

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "K", MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA Nos.1776 & 1777/M/2017
Assessment Years: 2003-04 & 2004-05**

Asst. Commissioner of Income Tax, (Large Taxpayer Unit)-1, World Trade Centre, Centre 1, 29 th Floor, Cuffe Parade, Mumbai - 400 005	Vs.	M/s. Johnson & Johnson Ltd., 501, Arena Space, Off JVLR, Opp: Majas Bus Depot, Jogeshwari (E), Mumbai-400 060 PAN: AAACJ 0866E
(Appellant)		(Respondent)

**CO No.242/M/2017
(Arising out of ITA No.1777/M/2017)
Assessment Year: 2004-05**

M/s. Johnson & Johnson Private Ltd., (Formerly known as Johnson & Johnson Ltd.) 501, Arena Space, Off JVLR, Opp: Majas Bus Depot, Jogeshwari (E), Mumbai-400 060 PAN: AAACJ 0866E	Vs.	Asst. CIT (LTU)-1, Mumbai World Trade Centre, Centre 1, 29 th Floor, Mumbai - 400 005
(Appellant)		(Respondent)

Present for:

Assessee by : Shri M.P. Lohia, A.R. &
Shri Pranay Gandhi, A.R.

Revenue by : Shri Saurabh Deshpande, D.R.

Date of Hearing : 07.06.2018

Date of Pronouncement : 18.06.2018

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled two appeals by the Revenue and the cross objection by the assessee have been preferred against

the common order dated 29.11.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2003-04 & 2004-05.

ITA No.1776/M/2017 (A.Y. 2003-04)

2. The various grounds raised by the Revenue are as under:

"1. On the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred deleting the addition of Rs. 2,67,88,516/- on account of unaccounted production and sale.

2. On the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the Assessing Officer to grant credit in respect of retained MOD VAT credit relating to opening stock.

3. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition made on account of payment to MIs Crawford Bailey & Co u/s 40A'2)(b) of the Act though the assessee has not discharged its onus to prove the reasonableness.

4. On the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing depreciation on testing equipment provided to laboratories and hospitals free of charge even though such testing instruments were not used by the Assessee.

5. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the adjustment made on account of tax on brand usage royalty without appreciating the fact that as per Article 13 of the agreement for payment of royalty, no condition exists for royalty being net of taxes and approval taken from RBI cannot be consider to be augmenting the terms of agreement with the principal.

6. On the facts and circumstances of the case and in law, the Id. CIT(A) erred in deleting the adjustment made on account of payment of royalty on traded finished goods made by the assessee to J & J US.

7. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in allowing the technical knowhow royalty payment @ 2%/4% instead of 1% as done by the TPO.

8. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition on account of tax and R & D cess paid on know-how royalty on traded finished goods and manufactured products.

9. The appellant prays that the order of the Id. CIT(A) on the above grounds be

set aside and that of the Assessing Officer restored.

10. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”

3. The issue raised by the Revenue in ground No.1 is against the deletion of addition of Rs.2,67,88,516/- by the Ld. CIT(A) as made by the AO towards unaccounted production and sale. At the outset, the Ld. Counsel of the assessee submitted before the Bench that the issue is covered in favour of the assessee by the decision of the co-ordinate bench of the Tribunal in assessee's own case in A.Y. 2002-03. The Ld. Counsel further submitted that the appeal filed by the Revenue in A.Y. 2002-03 against the said order of the Tribunal stands dismissed by the Hon'ble Bombay High Court, a copy of which is filed in the paper book.

4. The Ld. D.R. reasonably appeared to be in agreement with the contentions of the Ld. A.R.

5. We find that the identical issue has been decided by the co-ordinate bench of the Tribunal in ITA No.4092/M/07 for A.Y. 2002-03 order dated 28.08.2013 wherein it has been held that production loss depends on number of factors and in absence of any comparable to show that loss shown by the assessee is excessive and thus the appeal was decided in favour of the assessee. The said case was decided by the coordinate bench following the order in assessee's own case for A.Y. 1991-92 in ITA No.1146/M/1997. In the present case, we find that no evidence of purchases and sales outside the books of accounts were brought before the authorities below.

We, therefore, following the order of the co-ordinate bench of the Tribunal in the earlier years, dismiss the ground raised by the Revenue. We also note that the Hon'ble Jurisdictional Bombay High Court has not entertained the appeal by the Revenue on this issue by holding that there was no substantial question of law involved.

6. The issue raised in ground No.2 is against the direction of Ld. CIT(A) to AO to grant credit in respect of retained modvat credit relating to the opening stocks. After perusal of the record and hearing both the parties, we find that the issue is squarely covered by the order of the co-ordinate bench of the Tribunal wherein the same was restored to the file of AO with the direction to decide the issue afresh in the light of direction of the Tribunal in ITA No.2680/M/2003. The relevant operative extracts are reproduced below:

"7. We have carefully perused the orders of the lower authorities and we have also the benefit of the order of the Tribunal in assessee's own case in ITA No. 2680/M/03. We find that the Tribunal has considered this issue at para-95 of its order and at para-96 has held as under:

"Rival contentions heard. After hearing both the parties, we find that though this issue is similar to the issue raised in earlier years, however, provisions of section 145A, has been brought on statute w.e.f. 1st April 1999. Therefore, the same will be applicable in the assessment year 1999--2000. Consequently, we set aside the impugned order passed by the learned Commissioner (Appeals) and restore the issue back to the file of the Assessing Officer for denovo adjudication in the light of the provisions of section 145A. The Assessing Officer is also directed to give corresponding benefit in the opening stock in view of the judgment of Jurisdictional High Court in [CIT vs. Mahalaxmi Glass Works P. Ltd.](#) (2009) 318 ITR 116 (Bom) and the judgement of Delhi High Court in Mahavir Alluminium Ltd. (2008) 297 ITR 077 (Del). Thus, ground no.2, is allowed for statistical purposes."

Respectfully following the decision of the Tribunal, we restore this issue back to the files of the AO. The AO is directed to decide this issue afresh in the light

of the direction of the Tribunal mentioned hereinabove. Ground No. 1 to 3 raised by the assessee are allowed for statistical purpose.”

7. The Hon'ble Bombay High Court has not entertained the appeal raising a substantial question of law filed by the Revenue against the decision of the co-ordinate bench of the Tribunal on this issue. We, therefore, following the decision of the Tribunal, restore this issue back to the file of the AO to decide the same as directed hereinabove.

8. The issue raised in ground No.3 is against the deletion of addition by Ld. CIT(A) relating to the disallowance as made by the AO under section 40A(2)(b) in respect of payments made to Crawford Bailey & Co. The Ld. A.R. as well as the Ld. D.R. agreed that issue involved in this ground of appeal is covered in favour of the assessee by the decision of the co-ordinate bench of the Tribunal in ITA No.4092/M/07 for A.Y. 2002-03 vide order dated 28.08.2013 in assessee's own case. We have perused the said order and found that the issue is squarely covered in favour of the assessee. The operative para of the coordinate bench decision is extracted as under:

“72. Similar issue came up for hearing in assessee's appeal before the Tribunal in A.Y. 2001-02 in ITA No. 9437/M/04 wherein the Tribunal has deleted the addition mentioning that in order to make any disallowance u/s. 40A(2)(b), it is for the AO to bring on record some material to indicate that the payment was in fact excessive having regard to the fair market value of goods or services for the legitimate needs of the business. We find that during the year under consideration, The AO has disallowed invoking provisions of Sec. 40A(2)(b) on fees paid for legal counseling. We find that the Ld. CIT(A) has deleted the addition holding that for the payments for legal counseling, it is futile to think of comparables because counsels may not charge standard fee but may charge according to the issue involved. The Ld. CIT(A) further observed that if the AO wanted to disallow on the ground of excessive payment, he ought to have established excessiveness of the payment. This has not been done. Considering the decision of the Tribunal in assessee's own case, in the

light of the observations made by the Ld. CIT(A), we do not find any reason to interfere with the findings of the Ld. CIT(A). Ground No. 7 is accordingly dismissed.”

9. A perusal of the decision of the co-ordinate bench of the Tribunal reveals that for the purpose of making disallowance under section 40A(2)(b) of the Act, the AO has to demonstrate the excessive or unreasonable payment in the current year also vis a vis the market rate of such services. The AO has failed to prove that payment is unreasonable and excessive and we, therefore, following the co-ordinate bench of the Tribunal and maintaining the consistency with the earlier year, dismiss the ground raised by the Revenue. Pertinent to mention that the substantial question of law raised by the Revenue before the Hon'ble Jurisdictional High Court stands before the dismissed.

10. The issue raised in ground No.4 is against the decision of Ld. CIT(A) allowing the depreciation on testing equipment provided to laboratories and hospitals free of charge even though such testing instruments were not used by the assessee in his business.

11. We have heard the rival submissions of both the parties and perused the material on record. During the course of hearing both the parties agreed that the issue involved is squarely covered in favour of the assessee by the decision of the co-ordinate bench of the Tribunal in ITA No.4092/M/2007 for A.Y. 2002-03 order dated 28.08.2013 wherein it has been held that the assessee is entitled to the depreciation on testing

equipments provided to the laboratories and hospitals free of charge. The relevant extract is reproduced as under:

“82. Ground No. 12 relates to depreciation on testing equipments amounting to Rs. 34,50,441/-. This issue has been considered by the AO at para-14 on page-17 of his order and the Ld. CIT(A) has considered the same at para-20 on page-25 of his order.

83. A similar issue came up for hearing before the Tribunal in assessee's own case for A.Y. 2000-01 and 2001-02 in ITA Nos. 2774 & 9106/M/04 wherein the Tribunal has decided this issue in favour of the assessee following the decision of the Tribunal in the case of NR Jet Enterprises Ltd. in ITA No. 4474/M/04. Facts and circumstances being identical, respectfully following the decision of the Tribunal in assessee's own case ground No. 12 is dismissed.”

12. Therefore, we, respectfully following the decision of the co-ordinate bench of the Tribunal, dismiss the ground raised by the Revenue. Moreover, the substantial question of law raised by the Revenue on this issue stands dismissed by the Hon'ble Jurisdictional High Court.

13. The issue raised in ground No.5 is against the deletion of adjustment made on account of tax on brand usage royalty by Ld. CIT(A) as made by the AO under Article 13 of the agreement for payment of royalty which was paid net of taxes after obtaining the approval from the RBI. The Ld. A.R. submitted before the Bench that issue is squarely covered by the decision of the co-ordinate bench of the Tribunal in favour of the assessee in ITA No.4092/M/2007 for A.Y. 2002-03 order dated 28.08.2013 which was fairly conceded by the Ld. D.R.

14. After hearing both the parties and perusing the decision of the co-ordinate bench of the Tribunal, we find that that the issue is covered in favour of the assessee by the decision of

the co-ordinate Bench. The relevant extract is reproduced as under:

“34. We have heard the rival submissions, perused the orders of the lower authorities and also the copy of agreement submitted alongwith application to RBI as exhibited at pages 1143 to 1145 of the Paper book. We find that the application made by the assessee to RBI for brand usage agreement specifically mentions that the royalty to be remitted is net of taxes. Further, the approval was received from the RBI to remit the royalty on brand usage by the assessee @ 1% net of taxes. Considering the brand usage agreement vis-à-vis the approval granted by RBI, it can be safely inferred that taxes were liability of J&J India under the terms of agreement. The assessee has entered into a commercial arrangement with J&J US and it has been so arranged that the payment of taxes have to be borne by the assessee being a commercial arrangement, the same should not be questioned while calculating arm's length price. Reliance by the assessee on the decision of the Tribunal in the case of Dresser Rand India Pvt. Ltd. in ITA No. 3509/M/08 is well founded. Considering the entire facts in totality in the light of the brand usage agreement and the approval of the RBI, the findings of the Ld. CIT(A) is set aside. The AO is directed to delete the addition of Rs. 60,00,000/-. Ground No. 13 is allowed.”

15. Since the issue in hand is identical to one as decided by the co-ordinate bench of the Tribunal, we, therefore, respectfully following the same dismiss the ground raised by the Revenue.

16. The issue raised in ground No.6 is against the deletion of adjustment by the Ld. CIT(A) as made by the AO towards payment of royalty on traded finished goods made by the assessee to J & J US.

17. We have heard the rival submissions of both the parties and perused the decisions cited by the Ld. A.R. After perusal of the said order, we find that the issue is covered in favour of the assessee by the decision of the co-ordinate bench of the Tribunal in ITA No.4092/M/07 for A.Y. 2002-03 order dated

28.08.13 which was conceded by the Id DR. The operative part is reproduced as under:

“49. We have considered the rival submissions, perused the orders of the lower authorities and the material evidence brought on record in the form of paper book. In assessee's appeal, we have already held that the agreements between J&J India and J&J USA for payment of royalty has to be considered in the light of the approval of the RBI. We do not find any substance in the findings of the TPO that there is no need for paying royalty for technical/marketing know-how. We also do not find any force in the findings of the TPO that this royalty is deemed to be included in the Brand royalty. The Ld. CIT(A) has rightly considered the relevant clauses of the agreement between J&J India and J&J USA. We, therefore, do not find any reason to interfere with the findings of the Ld. CIT(A). Ground No. 1 is accordingly dismissed.”

18. We, therefore, following the decision of the Tribunal, dismiss the ground raised by the Revenue as the issue stands settled in the earlier year as discussed hereinabove.

19. The issue raised in ground No.7 is against the order of Ld. CIT(A) allowing the technical knowhow royalty payment @ 2%/4% instead of 1% as done by the TPO. The Ld. A.R. pointed out that the issue is covered in favour of the assessee by the decision of the co-ordinate bench of the Tribunal in ITA No.4092/M/07 for A.Y. 2002-03 order dated 28.08.13 which was fairly conceded by the Ld. D.R.

20. We have perused the said decision which is in favour of the assessee. The operative part is extracted below:

“52. The Ld. CIT(A) has considered this issue at page-12 para-6 of his order. It was strongly contended before the Ld. CIT(A) that the TPO has not provided any sound basis for restricting this royalty. After considering the facts and submissions of the assessee, the Ld. CIT(A) was convinced that the restriction by the TPO to 1% is without any basis and allowed the appeal.

53. Before us, the Ld. DR strongly supported the findings of the TPO.

54. The Ld. Counsel for the assessee reiterated that the payment is based as per the agreement entered into between J&J India and J&JUSA.

55. We have considered the submissions and perused the orders. As we have already held hereinabove that the payment of royalty has to be considered in the light of the agreement between the assessee and J&J USA, for the same reasons, we do not find any reason to interfere with the findings of the Ld. CIT(A). Ground No. 2 is accordingly dismissed.”

21. Since the issue in hand is identical to one as decided by the co-ordinate bench of the Tribunal, we, therefore, respectfully following the same dismiss the ground raised by the Revenue.

22. The issue raised in ground No.8 is against the deletion of addition on account of tax and R & D cess paid on know-how royalty on traded finished goods and manufactured products. The Ld. A.R. pointed that the issue is covered in favour of the assessee by the decision of the co-ordinate bench of the Tribunal in ITA No.4092/M/07 for A.Y. 2002-03 order dated 28.08.13 which was fairly conceded by the Ld. D.R.

23. We have perused the said decision which is in favour of the assessee. The operative part is extracted below:

“41. Ground No. 16 relates to the disallowance of tax and R&D cess paid on technical know-how royalty.

42. The TPO has disallowed the withholding tax and R&D Cess and technical know-how royalty. The Ld. CIT(A) has confirmed the decision of the TPO holding that withholding tax and R&D Cess can only be allowed only to the extent they are payable on allowable royalty. As we have already held elsewhere that royalty payments has been approved by RBI and therefore deserves to be allowed. Accordingly as the payments have been made in the light of the agreement with J&J US and as per the approval/guidelines of the RBI, we do not find any reason to disallow the tax and R&D Cess paid on technical royalty. We accordingly direct the AO to delete the addition made on this account. Ground No. 16 is accordingly allowed.”

24. Since the issue in hand is identical to one as decided by the co-ordinate bench of the Tribunal, we, therefore, respectfully following the same dismiss the ground raised by the Revenue.

25. Resultantly, the appeal of the Revenue is dismissed.

ITA No.1777/M/2017 (for A.Y. 2004-05)

26. The issue raised in ground Nos.1, 2, 3, 4, 8, 9 & 10 are identical to one as decided by us in ITA No.1776/M/2017 in ground Nos.1, 2, 3, 4, 5, 6 & 7 which were dismissed. Therefore, our finding in ITA No.1776/M/2017 would, mutatis mutandis, apply to the above grounds in ITA No.1777/M/2017 as well. Accordingly, these grounds raised by the Revenue are dismissed.

27. The issue raised in ground No.5 is against the decision of the Ld. CIT(A) holding that addition of Rs.5,69,60,372/- being remission of sales tax (deferral sales tax liability) under package scheme of incentives of Government of Maharashtra is not chargeable to tax as 'Business income' of the assessee company u/s 41(1) of the Act. The Ld. A.R. submitted that the issue is covered in favour of the assessee by the decision of the Hon'ble jurisdictional Bombay High Court in the case of CIT vs. Sulzer India Ltd. [2014] 369 ITR 717 (Bom) and the decision of the Apex Court in the case of CIT vs. Balkrishna Industries Ltd. (2017) 88 taxmann.com 273 (SC) which was fairly conceded by the Ld. D.R.

28. We have heard the rival submissions of both the parties and perused the material on record including the decisions cited by the Ld. A.R. The undisputed facts are that the assessee availed the benefit of sales tax deferral scheme offered by the State of Maharashtra for its Aurangabad plant. Under the said scheme the company has deferred the sales tax liability to the tune of Rs.13,14,79,300/- for the period ending from September 1999 to March 31.09.2008. Thereafter, the said deferred sales tax liability has been converted into interest free loan payable to Ckom vide agreement dated 10.05.1994 between the Government of Maharashtra through the implementing agency Ckom and the assessee. Under the said scheme the assessee repaid the sales tax loan prior to the due dates by making payments at the discounted rate i.e. at net present value. Under the said scheme the net present value of the sales tax liability as repaid till financial year 2003-04 was Rs.7,72,28,628/- against the outstanding of Rs.13,41,89,000/-. Thus the difference of liability as on 31.03.03 Rs.5,69,60,373/- was written back during the year as not being payable anymore. The said amount was not offered to tax by the assessee as the same is a capital receipt. The AO did not find the reply of the assessee satisfactory and added the same to the income of the assessee. The first appellate authority also allowed the appeal of the assessee. The Ld. CIT(A) allowed the appeal of the assessee by holding that the remission of sales tax liability is not chargeable to tax as business income of the assessee under section 41(1) of the Act. We have perused the decision

cited before us in the case of CIT vs. Sulzer India Ltd. (supra) wherein the Hon'ble Bombay High Court has held that where the assessee has made premature payment of deferral sales tax at net present value against the total liability and credited the balance to its capital reserve account. The said credited amount was a capital receipt and could not be a remission or cessation of trading liability under section 41(1). In the case of CIT vs. Balkrishna Industries Ltd. (supra) the Hon'ble Supreme Court has decided the issue in favour of the assessee by holding that the premature payment of sales tax liability under Sales Tax Deferral Scheme of 1983 would not amount to remission or cessation of assessee's liability. So far as the excess of liability over the payments at net present value were made by the assessee is concerned that can not be treated as remission or cessation of assessee. In view of the facts of the assessee's case and the ratio laid down in the above decisions, we are of the considered view that the case of the assessee is squarely covered in assessee's favour and accordingly we dismiss the ground raised by the Revenue.

29. The issue raised in ground No.6 is against the decision of Ld. CIT(A) holding that refund of Rs.37,98,20,369/- made to NPPA is an amount which is hit by the explanation 1 of section 37 of the Act and allowed as deduction. The Ld. A.R. submitted that the issue is covered in favour of the assessee by the decision of the co-ordinate bench of the Tribunal in assessee's own case in ITA No.675/M/2009 for A.Y. 1999-

2000 vide order dated 18.01.2013 which was fairly conceded by the Ld. D.R.

30. We have heard the rival submissions of both the parties and perused the material on record. We find that the identical issue was decided by the co-ordinate bench of the Tribunal in assessee's own case in ITA No.675/M/2009 (supra). The operative portion which is reproduced as under:

"135. We have considered the rival contentions, perused the orders of the authorities below and the material available on record. The assessee, which is also engaged in the manufacturing of drugs, was selling scheduled drugs. The NPPA which is a Government authority is responsible for implementation of the provisions of drug price and control and/or is competent to fix the price of scheduled drugs by taking into consideration certain cost parameter. The assessee was charging ₹25 per strip of Raricap tablet. Later on, the NPPA, vide order dated 7th August 1996, fixing the revised price of Raricap tablet at ₹16.24. Immediately thereafter, the assessee on 19th August 1996, filed a detail reply that price of ₹25, was approved under DPCO, 1987 and, therefore, requested the Government to furnish the cost data so that the revised application can be filed. Subsequently, on 30th March 1997, the assessee discontinued to manufacture Raricap tablet. On 24th September 1998, a notice was issued from NPPA determining the total over charged amount of ₹5.32 crores from the period of August 1996 to August 1998. Against the said notice, the assessee filed Writ Petition before the Delhi High Court. The Delhi High Court, vide its judgment dated 23rd November 1998, passed an interim order and directed the assessee to deposit ₹1.50 crores with NPPA till the disposal of the Petition. On 10th December 1998, payment of ₹1.50 crores was paid to NPPA based on such interim order of the High Court. From the records, it is seen that the assessee has been regularly filing replies to the NPPA for giving justification for reducing the price and the working of the cost. However, without reverting to the assessee's reply on 1st November 2002, a revised order was passed by the NPPA whereby it determined the total overcharged amount of ₹1,56,06,224, for the period from 20th August 1998 to 31st March 1997 and further interest of ₹50,38,024. On 1st July 2008, the Delhi High Court disposed off the Writ Petition quashing the earlier order of the NPPA and directed to pass order afresh for fixing the price. On 18th December 2009, NPPA again passed an order on similar lines confirming the demand of ₹1,56,06,224 and asked the assessee to pay the balance demand by May 2009, as the assessee had already deposited ₹1.50 crores. In the assessment year 1999-2000, what the assessee has claimed is a sum of ₹1.50 crores only which has been deposited to the NPPA in view of the interim order passed by the High Court in its Profit & Loss account. After going through various notifications and relevant provisions of [The Essential Commodities Act, 1955](#), we find that there are separate provisions for penalty and interest and the sum of ₹1.50 crores, which has been paid is the refund of excess price paid by the assessee to NPPA. Hence,

there is no violation and infringement of any law or Government's order. The assessee has been kept on representing before the NPPA for the justification of the cost for which no reply or order was passed by the NPPA in respect to the same. Finally, the amount was determined at ₹1.56 crores which only include the principal amount of the refund. Thus, the payment of ₹1.50 crores made on 10th December 1998, which falls in assessment year 1999-2000, is an allowable expenditure under [section 37\(1\)](#) and, therefore, the same is allowed as revenue expenditure. Various case laws relied upon by the learned Counsel are not dealt with as on the facts of the case itself, we allow the assessee's ground on merit.”

31. The facts of the present case being materially same to the one as decided by the co-ordinate bench of the Tribunal as referred to hereinabove, we, therefore, maintaining the consistency with the earlier year, dismiss the ground raised by the Revenue.

32. The issue raised in ground No.7 is against the decision of CIT following the order of ITAT in assessee's own case wherein it is held that brand usage royalty was payable without a formal deed and based on commercial expediency, despite the assessee failing to provide sufficient evidence to prove its liability during the period.

33. After hearing both the parties and perusing the material on record, we find that J & JUS India has paid brand usage royalty to J & JUS @ 1% of net sales based on agreement dated 14.03.2002. After hearing both the parties and perusing the records as placed before us carefully, we find that the payment of brand usage royalty at 1% has not been disputed by the TPO and was not subject matter before the Ld. CIT(A) and accordingly the ground raised by the Department

in A.Y. 2004-05 is out of context and infructuous in nature and accordingly the same is dismissed.

34. Appeal of the Revenue is dismissed.

CO No.242/M/2017 (A.Y. 2004-05)

35. We have already dismissed the appeal of the Revenue. Therefore, the cross objection filed by the assessee in support of the order of Ld. CIT(A) is infructuous and accordingly dismissed.

36. In the result, both the appeals of the Revenue as well as cross objection of the assessee are dismissed.

Order pronounced in the open court on 18.06.2018.

**Sd/-
(Mahavir Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 18.06.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.