares of the company of 0.02% therefore it cannot be said that a sum of Rs. 29.50 crores would have been paid to that shareholder holding 0.02% as dividend. Therefore The impugned amount of commission was separate and was not in addition or in lieu of dividend linked to percentage of shares held by Mr. Munjal in the appellant company. We draw support for the aforesaid view from the recent decision of Delhi High Court in the case of *Carrier Launchers India Ltd. vs. ACIT: 358 ITR 179*, where, too, the High

Court held that where the commission is paid in lieu of services provided by the employee and the amount of commission has no link with the dividend that the recipient would be entitled to as a shareholder, such payment is outside the purview of section 36(1)(ii) of the Act. The relevant observations of the High Court are as under:

“19. The revenue's contention that the Tribunal erred in allowing the bonus payment to the directors cannot be accepted. It has not disputed the facts viz., (a) that the payment was supported by board resolutions and (b) that none of the directors would have received a lesser amount of dividend than the bonus paid to them, having regard to their shareholding. Further, the directors are full-time employees of the company receiving salary. They are all graduates from IIM, Bangalore. Taking all these facts into consideration, it would appear that the bonus was a reward for their work, in addition to the salary paid to them and was in no way related to their shareholding. The bonus payment cannot be characterized as a dividend payment in disguise. The Tribunal has found that having regard to the shareholding of each of the directors, they would have got much higher amounts as dividends than as bonus and there was no tax avoidance motive. The quantum of the bonus payment was linked to the services rendered by the directors. It cannot therefore be said that the bonus would not have been payable to the directors as profits or dividend had it not been paid as bonus/commission.

20. The issue has been considered by this Court in AMD Metplast (P.) Ltd v. Dy. CIT [2012] 341 ITR 563 / 20 taxmann.com 647 (Delhi) in the light of the judgment of the Bombay High Court in Loyal Motor Service Co. Ltd vs. CIT [1946] 14 ITR 647. It was observed that the judgment of the Bombay High Court (supra) does not assist the revenue and that so long as the bonus or commission is paid to the directors for services rendered and as part of their terms of employment it has to be allowed and sec.36(1)(ii) does not apply.

21. Having regard to the above legal position and the factual findings recorded by the Tribunal, we are unable to say that the Tribunal erred in holding that the bonus payment was allowable u/s.36(1)(ii) of the Act. The substantial questions of law are answered in the affirmative, against the revenue and in favour of the assessee for both the years.”

We also agree with the decision taken by the Tribunal in the case of appellant group company, viz., Hero Honda Finance Ltd. Vs. Addl. CIT : ITA No.4329/Del/2010 relating to AY 2005-06, wherein the similar disallowance was deleted. In view of this we are of the opinion that in making payment of commission to the managing director of the company of 29.50 crore the provisions of section 36 (1) (ii) of the income tax act cannot be applied. Furthermore regarding the commercial expediency of the above sum the such commission was decided by the remuneration committee constituted by the company in terms of the provisions of the listing agreement entered into with various stock exchanges. Even otherwise the commission's leading to the percentage of the profit earned by the company has for the companies act and there is an outer limit which is also been fixed in the terms and conditions of employment of the managing director therefore it cannot be said that there is no business expediency in payment of such commission to the managing director of the company. In view of this ground No. 25 of the appeal regarding disallowance of Rs. 29.54 crores paid the managing director as commission disallowed by the Ld. assessing officer is deleted and accordingly the above ground of appeal of the assessee is allowed.”

The aforesaid disallowance made by the assessing officer in the preceding years, viz. AY 2010-11 and AY 2011-12 has been deleted by the Tribunal vide recent consolidated order dated 24.10.2016. In the said order, the Tribunal held that the commission paid to directors with reference to percentage of profits of the company for the services rendered as per the terms of appointment, constitutes part of the remuneration package, and in the absence of any disallowance on other components of remuneration paid to such

director, the commission cannot, *ipso facto* be classified as payment of profit/dividend covered within the exception provided under Section 36(1)(ii) of the Act. It is also pertinent to mention that no appeal has been filed by the department before the High Court. Thus, the Tribunal decision has attained the finality. Therefore, Ground No. 36 to 36.3 are allowed in favour of the assessee.

93. Ground No. 37 to 37.1, is regarding disallowance of expenses incurred on account of 'Corporate Social Responsibility (CSR) of Rs. 35.20 lacs. During the year the expenditure of Rs. 35.20 lacs was debited under the head "community development expenses" ("CSR activity") in the books of accounts. The AO disallowed the aforesaid expenses on the ground that it was not incurred wholly and exclusively for the purposes of earning business income from the activity of manufacture and sale of two-wheelers and, therefore, such expenditure was not allowable deduction under section 37(1) of the Act. The Assessing Officer observed that the aforesaid payments were in the nature of application of income, which were not allowable as expenditure under the provisions of the Act and that the assessee failed to establish with necessary documentary evidences, the onus cast upon it as per law.

94. The Ld. AR submitted that the disallowance of expenses incurred on account of CSR made by the assessing officer in the preceding years, viz. AY 2010-11 and AY 2011-12 has been deleted by the Tribunal vide recent consolidated order dated 24.10.2016, wherein the Tribunal held that the expenditure incurred by the assessee company on Corporate Social Responsibility, prior to insertion of explanation 2 to Section 37(1) of the Income Tax Act, was an allowable business deduction under the said provision. The Tribunal, in the said order, further elaborated that the role of the assessee was not restricted to merely earning profit, but also discharging certain community related expenses, which would be considered to have been incurred on account

of commercial/ business expediency. It is pertinent to point out that no appeal has been filed by the Department in assessment year 2011-12.

95. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

96. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

“235) We have heard the rival contentions. We have given our findings while disposing ground of appeal no. 24 in the assessee’s appeal supra that under section 37(1) of the Act, the expression ‘for the purpose of business’ is wide enough to cover expenses incurred on account of business/commercial expediency and is not restricted to expenses incurred for the purpose of earning profit. The appellant is a large corporate house and is one of the flagship companies in India. In the course of carrying of business, the role of the appellant is not restricted to merely earning profit but also discharging certain community related obligations, with a larger intent of fostering its goodwill/reputation. We have gone through the details of various expenses incurred by the assessee which were debited under the head “Corporate social responsibility” and elaborated in detail in the submissions made by the Ld. Counsel above. The said expenses although were not incurred towards earning profit, but were incurred out of commercial expediency and were directly/indirectly related to its business like earning goodwill/display of name, employee’s welfare, etc. The said expenses therefore, in our view, satisfy the test of being allowable as business deduction under section 37(1) of the Act. We draw support for the aforesaid conclusion from the following decisions of the various Tribunals/High Courts :

(i) In the case of Mysore Kirloskar Ltd. vs. CIT: 166 ITR 836 (Kar.), the assessee started school for education of children of its employees for attracting technocrats and men of managerial skill to its industry. Donations made by the company to the school were claimed as business expenditure

under section 37(1) of the Act. The Tribunal sustained disallowance of the deduction claimed on the ground that the expenditure was not incurred wholly and exclusively for the purpose of business of the assessee. The Hon'ble High Court did not approve the approach of the ITAT and allowed the claim of the assessee by observing as under:

“Held,(i) that the words " for the purpose of business " used in section 37(1) should not be limited to the meaning of " earning profit alone ". Business expediency or commercial expediency may require providing facilities like schools, hospitals, etc., for the employees or their children or for the children of the ex-employees. Any expenditure laid out or expended for their benefit, if it satisfies the other requirements, must be allowed as deduction under section 37(1) of the Act. The fact that somebody other than the assessee was also benefited or incidentally took advantage of the provision made, should not come in the way of the expenditure being allowed as a deduction under section 37(1) of the Act. Nevertheless, it is expenditure allowable as deduction under the Act.

(ii) That the word “expenditure” primarily denoted the idea of spending or paying out or away. It was something which was gone irretrievably, but should not be in respect of an unascertained liability of the future. It must be an actual liability in praesenti, as opposed to a contingent liability of the future.

(iii) The reasons given by the Tribunal for rejecting the claim of the assessee were not sound. Moreover, since the Tribunal had not recorded a finding as to whether the donation made by the assessee to the trust could be considered as “expenditure”, the matter had to be remanded to the Tribunal for decision afresh in the light of the observations contained in the judgment.”

(ii) In the case of Mahindra and Mahindra vs. CIT 261 ITR 501, the Bombay High Court allowed deduction of expenditure incurred by the

assessee in making initial contribution to the approved superannuation fund to an educational society, which was running school for children of employees, as business expenditure under section 37(1) of the Act. It was held that the amount should be allowed as business expenditure because it was incurred predominantly for staff welfare. The decision in the case of Mahindra & Mahindra (supra) was further followed by the Bombay High Court in the case of CIT vs. Mahindra & Mahindra: 284 ITR 679.

(iii) In the case of CIT v. India Radiators Ltd.: 236 ITR 719 (Mad.), the Madras High Court observed as under:

“The finding of the Tribunal is that by making the contribution to the Panchayat for upgrading the elementary school, the assessee-company was assured by the school management that it would give preference in the matter of admission to the children of the employees in the said school. The Tribunal placed reliance on a letter from the President of the Building Committee and Parents Teacher Association of the school. It is well settled that if a certain sum of money was expended for the education of the children of the employees of the assessee-company, it should be regarded as staff welfare expenditure, particularly in view of the fact that in these days it is very hard to get admission in educational institutions. The employees of the assessee are given the satisfaction by the donation made by the assessee that their employers have taken full care of the education of their ward and such a mental satisfaction on the part of the employees would generate good will and the expenditure can be regarded as staff welfare expenditure and allowable as business expenditure. The contribution made by the assessee to the Panchayat has resulted in the benefit of the assessee’s business in the sense that the assessee’s employees are the beneficiaries in getting preferential admission in the school. The fact that the benefit has percolated to the general public would not stand in the way of assessee getting the necessary deduction once the expenditure is held to be business expenditure. Hence, the Tribunal has

come to the correct conclusion that the expenditure incurred by the assessee was a revenue expenditure. It should also be noted that the contribution made to the Panchayat was not in contravention of any law, nor was it opposed to public policy. In this view of the matter, the contribution made by the assessee to the Panchayat for the up-gradation of the elementary school should be regarded as an allowable business expenditure under the provisions of s. 37(1).”

(iv) In the case of *CIT Vs. Chemicals and Plastics India Ltd.* 292 ITR 115 (Mad.), the assessee claimed deduction in relation to contribution to Madras Chamber of Commerce, of which the assessee was a member, as business expenditure. It was contended that since the maintenance of the trade Chamber was for the furtherance of business interests of the constituents of the Chamber, the contribution made had to be treated as business expenditure. The assessing officer rejected the claim for deduction, which was allowed by the Tribunal. The Hon'ble High Court approved the view taken by the ITAT by holding that since activities of the Chamber of Commerce were closely linked with the welfare of corporate entities who were its members and whose interests were taken care of by the Chamber, the expenditure was deductible, irrespective of whether the expense incurred was compulsory or otherwise.

(v) In the case of *CIT v. Madras Refineries Ltd.*: 266 ITR 170, the Madras High Court observed as under:

“The concept of business is not static. It has evolved over a period of time to include within its fold the concrete expression of care and concern for the society at large and the people of the locality in which the business is located in particular. Being known as a good corporate citizen brings goodwill of the local community, as also with the regulatory agencies and the society at large, thereby creating an atmosphere in which the business can succeed in a greater measure with the aid of such goodwill. Monies spent for bringing drinking water as also

for establishing or improving the school meant for the residents of the locality in which the business is situated cannot be regarded as being wholly outside the ambit of the business concerns of the assessee, especially where the undertaking owned by the assessee is one which is to some extent a polluting industry. The Tribunal was right in allowing the deduction of the entire expenditure of Rs. 15,32,000 as business expenditure.”

(vi) In the case of Hindustan Petroleum Corpn. Ltd. Vs. DCIT 96 ITD 186 (Bom.), the assessee company incurred certain expenditure towards implementation of 20 point programme. The expenditure was incurred to improve the conditions of SC/ST in pursuance of national policies and to help acceleration of all round development of villages by providing assistance to educated unemployed to earn a living. The assessing officer held that since the expenditure was in the nature of donation, the same could not be allowed deduction. The CIT(A) upheld the order of the assessing officer by holding that the expenditure incurred did not have any direct connection with the business of the assessee because the beneficiaries of the expenditure were not employees of the assessee nor had the assessee any statutory obligation to incur such expenditure. On second appeal, by making reference to various authorities including the decision of the Hon'ble Karnataka High Court in the case of Mysore Kirloskar Ltd. Vs. CIT (supra), the ITAT upheld the claim of the assessee. The relevant observations of the Tribunal are as under:

“It has been held by the Karnataka High Court in the case of Mysore Kirloskar Ltd. Vs. CIT (1987] 166 ITR 836/30 Taxman 467 that while the basic requirements for invoking sections 37(1) and 80G are quite different, but nonetheless the two sections are not mutually exclusive. Thus, there are overlapping areas between the donations given by the assessee and the business. In other words, there can be certain amounts, though in the nature of donations, and nonetheless, these amounts may be deductible

under section 37(1) as well. Therefore, merely because the expenditure in question was in the nature of donation, or, as per the words of the Commissioner (Appeals), 'prompted by altruistic motives', it did not cease to be an expenditure deductible under section 37(1). In the case of Mysore Kirloskar Ltd. (supra), the High Court observed that even if the contribution by the assessee is in the form of donations, but if it could be termed as expenditure of the category falling in section 37(1), then the right of the assessee to claim the whole of it as a deduction under section 37(1) cannot be declined. What is material in this context is whether the expenditure in question was necessitated by business considerations or not. Once it is found that the expenditure was dictated by commercial expediencies, the deduction under section 37(1) cannot be declined.

In the instant case, the expenditure on 20-Point Programme was incurred in view of specific directions of the Government of India. It could not but be the business interest of the assessee to abide by the directions of the Government of India which also owned the assessee. Further, the expenditure incurred for the implementation of 20-Point programme was solely for the welfare of the oppressed classes of society, for which even the Constitution of India sanctions positive discrimination and for contribution to all around development of villages, which has always been the central theme of Government's development initiatives. An expenditure of such a nature cannot but be, 'a concrete expression of care and concern for the Society at large and an expenditure to discharge the responsibilities of a 'good corporate citizen which brings goodwill of with the regulatory agencies and society at large, thereby creating an atmosphere in which the business can succeed in a greater measure with the aid of such goodwill' . Just because the expenditure was voluntary in nature and was not forced on the assessee by a statutory obligation, it could not cease to be a business expenditure.

236) Further, the insertion of explanation 2 to section 37(1) has been inserted w.e.f. 01/04/2015 and shall be applicable for the assessment year 2015 – 16 onwards and therefore same does not apply to the assessment year in question before us in this appeal. In view of the above we agree with the findings of the ld DRP and dismiss the ground no 11 of appeal raised by the department.”

The aforesaid disallowance made by the assessing officer in the preceding years, viz. AY 2010-11 and AY 2011-12 has been deleted by the Tribunal vide recent consolidated order dated 24.10.2016, wherein the Tribunal held that the expenditure incurred by the assessee company on Corporate Social Responsibility, prior to insertion of explanation 2 to Section 37(1) of the Act, was an allowable business deduction under the said provision. The Tribunal, in the said order, further elaborated that the role of the assessee was not restricted to merely earning profit, but also discharging certain community related expenses, which would be considered to have been incurred on account of commercial/ business expediency. It is pertinent to point out that no appeal has been filed by the Department in assessment year 2011-12. Thus, the decision of the Tribunal attains finality. Therefore, Ground No. 37 to 37.1 are allowed in favour of the assessee.

97. Ground No. 38 to 38.1 is regarding disallowance of deduction u/s 80IC amounting to Rs.26.91 crores. The proportionate amount of sales to vendors for processing of semi-finished goods supplied by the assessee, compute on ad-hoc basis, on the ground that manufacturing activity to the aforesaid extent of sales was outsourced. The amount was of Rs. 26.91 Crores. During the year, the assessee claimed a deduction of Rs. 1129.63 crores under section 801C of the Act with respect to profits from manufacturing activity carried out at Haridwar. The assessee had engaged various ancillary units/third parties to carry job-work/processing on the components supplied by the assessee for further consumption of such finished components in the activity of manufacture of two wheelers. In the assessment order, the assessing officer

observed that supply/sale of semi-finished components to the vendors for further processing and consumption thereof in assembly/manufacture of two wheelers constituted outsourcing of manufacturing activity. In view- of the same, the assessing officer disallowed deduction under section 801C of the Act by an amount of Rs. 26.91 crores. being the proportionate amount of sales of Rs. 196.39 crores to vendors for further processing of semi-finished goods supplied by the assessee, attributed in the ratio of total profits of the eligible undertaking to total sales of that undertaking, on ad-hoc basis, on the ground that manufacturing activity to the aforesaid extent of sales was outsourced and. therefore, proportionate amount of profit derived there from was not eligible for deduction under section 80IC of the Act.

98. The Ld. AR submitted that the aforesaid issue stands squarely covered in favour of the assessee inasmuch as the Tribunal while adjudicating upon the issue of disallowance u/s 80IC on account of job work/ outsourcing of manufacturing activity in the immediately preceding assessment years, i.e. AY 2010-11 and AY 2011-12, held that outsourcing of certain intermediary processes or procurement of finished components in the process of manufacture does not tantamount to outsourcing of manufacturing activities and thus would not hamper the claim of deduction of the assessee company under Section 80 IC of the Act. It is also pertinent to mention that no appeal has been filed by the Department before the Hon'ble Delhi High Court.

99. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

100. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

“150) We have heard the rival contentions. On query from the bench, the appellant had furnished the process chart for manufacturing of final products followed in all the three units. On perusal of the same, it was noted that since

plant at Haridwar was a new plant and Gurgaon and Dharuhera were old plants, certain initial processes, like press shop, heat treatment, etc., which was carried out at the latter unit were not carried out at the unit at Haridwar. The aforesaid lend support to the argument made by the appellant for justifying the lower consumption of electricity at Haridwar as compared to electricity consumed in other two units. That apart, even assuming that certain intermediary processes were not carried out by the eligible unit at Haridwar and were outsourced to the third parties or non-eligible units, the same cannot lead to the conclusion that the entire profits are not derived from the manufacturing activity for being liable for deduction under section 80IC of the Act. The profit earned by the eligible unit is from manufacturing of two wheelers, which is an eligible activity covered under section 80IC of the Act. Outsourcing of certain intermediary processes or procurement of some finished components for assembly thereof in the vehicle does not, in our view, mean outsourcing of the manufacturing operations. The Courts have in fact repeatedly held that even where the entire manufacturing activities are outsourced or carried out by third party, but the overall supervision, control, and management of the product manufactured is with the assessee, the assessee would be regarded as engaged in manufacture or production of relevant goods. The latest is the decision of Delhi High Court in the case of ITO v AAR ESS Exim (P) Ltd: 372 ITR 111. Thus, disallowance made by the assessing officer on the aforesaid ground was not based on any valid reasons and accordingly the same is deleted and ground 32 of appeal is allowed.”

The aforesaid issue stands squarely covered in favour of the assessee inasmuch as the Tribunal while adjudicating upon the issue of disallowance u/s 80IC on account of job work/ outsourcing of manufacturing activity in the immediately preceding assessment years, i.e AY 2010-11 and AY 2011-12, held that outsourcing of certain intermediary processes or procurement of finished components in the process of manufacture does not tantamount to outsourcing of manufacturing activities and thus would not hamper the claim of deduction

of the assessee company under Section 80 IC of the Act. It is also pertinent to mention that no appeal has been filed by the Department before the Hon'ble Delhi High Court. These fact are identical with the present Assessment Years. The issue is squarely covered in favour of the assessee by the Tribunal's order for A.Ys. 2010-11 & 2011-12. Besides this the Revenue has accepted this issue and has not challenged the same in Hon'ble High Court. Thus, this issue attains finality. Therefore, Ground No. 38 to 38.1 are allowed in favour of the assessee.

101. Ground No. 39 to 39.1 is regarding disallowance of deduction u/s 80IC amounting to Rs.540.65 crores. The part of the manufacturing activity(ies) at Haridwar were outsourced on the basis of lower consumption of power per unit at Haridwar plant vis-à-vis rate of power consumption at other two plants. The amount is Rs. 540.65 lacs. The assessee is engaged in the business of manufacturing two- wheelers, which, inter alia, involves various processes including assembly of certain components of two-wheelers like, gear, fuel tank, engine, etc. It is on completion of these processes including assembly of the aforesaid each components that a separate and distinct product, viz., two-wheeler, comes into being. The only difference in the manufacturing activity carried on at Haridwar plant and other units is that in the latter units, certain processes like press shop, heat treatment, etc., is carried out at such units, whereas these processes are not carried out in eligible unit at Haridwar. Accordingly, on query by the assessing officer regarding lower consumption of electricity, the assessee furnished details of power consumed at all the three manufacturing plants in the following format:

Units	Electricity Consumed (in Units)	Production Figures (in quantity)
Haridwar	3,25,50,345	22,53,200
Gurgaon	6,22,44,192	19,55,856
Dharuhera	5,79,71,177	20,56,691

The AO on the basis of lower consumption of electricity per unit at Haridwar vis-a-vis average rate of consumption of electricity per unit at Gurgaon and Dharuhera plants, assumed that part of manufacturing activities at Haridwar plant were outsourced and accordingly, disallowed proportion of outsourced manufacturing activities in the following manner:

Particulars	Haridwar	Dharuhera	Gurgaon
Power consumption (KWH)	35,250,345	57,971,177	62,244,192
Units Manufactured (No.)	22,53,200	20,56,691	19,55,856
Consumption per unit (KWH)	15.64	28.19	31.82
Average consumption at Gurgaon and Dharuhera		30.01	
Total Deduction u/s 80IC (Crores)	1,129.63		
Allowable (Crores) [(15.64/30.01) 81129.63]	588.98		
To be disallowed (Crores) (1129.63 - 588.98)	540.65		

In the aforesaid manner, the assessing officer has proposed disallowance of deduction under section 80IC by an amount of Rs.540.65 crores on the ground that part of the manufacturing activities was outsourced.

102. The Ld. AR submitted that the aforesaid issue stands squarely covered in favour of the assessee in light of the fact that disallowance made by the assessing officer on identical ground in the immediately preceding assessment years, i.e. AY 2010-11 and AY 2011-12 has been deleted by the Tribunal vide consolidated order dated 24.10.2016 wherein the Tribunal noted that difference in consumption of electricity was on account of the fact that the plant at Haridwar was more energy-efficient and hence certain

processes were carried out in said plant. The Tribunal further held that outsourcing of certain intermediary processes or procurement of finished components in the process of manufacture does not tantamount to outsourcing of manufacturing activities and thus would not hamper the claim of deduction of the assessee company under Section 80 IC of the Act. It is also pertinent to mention that no appeal has been filed by the Department before the High Court.

103. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

104. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

“150) We have heard the rival contentions. On query from the bench, the appellant had furnished the process chart for manufacturing of final products followed in all the three units. On perusal of the same, it was noted that since plant at Haridwar was a new plant and Gurgaon and Dharuhera were old plants, certain initial processes, like press shop, heat treatment, etc., which was carried out at the latter unit were not carried out at the unit at Haridwar. The aforesaid lend support to the argument made by the appellant for justifying the lower consumption of electricity at Haridwar as compared to electricity consumed in other two units. That apart, even assuming that certain intermediary processes were not carried out by the eligible unit at Haridwar and were outsourced to the third parties or non-eligible units, the same cannot lead to the conclusion that the entire profits are not derived from the manufacturing activity for being liable for deduction under section 80IC of the Act. The profit earned by the eligible unit is from manufacturing of two wheelers, which is an eligible activity covered under section 80IC of the Act. Outsourcing of certain intermediary processes or procurement of some finished components for assembly thereof in the vehicle does not, in our view, mean outsourcing of the manufacturing operations. The Courts have in fact

repeatedly held that even where the entire manufacturing activities are outsourced or carried out by third party, but the overall supervision, control, and management of the product manufactured is with the assessee, the assessee would be regarded as engaged in manufacture or production of relevant goods. The latest is the decision of Delhi High Court in the case of ITO v AAR ESS Exim (P) Ltd: 372 ITR 111. Thus, disallowance made by the assessing officer on the aforesaid ground was not based on any valid reasons and accordingly the same is deleted and ground 32 of appeal is allowed.”

The aforesaid issue stands squarely covered in favour of the assessee in light of the fact that disallowance made by the assessing officer on identical ground in the immediately preceding assessment years, i.e. AY 2010-11 and AY 2011-12 has been deleted by the Tribunal vide consolidated order dated 24.10.2016 wherein the Tribunal noted that difference in consumption of electricity was on account of the fact that the plant at Haridwar was more energy-efficient and hence certain processes were carried out in said plant. The Tribunal further held that outsourcing of certain intermediary processes or procurement of finished components in the process of manufacture does not tantamount to outsourcing of manufacturing activities and thus would not hamper the claim of deduction of the assessee company under Section 80 IC of the Act. It is also pertinent to mention that no appeal has been filed by the Department before the High Court. These facts are identical with the present Assessment Year. The issue is squarely covered in favour of the assessee by the Tribunal's order for A.Ys. 2010-11 & 2011-12. Besides this the Revenue has accepted this issue and has not challenged the same in Hon'ble High Court. Thus, this issue attains finality. Therefore, Ground No. 39 to 39.1 are allowed in favour of the assessee.

105. Ground No. 40 to 40.2 is regarding disallowance of deduction u/s 80IC of the Act on account of inter-unit transfer of goods of Rs. 5.32 Crores. The assessee is engaged in the business of manufacturing two- wheelers. For the

aforesaid activity, the assessee purchases various components required to be used in the assembly of two- wheelers, like gear box, fuel tank, etc., from third party vendors. In the present transaction, the aforesaid components were first purchased by non-eligible units at Gurgaon or Dharuhera from third parties, due to proximity of location of such units with third parties, business relationship, etc. and were thereafter transferred at the same purchase price to the eligible unit at Haridwar. In such a transaction, no value addition in such components was carried out by the non-eligible units. In the books of accounts of the plant at Haridwar which is eligible for deduction under section 80IC of the Act. goods aggregating to Rs.58.56crores. were shown to have been procured from other units, i.e.. Dharuhera and Gurgaon plants. Out of the aggregate transactions of Rs.58.56 crores. (i) components having value of Rs.3.11 crores were semi-finished goods for which nominal processing was carried out at other units before transfer to the Haridwar plant, and (ii) balance components having value of Rs. 55.45 crores were procured by the aforesaid non-eligible units from third parties and were transferred to the eligible unit at material cost. Freight charges on transfer of the aforesaid items were always booked at the receiving unit. In the assessment order, the assessing officer applied the provisions of section 80IA(8) read with section 80IC(7) of the Act and disallowed deduction under section 80-IC by an amount of 5,32,00,000, holding that for the purpose of computing deduction under the latter section, inter-unit transfer of goods should have been recorded at market price, instead of cost price as carried out by the assessee. Accordingly, the assessing officer attributed mark-up of 9.03%. being the net profit rate of Gurgaon Unit, on the cost of goods aggregating to Rs. 53.09 crores, procured by the eligible unit at Haridwar from Gurgaon unit and mark-up of 4.35%. being the net profit rate of Dharuhera unit on the cost of goods aggregating to Rs 2.35 crores procured from Dharuhera unit, which was purchased and transferred without processing, thus reducing the quantum of deduction by Rs.4.89 crores. With respect to the other purchase of Rs. 3.11 crores, being

semi-finished goods for which nominal processing was carried out at other units before transfer to the Haridwar plant, the assessing officer, for reasons similar to discussed in Objection No. 28/29 (supra), viz., outsourcing of manufacturing activity, disallowed deduction under section 80IC of the Act by an amount of 0.43 crores. being the proportionate amount of purchases of Rs. 3.11 crores, computed on ad-hoc basis, on the ground that manufacturing activity to the aforesaid extent of purchases was outsourced and, therefore, proportionate amount of profit derived from such purchases was not eligible for deduction u/s 80IC of the Act.

106. The Ld. AR submitted that the aforesaid issue stands squarely covered in favour of the assessee, by the order dated 24.10.2016 passed by Tribunal in the immediately preceding assessment years, i.e. AY 2010-11 and AY 2011-12 wherein identical disallowance made by the assessing officer has been deleted. The Tribunal, in allowing the claim of the assessee under section 80-IC of the Act, held that for the purpose of computing market price of inter-unit transfer of goods, when the non-eligible units procured goods at market price from third party vendors and supplied the same to the eligible unit at the same purchase price as increased by the applicable freight cost, no further substitution of such price is warranted in terms of section 80IA(8) of the Act and the transaction was a genuine business transaction borne out of commercial expediency.

107. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

108. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

“140) We have heard the rival contentions. We have observed that merely because there was inter-unit transfer of certain goods from non-eligible unit to eligible unit, the assessing officer automatically applied the provisions of

section 80IA(8) of the Act to hold that such transfer should have been at market price without looking to the nature of transfer and the facts and circumstances of the case. It has been explained by the Appellant that substantive transfers were made on account of some finished components procured by the non-eligible unit from third party vendors, due to proximity of location/relationship, for further transfer to the eligible unit. The freight charges incurred in relation to the procurement and further transfer from non-eligible to eligible unit have been stated to be borne by the eligible unit. We find force in the aforesaid facts stated by the appellant, considering that the unit at Haridwar was a new unit, whereas the other non-eligible units at Gurgaon and Dharuhera were old, established way back in years 1984 and 1997, having up and running operations during the year under consideration. Various ancillary units manufacturing components for such plants were also established near the old plants, which were continuously supplying such components to the non-eligible units. There was thus strong business/commercial reasons for such ancillary units to supply the components to the non-eligible unit first, by virtue of the existing relationship / process for supply of goods in place, which were further transferred at cost to the eligible unit at Haridwar. We do not find any in-genuineness in the aforesaid practice, which is backed by strong commercial reasons as, highlighted above. In the said process, there is no additional cost burden to be borne by the non-eligible unit. The aforesaid transfer only involves additional freight cost, which as stated has been borne by the eligible unit. Further, the provisions of section 80IA(8) as discussed in ground of appeal no. 26 (supra) provides for inter unit transfer at market price. The market price of the components procured by the non-eligible units from third parties/independent vendors do not undergo any change at the time of further transfer by the non-eligible unit to the eligible unit. In other words, the market price of such components at which the same was procured by non-eligible units remains constant. Accordingly, even by applying the provisions of section 80IA(8), in

our opinion, there can be no substitution of the price at which goods are debited by the eligible unit in its independent books of account. Similarly, with respect to components having value of Rs.6.34 crores, which were transferred by the non-eligible unit to the eligible unit at Haridwar after nominal processing, too, in our opinion, does not result in enhancement of any market price of such goods; in other words, in a free market condition such goods would have also been sold at the same price at which they have been transferred by the non-eligible unit to the eligible unit. In that view of the matter, we find that the present issue was not decided by the assessing officer in correct perspective and, therefore, erred in disallowing deduction under section 80IC, by enhancing the purchase price by adding certain markup thereon. In view of this we allow ground No. 30 of the appeal of the assessee.”

The aforesaid issue stands squarely covered in favour of the assessee, by the order dated 24.10.2016 passed by Tribunal in the immediately preceding assessment years, i.e. AY 2010-11 and AY 2011-12 wherein identical disallowance made by the assessing officer has been deleted. The Tribunal, while allowing the claim of the assessee under section 80-IC of the Act, held that for the purpose of computing market price of inter-unit transfer of goods, when the non-eligible units procured goods at market price from third party vendors and supplied the same to the eligible unit at the same purchase price as increased by the applicable freight cost, no further substitution of such price is warranted in terms of section 80IA(8) of the Act and the transaction was a genuine business transaction borne out of commercial expediency. Therefore, Ground No. 40 to 40.2 are allowed in favour of the assessee.

109. Ground No. 41 is regarding disallowance of deduction u/s 80IC of the Act on account of inflation of profit by charging higher basic price of Rs. 812 crores (restricted to 556 crores). The assessee is engaged in the business of manufacturing two- wheelers. For the units sold by eligible business unit of

assessee situated at Haridwar, the basic sale price charged from customers is higher than the basic sale price charged by the other / non-eligible units. The final price charged by the assessee from dealers/customers with respect to units sold from Haridwar and other units is the same and is not at variance. The difference in basic price is on account of exemption from excise duty available to the unit at Haridwar. There were no extraordinary profits to the eligible unit, vis-a-vis, other / non-eligible units, in as much as, in the latter unit(s), as per CENVAT Rules, the assessee was eligible to tax credit of excise duty paid on purchase of excisable goods against the excise duty charged and collected from customers, which reduced the cost of production in such units, whereas in the case of eligible unit, in the absence of exemption from charging excise duty, the excise duty paid on purchase of components was not available for credit and formed part of cost of production, which consequently reduced the profit earned at such unit. The A.O. admitting that there was no violation of provisions of section 801 A(8) read with section 801C(7) of the Act, applied provisions of section 801 A(10). which have also been made applicable to section 80IC as per sub-section (7) thereof, and held that the eligible business earned extra ordinary profits on account of higher basic price charged from customers vis-a-vis price charged by non-eligible units, which ought to be disallowed as per the said sections. It was held that the assessee by not carrying out the transactions in the aforesaid manner, earned extraordinary profits at Haridwar unit, which ought to be disallowed as per the provisions of section 801 A(10) read with section 80IC(7) of the Act. In view of the above, the assessing officer proposed disallowance of deduction under section 801C of the Act by an amount of Rs. 812,63,13,802 being the amount of alleged extraordinary profits earned by Haridwar unit on account of higher sale price charged on sale of two-wheelers vis-a-vis price charged by other / non-eligible units. Since the assessing officer had disallowed upto Rs.572,88,00,000 out of total deduction of Rs. 1129,63,47,649 as per Grounds of appeal 38 to 40 under section 801C on various grounds , therefore balance deduction under section

80IC of Rs. 556,75,47,649/- has been proposed to be disallowed on the aforesaid account in the assessment order.

110. The Ld. AR submitted that the aforesaid issue stands squarely covered in favour of the assessee, in as much as similar disallowance made by the assessing officer in the immediately preceding assessment years, i.e. AY 2010-11 and AY 2011-12 has been deleted by the Tribunal vide consolidated order dated 24.10.2016. In the said order, the Tribunal, while allowing the claim of assessee under section 80-IC of the Act, held that there was basic fallacy in the case made by the AO since the higher basic price was on account of excise duty exemption given to the eligible unit. The Tribunal further observed that the final price charged to the end customer was the same irrespective of the unit of manufacture. The Tribunal also rejected the reliance placed by the AO on the provisions of section 80IA (10) by holding that the said provision was applicable to transactions entered with related parties whereas the alleged higher price charged by the assessee was from customers/ dealers. As regards the allegation of the AO qua role of Head Office, it was observed that the HO was rendering any separate services and was merely playing a central role for undertaking common administrative expenses and thus, no separate profit attribution was required to be made on the HO. Comparison of prices at haridwar unit vis-a-vis other non- eligible units were submitted before the revenue authorities. It is also pertinent to mention that no appeal has been filed by the department before the Hon'ble Delhi High Court.

111. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

112. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

“144) We have heard the rival contentions. At the outset, we agree with the submissions of the appellant and reject the contentions of the assessing

officer that higher price was charged for vehicles sold from eligible unit vis-a-vis non-eligible unit. The appellant in this connection also produced sales invoices of vehicles of same models removed from eligible unit as also non-eligible unit. The final price charged from the customer, as it would have been ordinarily expected, was same in both the cases. The aforesaid factual position was expected, since there is no reason behind the customer to pay higher price for purchasing same model of vehicle from the eligible unit at Haridwar, vis-a-vis, price to be paid for purchase from non-eligible unit. We agree with the contentions of the appellant that the basic sale price before charging excise duty in case of eligible unit was higher than the basic price of non-eligible unit on account of exemption from excise duty given to the unit located at Haridwar. In view of the same, there was basic fallacy in the entire case made by the assessing officer, while disallowing deduction under section 80IC on the aforesaid ground. That apart, although the appellant had submitted, that no additional profits accrued to the eligible unit on account of exemption from excise duty and charging higher basic price vis-à-vis basic price at non-eligible unit due to non-availment of CENVAT credit of excise duty paid on purchases at the said unit, we hold that even assuming higher profits were earned by the eligible unit, the same cannot be disallowed by applying provisions of section 80IA(10) read with section 80IC(7) of the Act which reads as under:

“(10) Where it appears to the Assessing Officer that, owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the

amount of profits as may be reasonably deemed to have been derived therefrom”

145) *The aforesaid section is applicable where the eligible unit has entered into transaction with related parties. In the given situation, as taken-up by the assessing officer, the alleged higher sale price being charged by the eligible unit is from the final customer/dealers, which are not covered within the scope of aforesaid section. In that view of the matter, for the aforesaid reason as well, the assessing officer clearly erred in doubting the sale price of goods from eligible unit and consequential earning of higher profits. As regards the other findings of the assessing officer that finished goods should have been transferred from the eligible unit to Head Office at normal profit and Head Office should have further sold the goods at higher sale price or in other words, profits earned by the eligible unit should be attributed to the Head Office for sale and marketing activities carried out by the latter unit, in our opinion, is also not correct. The Head Office is not a separate entity/person or a profit centre. The Head office in a case of multiple manufacturing units plays a central role for undertaking common expenses like administrative, marketing, etc. for all its manufacturing units. The Head Office in such a situation, in our view, is not rendering any separate services to the manufacturing/eligible unit but is a cost centre incurring expenses for and on behalf of all such units. The only rational approach in such a kind of situation is to apportion the common expenses incurred by the head office to various profit making units on a scientific and rational basis. Considering that such expenses are incurred by head office for and on behalf of the profit making units, no profit is liable to be attributed to the head office. We rely in this regard on the decision taken by this Bench in the case of Ranbaxy Laboratories Ltd. v. ACIT: ITA No. 196/Del/2013, wherein on the same controversy it was observed as under:*

“87. It is one of the contention of revenue that selling and distribution activity is itself a separate profit center and therefore whatever services

have been provided by the selling and distribution arm of the company to the eligible undertaking should have been charged and reduced from the profit of the industrial undertaking after valuing service of selling and distribution arm of the company at market rate. At present assessee has allocated it at cost. Therefore, ld. AO has invoked provisions of section 80 IA (8) of the act. It is not dispute that that products manufactured by these industrial units are sold by selling and distribution arm of the assessee and the cost incurred is allocated to these respective units on the basis of appropriate allocation key of sales. Ld. AR of the appellant relying on the decision of coordinate bench of Cadila Healthcare Ltd vs. ACIT 21 Taxmann.com 483 has submitted that there cannot be any specific demarcation between manufacturing and selling activities of the assessee and profit accrues only at the time of sales of the goods only. Therefore, the contention of the revenue that selling and distribution function of the assessee is a separate profit center is required to be rejected at threshold. We have carefully considered the argument of ld. AR and of the revenue on this point as well as the ld. AO and Ld. DRP. We are of the view that this argument is almost similar to the argument raised by the revenue in the case of Cadila Healthcare Ltd vs. ACIT 21 Taxmann.com 483.

We have carefully perused this decision and note that the controversy in this ground of appeal with respect to applicability of section 80 IA (8) of the act, on marketing and other selling distribution as well as research and development services provided by the undertaking as a whole to the eligible industrial undertaking at the cost or market rate for working out the eligible profit for deduction, has been decided. Ld. DR could not point out any other contrary judgment to the decision cited by the Ld. AR. Therefore, we respectfully following the above decision of coordinate bench hold that provisions of section 80 IA (8) of the act do not apply to the assessee on transfer of services of marketing division of the company to

the eligible industrial undertaking whose profits are claimed as deductible.”

146) *In view of the above, we reverse the action of the assessing office in partly disallowing deduction under section 80IC on account of the have profit earned by the assessee in the eligible unit. In the result ground No. 31 of the appeal of the assessee is allowed.*

This fact is identical with the earlier Assessment Years. The issue is squarely covered in favour of the assessee by the Tribunal's order for A.Ys. 2010-11 & 2011-12. Besides this the Revenue has accepted this issue and has not challenged the same in Hon'ble High Court. Thus, this issue attains finality. Therefore, Ground No. 41 is allowed in favour of the assessee.

113. Ground No. 42 to 42.6 is regarding disallowance u/s 80IC of the Act on account of profit attributable to advertisement and marketing activities carried out at Head Office for Rs. 564.13 crores (restricted to NIL). In the business of manufacturing and selling two-wheelers, including goods manufactured at eligible unit, the assessee was required to incur marketing expenses. The said expenses were incurred by the Head Office at Delhi. The common expenses, including advertisement/brand creation expenses, etc. incurred at Head Office were allocated to various manufacturing units of the assessee-company, including the unit eligible for deduction under section 80IC, on a rational and scientific basis. In that view of the matter, the expenses on brand /advertisement, etc. incurred at Head Office were duly allocated to manufacturing units and have been deducted, while computing profits of the unit eligible for claim of deduction under section 80IC of the Act. The price realized on sale of the products, i.e., two wheelers, is credited to the profit and loss account and direct and indirect expenses, including advertisement expenses, incurred in relation to sale of the products are reduced therefrom, for purpose of computing profits of the eligible unit and corresponding claim of deduction under section 80IC of the Act. The AO held that profits are derived

by the assessee-company on account of three assets, viz., (1) manufacturing assets, (2) brand assets and (3) marketing assets whereas deduction under section 80IC is available only on profits derived from business of manufacturing of specified articles or things. It was further observed that the manufacturing and marketing activities were carried out at Head Office and, therefore, the brand developed was not owned by the eligible unit, which came into existence much later than the existence of the assessee- company as a whole. Thus, part of the profits earned by eligible unit should have been attributed to advertisement/marketing activities carried out by head office. In order to attribute profits to marketing/advertisement activities, AO computed rate of net profit for the financial year 1984-85. being the first year of operations of the assessee company, at 6.85% on an arbitrary basis and applied the same to arrive at the profit solely attributable to the manufacturing activity of Haridwar unit. On the basis of above, the assessing officer computed profit attributable to the manufacturing activity at Rs. 565.50 crores. Accordingly, deduction under section 80IC qua remaining profit of Rs.564.13 crores, allegedly attributable to marketing and advertisement activity was disallowed. Since the assessing officer had disallowed the entire amount of deduction claimed under section 80IC which has been objected to in grounds of objection nos. 28-31 (supra), no further disallowance on account of above was made in the assessment order.

114. The Ld. AR submitted that the issue is squarely covered in favor of the assessee by the order dated 24.10.2016 passed by the Tribunal for immediately preceding assessment years, i.e. AY 2010-11 and AY 2011 -12, wherein identical disallowance made by the AO has been deleted. The Tribunal, in coming to the aforesaid discussion, reiterated that the head office is not a separate profit centre and, therefore, no profit is to be separately attributed to such activity. It further observed that, for the purpose of working out eligible deduction under section 80-IC of the Act, actual expenses incurred at the head office are to be allocated between various profit centers on a

rational and scientific basis.

115. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

116. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

“154) We have heard the rival contentions. We have already discussed the aforesaid issue at length while disposing the ground of appeal No. 31 to 31.2 supra, wherein we have dealt with that head office is a separate cost centre and expenses incurred thereat needs to be allocated to various profit centers/manufacturing units on a rational and scientific basis, without any element of profit/markup. The issue raised by the assessing officer in the present ground of appeal is categorically similar to that raised in the aforesaid ground. Accordingly following our findings stated above, we reverse the action of the assessing officer and delete the disallowance made under section 80IC. Accordingly, the ground No. 33 of appeal is allowed.”

The issue is squarely covered in favor of the assessee by the order dated 24.10.2016 passed by the Tribunal for immediately preceding assessment years, i.e. AY 2010-11 and AY 2011 -12, wherein identical disallowance made by the AO has been deleted. The Tribunal, in coming to the aforesaid discussion, reiterated that the head office is not a separate profit centre and, therefore, no profit is to be separately attributed to such activity. It further observed that, for the purpose of working out eligible deduction under section 80-IC of the Act, actual expenses incurred at the head office are to be allocated between various profit centers on a rational and scientific basis. Therefore, Ground No. 42 to 42.6 are allowed in favour of the assessee.

117. Ground No. 43 to 43.1 is regarding disallowance of Rs.198.23 crores in respect of certain income earned by the eligible unit. Such incomes were not derived from the business of manufacture of specified articles or things for Rs.

198. 23 crores (restricted to NIL). During the relevant previous year, the eligible unit at Haridwar earned following other incomes, which were credited in the Profit and Loss Account of that unit:

S. No.	Name/Type of Other Income	Amount
1	Interest on loan given at subsidized rates to the employees	372,665
2	Interest on loan provided for working capital support to vendors	8,066,389
3	Interest on Security deposits	708,665
4	Freight Recovery from Customers	1,843,60,3,293
5	Misc Income Vendors-Cash discounting	129,596,348
	TOTAL	1,982,347,360/-

In the return of income, the assessee claimed deduction under section 80IC on the aforesaid 'other incomes' since the said receipts had direct and immediate nexus with the business of manufacturing and selling of specific articles or things. The assessing officer, without considering the nature of each of the aforesaid receipts, held that the aforesaid incomes were not derived from the business of manufacturing of articles or things and were, therefore, taxable under the head "income from other sources". Accordingly, the assessing officer disallowed deduction under section 80IC by an amount of Rs 198,23,47,360. However, since the assessing officer had disallowed the entire amount of deduction under section 80IC on various grounds which have been challenged in Grounds of Objection No. 28-31 therefore no further disallowance for the aforesaid amount, was made in the assessment order.

118. The Ld. AR submitted that similar disallowance made by the assessing officer in the immediately preceding assessment years, i.e. AY 2010-11 and AY 2011-12 has been deleted by the Tribunal vide consolidated order dated 24.10.2016. The Tribunal, after examining the nature of the aforesaid incomes, held that other incomes in the nature of Interest on loan to employees, interest on loan to vendors for working capital support, freight recovery, sundry sales, cash discounting from vendors and exchange fluctuation gain, etc. earned by a unit eligible for deduction under Section 80IC of the Act shall be considered as incidental to the activity of carrying out manufacturing and thus eligible for deduction under that section. Accordingly, the aforesaid issue stands squarely covered in favour of the assessee. Details of correspondences exchanged with vendors establishing working capital support on sample basis were submitted before the Revenue authorities.

119. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

120. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

158) We have heard the rival contentions. Our findings on the various issues raised by the assessing officer are given in seriatim hereunder:

1. Interest on loan given at subsidized rates to employees

The Supreme Court in the case of Liberty India vs. CIT: 317 ITR 218, has held that source of income beyond the first degree nexus with the manufacturing operation cannot be considered as derived from such business/activity. Following the aforesaid decision, the Courts / Tribunal in certain cases have held that interest income earned from fixed deposits made by the eligible unit is not eligible for deduction under the relevant provisions of the Act. [Refer: Paswara Electronics (P) Ltd. v. ITO: ITA No.

71/D/2011; *Reckit Benckiser India Ltd. v. Addl. CIT: 231 Taxman 585 (Cal.)*]

However, the facts under consideration are slightly different. The question that needs to be answered is whether interest income earned from loan given at subsidized rate to employees has first-degree nexus with the business operations carried on by the eligible unit. The appellant is engaged in the business of manufacturing two-wheelers and is not engaged in the activity of giving loans and advances to earn interest income. It is not the case of appellant or the assessing officer that surplus funds were given to the employees to earn interest income. The loans/advances to employees under consideration was a measure of incentive / perquisites to the employees involved in carrying on the business of manufacturing. The source of such income is, thus, not the activity of giving loan, but benefit extended to employees engaged in the business. The first-degree nexus of such income, in our view, is the eligible business carried on by the appellant. Therefore, such income would be eligible for deduction u/s 80IC of the Act. The action of the assessing officer on this account is thus reversed.

2. *Interest on loans provided for making capital support to vendors*

The present issue is similar to the immediately preceding issue. In our view, loan has been given to vendors to provide uninterrupted supply of goods to the appellant. The first-degree nexus of giving loan is, thus, business of manufacturing. Accordingly following our findings in the preceding issue, the action of the assessing officer on this account is reversed.

3. *Freight recovery from customers*

The assessing officer has completely gone wrong in considering freight charges recovered from customers as an independent source of income. The freight charges recovered by the appellant for supply of vehicle are

recoupment of such charges, which were paid by the appellant at the first place to the transporter delivering the vehicle to the customer/dealers. There is no profit element in the aforesaid recovery. In the absence of any income on the aforesaid recovery there was no warrant to deny benefit of deduction under section 80IC on the above. Accordingly, the action of the assessing officer is reversed on this ground.

4. *Sundry Sales*

The present issue is also similar to the immediately preceding issue relating to freight recovery. The sale of some finished components also does not involve any income element inasmuch as semi-finished components are supplied to ancillary units for further processing and finished components procured there from are subsequently debited at cost in the books. There is no profit element in the aforesaid transaction and therefore the benefit of deduction under section 80IC cannot be denied on above. In that view of the matter, the action of the assessing officer is reversed on this ground.

5) *Miscellaneous income – cash discounting from vendors*

The cash discount availed on early/prompt payment to creditors/supplies of material is also not an independent source of income but a discount towards the purchase price. The purchase price of goods is reduced from the profits of the eligible unit to arrive at profit derived from the manufacturing activity. Accordingly, any benefit towards purchase price would have direct nexus with the computation of the aforesaid profits. The aforesaid income is, thus, directly related to business of manufacturing. Accordingly the action of the assessing officer in disallowing deduction under section 80IC on above was not valid and therefore, the action of the assessing officer on aforesaid ground is reversed.

6) *Exchange fluctuation gain*

As regards denial of deduction under section 80IC on fluctuation gain of Rs.34,13,666, the appellant has pointed out that there was some mistake in the aforesaid claim which have been rectified by the assessing officer in the order dated 07.05.2015 passed under section 154 of the Act. Accordingly we do not render any finding on the aforesaid issue. As regards gain arising on reinstatement of liabilities in foreign currency against import of goods in our view is similar to the issue of cash discount on purchases dealt supra. Similar to our findings given on the said issue, considering that fluctuation gain on import of goods is going to directly reduce foreign exchange liability to be discharged against import of goods being debited in the profit and loss account to arrive at the profits of the eligible business, such benefit has direct nexus with the said business, which is eligible for deduction under section 80IC of the Act. We draw support for the aforesaid conclusion from the decision of the Bombay High Court in the case of CIT v. Rachna Udyog : 233 CTR 72. Accordingly the action of the assessing officer on this ground is reversed and we hold that assessee is eligible for deduction under section 80 IC of the income tax act on interest on loans given at subsidized rates to the employees of Rs. 1 62975/-, interest on loans provided for working capital support to vendors Rs. 6626854/-, freight recovery from customer Rs. 935418395/-, sundry sales of Rs. 9 2410 3150/-, cash discount received from the vendor is Rs. 5 673 2831/- and exchange fluctuation of Rs. 2 416 7060/-. In the result ground No. 34 of the appeal of the assessee is partly allowed.”

Similar disallowance made by the assessing officer in the immediately preceding assessment years, i.e. AY 2010-11 and AY 2011-12 has been deleted by the Tribunal vide consolidated order dated 24.10.2016. The Tribunal, after examining the nature of the aforesaid incomes, held that other incomes in the nature of Interest on loan to employees, interest on loan to vendors for working capital support, freight recovery, sundry sales, cash discounting from vendors and exchange fluctuation gain, etc.

earned by a unit eligible for deduction under Section 80IC of the Act shall be considered as incidental to the activity of carrying out manufacturing and thus eligible for deduction under that section. Accordingly, the aforesaid issue stands squarely covered in favour of the assessee. Therefore, Ground No. 43 to 43.1 are allowed in favour of the assessee.

121. Ground No. 44 to 44.6 is regarding disallowance of deduction u/s 80IC amounting to Rs.1129.63 crores for non compliance of Rule 18BBB and non-adherence to condition specified in Industrial Policy of Rs. 1129 crores (restricted to NIL). The assessee company had during the financial year 2008-09 on 07.04.2008 started commercial production at new manufacturing facility at Plot No. 3, Sector 10, Integrated Industrial Estate, Ranipur. S1DCUL, Haridwar (UTTARAKHAND) at Khasra Number 545 Village Salempur Mehdood, Haridwar on 07.04.2008. The said plot was notified by Notification No. 177 dated 28.06.2004 as industrial Estate under section 80IC(2)(a)(ii). In this connection, following documents were enclosed by the assessee.

- License and registration certificate
- Direct tax Notification No. 177 dated 28.06.2004
(relevant extracts)
- Khasra no. Certificate
- Central Excise Registration Certificate Commercial Tax
Registration Certificate
- First Sales Invoice
- Consent to establish motorcycle unit from Uttaranchal
Environment Protection and Pollution Control Board

The assessee for the purpose of establishing a factory/plant, as per the Factory Act, 1948, was required to obtain permission/license from the appropriate authority, in accordance with local State Government Factory

Rules, i.e., Uttar Pradesh Factory Rules, 1950, which were applicable in the present case. No separate license was required to carry on the business of manufacture of two wheelers as also to claim deduction for such activity under section 80IC of the Act. The only permission required was the aforesaid license to work as factory, which was submitted along with audit report in Form 10CCB read with Rule 18BBB(4) of the Rules. In view of the aforesaid, the assessee claimed deduction of Rs. 1129.63 crore under section 80IC of the Act during the relevant assessment year. In the assessment order, the assessing officer disallowed the entire amount of deduction claimed under section 80IC of the Act. on the ground that the following conditions were not satisfied by the assessee:

- The assessee failed to comply with Rule 18BBB of the Rules inasmuch as the assessee did not obtain any approval for carrying on the business of manufacturing two-wheelers in the State of Uttaranchal
- The assessee failed to comply with the condition of employment of natives of State of Uttaranchal at prescribed percentage as contained in the industrial policy issued by the Government for the State of Uttaranchal.
- The assessee failed to meet the condition of continuous employment of specified number of employees on any given day as contained in the factory license.

Since the assessing officer had disallowed the entire deduction claimed under section 80IC on various grounds, which have been objected in Grounds of Objection Nos. 28-31 (supra), no further disallowance for the aforesaid amount of Rs. 1129,63,47,649 was made in the assessment order.

122. The Ld. AR submitted that identical disallowance made by the Assessing Officer in the immediately preceding Assessment Years, i.e. Assessment Year 2010-11 and Assessment Year 2011-12 has been deleted by the Tribunal vide

consolidated order dated 24.10.2016, wherein it was held that the assessee had given all the necessary details and fulfilled all statutory conditions for the claim of deduction under Section 80IC of the Act. Further, the Tribunal held that even otherwise, entire claim of deduction could not be denied if some incomplete details are furnished by the assessee. It is also pertinent to mention that no appeal has been filed by the Department before the High Court.

123. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

124. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

“136) We have heard the rival contentions. The case of the assessing officer was that the appellant is not eligible for claiming deduction u/s 80IC since it did not satisfy the following conditions:

a) The appellant failed to comply with Rule 18BBB of the Rules inasmuch as the appellant did not obtain any approval for carrying on the business of manufacturing two-wheelers in the State of Uttaranchal;

b) The appellant failed to comply with the condition of employment of natives of State of Uttaranchal at prescribed percentage as contained in the industrial policy issued by the Government for the State of Uttaranchal; [Communication no.429/Ind. Dev. / Employment /2005-06, dated 19.11.2005, issued by the Secretary, Industrial Development to Director, Industries, Uttranchal]

c) The appellant failed to meet the condition of continuous employment of specified number of employees on any given day, as contained in the factory license.

As regards the first condition prescribed in Rule 18BBB regarding approval to carry on the eligible business, it was explained by the appellant that for the

purposes of carrying on business of manufacturing two-wheelers other than obtaining factory license as per the Factory Act, 1948, no other approval / permission was required from any Central / State government under any law. No such requirement has even been prescribed by the assessing officer. As regards the factory license, the appellant had obtained the said license from the appropriate state authority which was attached along with audit report in Form 10CCB in compliance of Rule 18BBB(4) of the Rules. Considering that no license was required to be obtained to carry on the eligible business under any law, the appellant could not have been said to violate the provisions of said Rule. As regards the other two failures, relating to state industrial policy alleged by the assessing officer, the satisfactions of such conditions have not been stipulated as a condition precedent under any provision of section 80IC of the Act.

The provisions of section 80IC are self-contained and if the condition stipulated therein are satisfied, the benefit therein cannot be denied on the ground of non-satisfaction of certain extraneous condition. We, accordingly, hold that there was no failure of satisfaction of conditions precedent to claim deduction u/s 80 IC as was pointed out by the assessing officer in the assessment order. That apart, we additionally note that the DRP had also agreed with the aforesaid view and had directed the assessing officer to not deny the benefit of deduction under section 80IC on the aforesaid ground. The DRP had set aside the matter to the file of the assessing officer to examine whether other conditions precedent for claiming deduction u/s 80IC were satisfied by the appellant or not. The aforesaid findings of the DRP have not been challenged by the assessing officer in appeal before us. Such findings have, thus, become final, which could not have been overridden by the assessing officer in the assessment order. Accordingly, for the aforesaid additional reason also, we hold that deduction u/s 80IC cannot be denied for alleged failure to comply with the aforesaid three conditions specified in the assessment order.

As regards compliance of conditions precedent for claiming deduction u/s 80IC, we note that the appellant during the course of set-aside proceedings had point-wise given entire details /information as to how it satisfied each condition precedent for claiming deduction under said section. The claim of deduction of the appellant is also duly supported with the audit report in Form 10CCB issued by the auditors, answering each question in the format and how the appellant satisfied all such conditions. In the final assessment order, the assessing officer has not pointed out violation of any such condition precedent. We agree with the submissions of the Ld. Counsel that the various errors (assuming without admitting) in submission of complete details/information by the appellant to the assessing officer, as noted in the assessment order, related to the computation of deduction, on the basis of which entire claim could not have been denied. Accordingly, in our view, the assessing officer was not justified in denying the benefit of deduction u/s 80IC to the appellant of Rs. 9972535090/-. In view of this ground No. 29 of the appeal of the assessee is allowed.”

This fact is identical with the earlier Assessment Years. The issue is squarely covered in favour of the assessee by the Tribunal's order for A.Ys. 2010-11 & 2011-12. Besides this the Revenue has accepted this issue and has not challenged the same in Hon'ble High Court. Thus, this issue attains finality. Therefore, Ground No. 44 to 44.4 are allowed in favour of the assessee.

125. Ground No. 45 is regarding disallowance expenses incurred on repair and maintenance of various assets alleging to be capital expenditure of Rs. 2.57 crores (net). During the relevant previous year, the assessee incurred expenses of Rs. 2,78,74,660/- for renovation of its various offices on account of routine repair and maintenance expenses of various existing assets used for the purposes of business, which were claimed revenue deduction. The details of aforesaid expenses were submitted to the Revenue authorities. The AO disallowed aforesaid expenditure

aggregating to Rs.2,78,74,660/-claimed by assessee, after allowing depreciation thereon @ 10% on the ground that the same was not in the nature of "current repairs" but is capital in nature and thus was not allowable deduction in terms of provisions of section 30(a)(ii) of the Act. Accordingly, net disallowance of Rs. 2,57,82,642 was made by the AO.

126. The Ld. AR submitted that the aforesaid issue has been decided by the Tribunal in assessee's own case in assessment year 2008-09, wherein the Tribunal while holding that repair and maintenance expenses which did not provide any enduring benefit or resulted in creation of any new asset were allowable deduction, set aside the issue to file of AO to verify whether the expenditure was incurred on existing assets. The AO, in the set aside order dated 26.02.2015 after examining the nature of expenses incurred by the assessee, was pleased to allow relief by holding that the expenses were in the nature of allowable business deduction. It would be pertinent to point out that the aforesaid issue has also been decided in favour of the assessee by the Tribunal in assessee's own case for assessment years 2010-11 and 2011-12, wherein the Tribunal while dismissing the departmental appeal on the said issue, followed the order of the Tribunal for the preceding A.Y. 2008-09 and deleted the disallowance made by the Assessing Officer. It is also pertinent to mention that no appeal has been filed the department before the High Court.

127. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

128. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

246) We have heard the rival contentions. We have seen the details of expenses incurred by the assessee. The same are routine expenses, which are quite reasonable having regard to the size and magnitude of the company. Such expenses are incurred year after year, which are always allowed

deduction. We also note that similar issue was allowed in the assessee's own case for assessment year 2008-09. The relevant observations of the Tribunal for assessment year 2008-09 are as under:

247) "51. We have considered the submissions and arguments of both the parties on the issue. Ld. Counsel of the assessee submitted that the claim of expenses was pertaining to the expenses which were incurred from time to time on miscellaneous repair/maintenance like building maintenance, whitewash, paint work, plastering, enamel and premium work, replacement of roof cladding sheet/ kharanja on the various existing assets which did not result in any manner in increase of production capacity and the expenses were incurred to facilitate a smooth running of existing business operations. Ld. Counsel of the assessee also submitted that the expenses incurred on routine repair and maintenance were in relation to various existing assets of the assessee company used for the purpose of business only. Ld. Counsel of the assessee further submitted that the expenditure of Rs.3,60,409/- was incurred in respect of existing asset i.e. DGH House by way of renovation which include replacement of roof, brick work, flooring and plastering etc. Ld. Counsel of the assessee further submitted that the said expenditure are revenue in nature and has been accepted by the AO in the earlier years.

52. Ld. DR replied that when the assessee failed to file any vouchers to establish or substantiate the claim of expenditure on repair and maintenance, then the AO has no option but to disallow the same. The DR further submitted that when the assessee is beneficiary of the benefit of enduring nature, then the AO is justified to treat the same expenses as capital in nature. The DR supported the orders of the authorities below and alternatively submitted that the issue requires detailed examination and verification at the end of AO, then if it is found to be appropriate, the issue may be set aside to the file of AO for fresh adjudication.

53. On careful perusal of record placed before us, we observe that the AO made an addition on the following observations and findings:-

Before coming to any conclusion, it is necessary to bring on record the findings of the Special Auditor on the issue. Same is as under: -

During the course of special audit, we have observed that in the following cases the expenses have been charged off as revenue expenses whereas the supporting vouchers suggest that the same should have been capitalized. The copy of the vouchers is marked as page no. 3A57 to 3A63(forming part of volume III). The details of the same are given below:-

Sl. No.	Account Head	Date of Expense	Location	Text Narration	Total Amount
1	BuildingMaintenance	19.01.2008	HHHD	Construction of Air Intake Room DG Set	3,60,409
2	Maintenance-Horticulture	31.03.2008	HHHD	Provision for capital work	14,39,892
				Total	18,00,301

From the above facts it is seen that in respect of building maintenance expenditure of Rs.360409/- is in fact related to construction of Air Intake Room DG set. Expenditure is clearly capital in nature. As regard balance of the payment at Rs.1439892, where the assessee claims them to be in the nature of repairs, the Auditor has reported that vouchers are not available. Only detail submitted by the assessee is a list the provision of capital nature work as on 31.03.08. Though the inner items appear to be in the nature of repairs but no vouchers were available to the Special Auditor during the course of audit or submitted to the AO in response to the reply of final show cause. Therefore, AO is inclined to go by the nature of these expenses as given by the assessee

itself i.e. provision for capital nature work'. Entire amount of Rs.1800301/- is therefore inadmissible being capital in nature. Therefore, after allowing depreciation @10% amounting to Rs.90015, for the period of 6 months, amount of Rs. 17,10,286/- is added to the income of the assessee.

The DRP vide its order dated 28.03.2013 has decided this issue in favour of Revenue. Accordingly, in conformity with the order of DRP, an addition of Rs.17,10,286 is made to the total income of the assessee. "

54. In view of above conclusion of the AO, we clearly observe that the AO has observed that "though inner items appear to be in the nature of repairs but no vouchers were available to the Special Auditor during the course of audit or submitted to the AO in response to the reply of final show cause." Hence, we are of the opinion that it is a well-settled legal proposition that the repairs and maintenance expenses which does not bring any benefit of enduring nature or create any new asset for the assessee then the same expenses should be allowed. At the same time, we also observe that the onus is on the assessee to establish that the expenses were incurred on the existing assets of the assessee which did not bring any benefit of enduring nature or create any new asset for the assessee and the assets were used for the purpose of business only. In the present case, the assessee made a claim of Rs. 1800301/- which consist of provision of Rs. 1439892/- for repair expenses and second part of Rs.360409/- said to be incurred in respect of building maintenance. In a peculiar situation when the assessee failed to file any vouchers of expenditure to substantiate its claim, then the AO has no option but to disallow the same. We find it appropriate to restore the issue to the file of AO for a fresh adjudication with a direction that the issue of claim of assessee pertaining to repair and maintenance expenses shall be decided after affording due opportunity of hearing for the assessee. The AO is also directed to examine and

verify the fact that whether the claim of expenditure was actually incurred on the existing assets of the assessee and whether the assessee got any benefit of enduring nature in return of said expenditure. With above directions to the AO, ground no. 10 to 10.1 of the assessee are disposed of and deemed to be treated as allowed for statistical purposes.”

248) *Parties before us have admitted that there is no difference in the facts and circumstances of the present case and also the nature of expenditure involved in the present issue compared to the nature of expenses and issued decided by the coordinate bench in above order. Even before us, the revenue could not point out that any of the expenditure incurred by the assessee on account of repairs is not on the existing assets, but new assets have been purchased out of these expenses. In view of above facts we delete the disallowance made by the Ld. and assessing officer respectfully following the decision of the coordinate bench in assessee’s own case for earlier years and consequent order of the Ld. and assessing officer after examining the complete details in the result, we direct the Ld. and assessing officer to delete the disallowance made of Rs. 1 825 5930/-by holding that expenditure incurred of Rs. 1 976 6172 is allowable repairs and maintenance expenditure on the existing assets of the company and is revenue in nature. In the result ground No. 14 of the appeal of the revenue is dismissed.”*

This fact is identical with the earlier Assessment Years. The issue is squarely covered in favour of the assessee by the Tribunal’s order for A.Ys. 2010-11 & 2011-12. Besides this the Revenue has accepted this issue and has not challenged the same in Hon’ble High Court. Thus, this issue attains finality. Therefore, Ground No. 45 is allowed in favour of the assessee.

129. Ground No. 46 is regarding disallowance of expenses incurred on mobile phones as capital expenditure of Rs. 2.77 lacs (net). During the relevant assessment year, the assessee incurred an amount of Rs. 3,08,600/- towards

purchase of mobile phones meant to be used by its employees, which were claimed as revenue deduction. The details of such expenses are:-

Doc No.	Text	Posting Date	Amt. (Rs.)
23001667	COST OF BLACKBERRY 9780- BHARTENDU KABI	14-6-2011	20,000
23002028	COST OF 7 BLACKERRY PHONES	30-6-2011	150,500
23002039	COST OF APPLE 1 PHONE-1No.	30-06-2011	40,900,
23003733	COST OF BLACKBERRY 9900-3 3 Nos	31-8-2011	97,200
	TOTAL		3,08,600

The AO disallowed aforesaid expenditure on the ground that expenditure incurred on mobile phones was capital expenditure and held that the assessee derived benefit of enduring nature from such expenditure.

130. The Ld. AR submitted that the aforesaid issue has been decided in favour of the assessee by the order of the Tribunal in assessee's own case in assessment year 2010-11 and 2011-12. wherein the Tribunal while dismissing the departmental appeal in ITA Nos. 2424/Del/2015 and 1609/Del/2016 held that in view of the rapid changes/up-gradations in technology, expenditure incurred by the assessee company on acquisition/purchase of mobile phones is a regular business up-gradation/replacement expenditure, which shall be eligible as business deduction u/s 37(1) of the Act.

131. The Ld. DR relied upon the Assessment Order and Order of the TPO, but could not distinguish the decision of the Tribunal.

132. We have heard both the parties and perused the material available on record. The Tribunal in A.Ys. 2010-11 and 2011-12 held as under:

“251) We have heard the rival contentions. The issue in the present ground is similar to the ground of appeal no. 36 taken in assessee’s appeal. While disposing the said ground we have held that in the modern era of fast changing technology, expenses incurred on replacement/up gradation of existing assets is allowable revenue expenditure. It is a common knowledge that there is a huge revolution in the mobile telephony industry, which forces person, especially in case of corporate to constantly upgrade to newer model of mobile phones. It cannot also be disputed that mobile phone in the facts and circumstances of the assessee’s case does not constitute profit earning apparatus or as an essential tool of trade to carry on such business. Mobile phones only facilitate smooth carrying of business by the executives of the appellant company. In that view of the matter while following the decision taken while disposing of the ground of appeal no. 36 for assessee’s appeal we hold that expenditure incurred towards mobile phone in the facts of the appellant’s case is an allowable revenue expenditure. Accordingly, the order of the DRP is sustained and the ground of appeal raised by the department is dismissed.

252) In the result appeal No. 2424/Del/ 2015 filed by the revenue in assessment year 2010-11 is partly allowed.”

Thus, the issue is covered in favour of the Assessee for A.Y. 2010-11 and 2011-12 by the order of the Tribunal. Therefore, Ground No. 46 is allowed in favour of the assessee.

133. In result, the appeal of the Assessee is partly allowed for statistical purpose.

Order pronounced in the Open Court on 13th June, 2018.

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 13/06/2018
*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

