

आयकर अपीलिय अधीकरण, न्यायपीठ – “ए” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “A” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.309, 310 & 312/Kol/2017
Assessment Years :2003-04, 2004-05
& 2010-11

M/s Saregama India Ltd., 33, Jessore Road, Dum Dum, Kolkata-028 [PAN No. AACT 9815 B]	V/s.	DCIT, Circle-3(1), Aaykar Bhawvan, 7 th Floor, Kolkata-700 069
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

ITA No.470-473/Kol/2017
Assessment Years : 2003-04 to 2006-07

DCIT, Circle-3(1), Aaykar Bhawvan, 4 th Floor, Room No. 19, P-7, Kolkata-700 069	V/s.	M/s Saregama India Ltd., 33, Jessore Road, Dum Dum, Kolkata-028 [PAN No. AACT 9815 B]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri J.P. Khetan, Senior Advocate & Shri P. Jhunjhunwala, Advocate
राजस्व की ओर से/By Revenue	Shri Ram Bilash Meena, CIT-DR & Shri Dhruvajyoti Roy, JCIT-DR
सुनवाई की तारीख/Date of Hearing	13-01-2020
घोषणा की तारीख/Date of Pronouncement	29-01-2020

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

The instant batch of seven cases pertains to a single assessee M/s Saregama India Ltd. First two assessment year(s) 2003-04 & 2004-05 involve

assessee's and Revenue's cross appeal(s) ITA No.309 and 470/Kol/2017 and ITA Nos. 310 & 471/Kol/2017. Assessment year(s) 2005-06 and 2006-07 contain latter appeal(s) ITA No.s 472 & 473/Kol/2017 and assessment year 2010-11 includes taxpayer's appeal ITA No.312/Kol/2017, arising against the Commissioner of Income Tax (Appeals)-22 Kolkata's separate orders; dated 07.12.2016 (**former two**), 08.12.2016 (**in 3rd and 4th**) and 09.12.2016 (**in last assessment year**) passed in case No.s.155/CIT(A)-22/Kol/03-04/15-16, 157/CIT(A)-22/Kol/04-05/15-16, 156/CIT(A)-22/Kol/10-11/15-16, 160/CIT(A)-22/Kol/01-02/15-16 & 163/CIT(A)-22/06-07/15-16, assessment year-wise; respectively relevant proceedings in all cases are u/s 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Learned Shri J.P.Khetan, Senior Advocate / authorized representative with Shri P. Jhunjhunwala representing assessee and Shri Meena, learned CIT-DR and Shri Roy appearing at the Revenue's behest. Case file(s) perused.

2. A combined perusal of the seven appeal(s) suggests that various issues raised herein are almost identical / inter-connected. These seven appeal(s) are therefore disposed of vide our instant common adjudication.

We proceed assessment year-wise / issue-wise for the sake of convenience and brevity.

Assessment Year:2003-04:-

3. The Revenue's seven substantive grounds in its appeal ITA No.470/Kol/2017 seek to reverse the CIT(A)'s action deleting minimum guarantee royalty payments disallowance addition of ₹19,62,00,000/-, restricting advertisement / sales promotion, consultancy expenses, other ad hoc expenses and recording expenses involving varying sums from 10% estimated disallowance made in the course of assessment to 2% in lower appellate proceedings deleting disallowance of training and development expenses of ₹1982,000/- by treating it under revenue than capital head and shortage of stock breakage (**pre-recorded cassettes**) disallowance of ₹54 lakhs; respectively made by the Assessing Officer during the course of

assessment. The assessee's cross-appeal **ITA No.309/Kol/2017** also raises four identical issues as are in Revenue's substantive grounds No. 2 to 5 seeking to delete the entire 2% estimated disallowance(s) as well.

4. It in this backdrop of pleadings that we come to Revenue's first substantive ground seeking to revive the Assessing Officer's action disallowing the assessee's minimum guarantee royalty of ₹19,62,00,000/- as capital in nature. The CIT(A)'s detailed discussion takes into consideration the assessee's stand adopted throughout as well as Assessing Officer's findings whilst disallowing the impugned claim as follows:-

"04. Ground no.1(a) to 1(c) taken by the appellant-company relate to the action of the Ld. AO in disallowing a sum of Rs.19,62,00,000/- incurred by the appellant during the year on account of MG royalty by treating the same as capital expenditure. The matter has been dealt with by the Ld. AO as under:

1. M.G. Royalty:

"Examination of computation of total income enclosed with the return reveal that the assessee has added Rs.32,72,15,567/- as debited to P&L a/c. under the head royalties and subsequently Rs.34,50,15,567/- have been deducted to arrive at the loss as returned by the assessee. The assessee was asked to file details with respect to these items and In course of hearing the assessee submitted that **"out of total deducted amount of Rs.34,50,15,567/-, Rs.19,62,00,00/- is minimum guaranteed royalty"**. The assessee was asked to submit copy of agreement along with names and addresses of the parties in respect of minimum guaranteed royalty and the same was submitted its examination reveal that the assessee has acquired the absolute right of production and sale of cassettes, compact disc etc. its nature appeared to be capital in nature because this payment is one time contractual expenditure Incurred for the purpose of acquiring the absolute/monopoly right. As the right with respect to production of music cassettes/CD is a capital asset hence the assessee was asked to explain as to why the same should not be disallowed. The assessee submitted reply on 17.02.2006 - "As your kind self is aware, that the company is engaged inter-alia in the business of manufacture and sale of audio cassettes, CDs etc. and also in production of films/TV serials etc. For this purpose, the company enters into agreements with various producers etc. for purchasing the right to reproduce film -music (hereinafter referred to as '**music**') on payment or royalty. It may be pertinent to mention that in the nature of business in which the company is engaged, such right to reproduce the sell music obtained by the company under these agreements from the respective producers constitute its basic raw material. In some of the said agreement entered by the company with the respective producers, the music is purchased on the terms that a minimum guaranteed payment would be made to the producer tiff a specific sale volume is reached. After such specified sale Volume, the producers are entitled to receive further royalty depending on the sale volume achieved by the company.

For the purpose of its accounts, the company consistently treats and amortizes the same over a few years. In the previous year relevant to the

A.Y.2003-04, the company in the return of Income had claimed Rs.34,50,15,567/- being the expenditure incurred on royalty used wholly and exclusively for the purpose of its business. On the other hand, In the return of income the company had added back the entire amount of Rs.33,72,15,567/- debited in its profit and loss account under the head 'royalty'. The said claim of Rs.34,50,15,567/- also Included MG royalty accrued during the year of Rs.19,62,00,000/-.The said details are already furnished before your kind self under the cover letter dated 14th November, 2005.

As explained above, the company's business is that of manufacturing of recorded music cassette and CDs which it sells to the public at large and In the normal course of its business the company requires music as its raw materials. Since the company's business it consist of reproducing and selling recorded music, the MG royalty payment for the purchase of the original music is payment towards purchase of such raw material. The expenditure has been incurred out of business necessity and further the payment is related to the conduct the company's business that it must be regarded as an integral part of the profit earning process and not for acquisition of any right of a permanent character.

Your kind self-attention is also drawn to the decision of the Hon'ble Kolkata Tribunal in the company's own case for A.Y.1984-85 [reported in 48 ITO 145, 156, 157 (Ca I)] wherein the Hon'ble ITAT has held that "**Considering the nature of the assessee's business, music must be treated as its raw material. The royalty payment is therefore is directly related to the raw material. It is for the purpose of obtaining the raw material.....** In the present case, applying the test laid down in the aforesaid decision, it is found that the assessee has to obtain music for the purpose of its business. The assessee's business itself consists of purchasing of music, reproducing the same in gramophone record and music cassette and selling them to the public. The Hon'ble Supreme Court itself in the aforesaid decision has laid down that the question of whether the particular expenditure is capital or revenue must be decided in large context of business necessity or expediency. Since, the assessee's business itself constitute of reproducing and selling recorded music, the royalty payment for the purchase of the original music, which forms the raw material, is an expenditure incurred out of business necessity such as a sugar manufacture require a sugarcane as its raw material. The payment is so related to the conduct of the assessee's business that it must be regarded as an integral part of the profit earning process and not for acquisition of any asset or any right of a permanent character".

"It is submitted that the principle laid down by the Hon'ble Tribunal would apply to all payment for purchase of raw material (**music**) Irrespective of the determination of the quantum/mode/terms of payment. On perusal of the order of the Hon'ble ITAT, it is clear that the music is the raw material of the company and purchasing of music is made to reproduce the same in music cassettes, CDs for selling them to the public. The Hon'ble ITAT has also compared the situation with a sugar manufacture who would require sugarcane as Its raw material. Since purchase of sugarcane for the manufacture of the sugar (**i.e. for the production**) is a revenue expenditure, purchase of music for the purpose of reproducing the same in the music cassette and CDs would also be a revenue expenditure. Your kind self would appreciate that by whatever method the payment is made (I.e. in the

form of MG royalty till a specified sale and then further royalty on achieving different sales volume), the payment is made for the purchase of the music i.e. the basis raw material and therefore the same should be allowed as a revenue expenditure.

Without prejudice to above, factually It is also submitted that the actual shelf life of the music for which expenditure by way of MG royalty is incurred by the company is very short (**being three to six months ref: Annexure 1**) and accordingly, the question of enduring advantage derived by the company from payment made towards MG royalty does not arise at all.”

The above contention of the assessee regarding consistently treating the MG royalty as revenue expenditure against the purchase of raw material, not of enduring benefit and other circumstantial facts does not alter the real facts that the assessee will derive and enjoy the benefits of such expenditure/investment for a longer period instead of limited to the concerned year only. It is true that the assessee has contended that the benefit by way of sale of these produced music are limited to a shorter period though not proved by documentary evidence does not extinguishes its right/claim over the acquired right to produce music as per agreement entered. Even in the agreement there is no clause of such extinction of right. The Hon'ble Supreme Court in the case of Mewar Sugar Mills Ltd. Vs CIT reported in 87 ITR 400 held that payment for obtaining monopoly/absolute right is a capital expenditure. In the instant case, the ratio of judgment is applicable because the persons from where/whom the right has been purchased cannot resale the right over it to other persons and for It M.G. Royalty for the production of fixed number of assets and royalty for subsequent number are payable/paid. The assessee in its explanation also took shelter to the judgment of the Hon'ble jurisdictional ITAT, Kolkata (**ITA No.1528/Cal/89**) and in assessee's own case for A. Y .1984-85 wherein it has been held that such expenditure on account of royalty is in the nature of revenue expenditure and accordingly it is allowable as deduction while computing the total income of the company under the provisions of the Act but this judgment is distinguished in as that it relates to royalty paid and not for M.G. Royalty paid for the acquisition of monopoly right.

The Hon'ble Supreme Court in the case of J.K. Cotton Manufactures Ltd. VS. CIT 101 ITR 221 to determine the nature of expenditure, several tests that have been evolved over the years by the Hon'ble Supreme Court as also by the High Court, and they may briefly be formulated as follows:

(i) Bringing into existence an asset or advantage of enduring nature would lead to the inference that the expenditure disbursed is of a capital nature. These terms, such as '**asset**' or '**advantage of enduring nature**' are, however, purely descriptive rather than definite and no rule of universal application can be laid down. Ultimately, the question will have to depend on the facts and circumstances of each case, namely, quality and quantum of the amount, the position of the parties, the object of the transaction which has impact on the business, the nature of trade for which the expenditure is incurred and the purpose thereof, etc.

(ii) An item of disbursement may be regarded as of a capital nature when it is relatable to fixed asset or capital, whereas if it is related to circulating capital or stock-in-trade It would be treated as revenue expenditure.

(iii) Expenditure relating to framework of business is generally capital expenditure.

In the similar circumstances, if the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business, it is properly attributable to capital and is of the nature of capital expenditure; if, on the other hand, it is not made for the purpose of bringing into existence any such asset or advantage but for running the business of working it with a view to produce the profits, it is revenue expenditure. This view has been confirmed by several decisions delivered by the Hon'ble Apex Court and other High Court of the law.

Assam Bengal Cement Co. Ltd. vs. CIT [1995] 27 ITR 34 (SC)/CIT vs. Shri Digvijay Cement Co. Ltd. [1986] 159 ITR 253 (Guj./Lakshmiji Sugar Mills Co. (P) Ltd. vs. CIT [1971] 82 ITR 376 (SC)/CIT Vs Menora Hosiery Works (P) Ltd. [1977] 109 ITR 714 (Bom.)/Premier Automobiles Ltd. vs. CIT [1984] 150 ITR 28 (Bom.)/CIT vs. Panipat Woollen & General Mills Co. Ltd. [1976] 103 ITR 66 (SC)/CIT vs. Amalgamated Jam bad Syndicate (P) Ltd. [1979] 117 ITR 698 (Cal.)/CIT vs. D. Mandal [1988] 41 Taxman 129 (Cal.)/CIT Vs. Zoroaster & Co. [1982] 133 ITR 559 (Raj.)/Hindustan Aluminium Corporation Ltd. vs. CIT [1983] 144 ITR 474 (Cal.)/Gujrat Mineral Development Corporation Ltd. vs. CIT [-1983]143 ITR 822 (Guj.).

The above argument of the assessee is not considered to be tenable with following observations:

1. The assessee has accepted that MG royalty is paid for acquiring absolute right for the reproduction of the music cassette/CD on a particular film as per agreement with various parties. Hence, the benefit coming to the assessee out of Investment/expenditure is a capital asset.

2. The observation/decision of the Hon'ble ITAT in the assessee's case referred above is distinguished because in that case the Issue considered was royalty as a whole but In the Instant case, it is, with respect to minimum guaranteed royalty without which the assessee cannot proceed to produce music/cassettes/CD etc. and this right cannot be withdrawn. The general royalty is related to expenses made after the production of specified number as mentioned in the agreement. The general royalty may be considered of revenue nature because it is paid at a specified rate on sales which means that the amount of royalty is variable with quantum of sale but in this case it is fixed and contractual and the company is competent to produce music only after entering the contract and making payment at the initial stage. In other words, the MG royalty is purchase price to acquire that right. Again, it can be inferred that even if no production of music/cassette is made even then MG royalty is to be paid because without making this payment company is not competent to produce the music cassette/CD.

In the circumstances, the above judgment is distinguished from the instant case and in view of these discussions, the payment/investments of MG royalty for Rs.19,62,00,000/- is considered as capital expenditure and the same is being added to the total income. [Addition: 19,62,00,000/-]"

05. During the course of the appeal, the appellant I Ld. A.R for the appellant - company have submitted as follows:

"Nos.1(a) -1(e): Minimum Guarantee Royalty: Rs.19,62,00,000/-

The appellant is engaged inter-alia in the business of manufacturing and sale of music cassettes, compact discs (CDs) etc. as stated above. For this purpose, the appellant enters into agreements with various producers etc. for purchasing the right

to reproduce film-music (hereinafter referred to as "**music**") on payment of royalty. Under the terms of these agreements the appellant purchases the music, reproduces It in cassettes and COs and sale the same to the public at large. It may be pertinent to mention that in the nature of business In which the appellant is engaged, such right to the music obtained by the appellant under these agreements from the respective producers constitutes its basic raw material.

In some of the agreements entered by the appellant with the respective producers, the music is purchased on the terms that a minimum guaranteed payment (hereinafter referred to as "**MG Royalty**") would be made to the producers till a specific sale volume is reached. After such specified sale volume, the producers are entitled to receive further royalty depending on the sale volume achieved by the company. Copy of such agreements with the Producers is enclosed herewith (**Pgs.1 - 114**).

For the purpose of its accounts, the appellant consistently treats the MG royalty paid during the year In terms of the said agreements as deferred revenue expenditure and amortizes the same over a few years. In computing its Income under the provisions of the Income Tax Act, the appellant had claimed expenditure incurred on account of MG royalty amounting to Rs.19,62,00,000/- as revenue expenditure to be allowed under section 37(1) of the Act. In its return of Income for the year under appeal while arriving at Its income chargeable to tax under the provision of the Act other than section 115JB, the appellant added back the entire amount of Rs.33,72,15,567/- debited in its profit & loss A/c. under the account-head '**royalty**' and claimed deduction of an aggregate amount of Rs.34,50,15,567/- which related to royalty accrued during the year. The said amount included MG royalty of Rs.19,62,00,000/- accrued during the year under appeal. A copy of the computation annexed with the return (**Pg. 115**).

On specific query raised by the Assessing Officer during the course of the assessment proceedings, the appellant duly furnished copies of agreements of MG Royalty and explained its contention towards allow ability of such MG royalty as revenue expenditure while computing its income chargeable to tax. The Assessing Officer however rejected the contention of the appellant by holding that the expenditure Incurred towards MG Royalty Is a capital expenditure as the same has been incurred to acquire the absolute right for reproduction and sale of cassettes. The appellant does not agree with the aforesaid action of the Assessing Officer for reasons stated herein below -

At the outset we would like to submit that the said Issue has been decided by your kind self in favour of the appellant in **Assessment Year 2002-03**. Your kind self In the said order has held that MG royalty Is allowable as revenue expenditure. Copy of the order dated **02-08-2005 for Assessment Year 2002-03** is attached (Pgs. 116-125). Further we would like to submit as follows:

(i) Raw Material is Music: The appellant's business is that of manufacturing of recorded music cassettes and COs which it sells to the public at large and In the normal course of its business the appellant requires music as its raw material. Such music is obtained from various sources including through the subject agreements under which the right to reproduce music is transferred and assigned to the appellant by the respective producers. Since the appellant's business itself consists of reproducing and selling recorded music, the MG Royalty payment for the purchase of the original music is payment towards purchase of such raw material. The expenditure has been incurred out of business necessity and further the payment is related to the conduct of

the appellant's business that it must be regarded as an integral part of the profit earning process and not for acquisition of any asset or any right of a permanent character.

The learned CIT(Appeals) may kindly note that the issue in hand is squarely covered in favour of the assessee by the decision of the Hon'ble Kolkata Tribunal in the assessee's own case for assessment year **1984-85**. A copy of the said order of the Kolkata Tribunal bearing ITA. No. 1528/Ca1/89 dated 13th July, 1993 is enclosed herewith (**Pgs, 126-144**).

Attention of the learned CIT(Appeals) is drawn to the decision of the Hon'ble Kolkata Tribunal in the appellant's own case for assessment year 1984 - 85 wherein it has been held at pages 15 - 16 & 17 (**Pgs. 140-142**) that "Considering the nature of the assessee's business, music must be treated as its raw- material. The royalty payment is therefore directly related to the raw-material. It is for the purpose of obtaining the raw material. In the present case, applying the test laid down in the aforesaid decision, it is found that the assessee has to obtain music for the purpose of its business. The assessee's business itself consists of purchasing of music, reproducing the same in gramophone records and music cassettes and selling them to the public. The Hon'ble Supreme Court itself in the aforesaid decision has laid down that the question whether a particular expenditure is capital or revenue must be decided in the larger context of business necessity or expediency. Since the assessee's business itself consists of reproducing and selling recorded music, the royalty payment for the purchase of the original music, which forms the raw material, is an expenditure incurred out of business necessity just as a sugar manufacturer would require sugarcane as its raw material. The payment is so related to the conduct of the assessee's business that it must be regarded as in Integral part of the profit earning process and not for acquisition of any asset or any right of a permanent character."

The learned CIT (Appeals) attention is drawn to page 13 (Pg. 138) of the aforesaid Hon'ble Tribunal's order where the agreement based on which the royalty paid has been stated at **Paragraph 11**. The said paragraph read as follows -

"The agreement with the producers of films for the purpose of obtaining the copyright in the film songs and music of the original sound track also contains the following clause:

(3)(A) The Producer hereby assigns and transfers and agrees to assign and transfer to the company absolutely and beneficially for the world:-

(i) The copyright for making records of all contract works which are made available to the Company under the terms of this Agreement and the copyright, performing right and all other rights title and interest in and to the literary dramatic and musical works embodied in the Producer's Films including all rights of publication, sound and television broadcasting public performance and mechanical reproduction of the said works.

(ii) The sole and exclusive right to make or authorise the making of any record embodying the contract recordings, either alone or together with any other recordings

On perusal of the said clause of the agreement stated hereinabove, the learned CIT(Appeals) would appreciate that in the case before the Hon'ble Kolkata Tribunal in appellant's own case for earlier year, the copyright and rights were transferred and

assigned by the producers to the company as has been done in the present case. Considering all these facts, the Hon'ble Tribunal held that royalty paid for purchasing of music was to be allowed as revenue expenditure as the said music was used as raw material in assessee's business. The Hon'ble Tribunal has held that the payment is so related to the conduct of the assessee's business that It must be regarded as in integral part of the profit earning process and not for acquisition of any asset or any right of a permanent character. It is submitted that the principle laid down by the Hon'ble Tribunal would apply to all payments for purchase of raw material.

It may be pertinent to mention that the said decision of the Hon'ble Kolkata Tribunal has attained finality as no appeal was preferred by the Revenue Authorities against subsequent rejection of its reference application under section 256(2) of the Act by the Hon'ble Calcutta High Court. It is submitted that as the Department has accepted the decision of the Hon'ble Tribunal, it is not open to the Department to agitate on the same issue again without just cause. Reliance in this regard is placed on the decisions of the Hon'ble Supreme Court in **Berger Paints India Ltd. vs. CIT [266 ITR 99 (SC.)]**, **CIT vs. Shivsagar Estate [257 ITR 59 (SC.)]** and **CIT vs. Narendra Doshi [254 ITR 606 (SC.)]** wherein it has been held that if the Revenue has not challenged the correctness of the law and has accepted it, then it is not open to the Revenue to challenge its correctness without just cause.

On perusal of the order of the Hon'ble Tribunal, it is clear that music is a raw material of the assessee company and purchasing of music (raw material) is made to reproduce the same in music cassettes and CDs for selling them to the public. The Hon'ble Tribunal has also compared the situation with a sugar manufacturer who would require sugarcane as its raw material. Since purchase of sugarcane for the purpose of manufacture of sugar (i.e. for the production) is a revenue expenditure, purchase of music for the purpose of reproducing the same in the music cassettes and CDs would also be revenue expenditure. The learned CIT (Appeals) would appreciate that by whatever method the payment is made (i.e. in the form of MG Royalty till a specified sale and then further royalty on achieving different sales volume), the payment is made for the purchase of the music i.e. the basic raw material and therefore the same should be allowed as revenue expenditure.

Moreover, the Assessing Officer had contradicted to his own stand by holding that "**so far as general royalty is concerned this expenditure is of revenue nature**" (by general royalty, he meant that royalty which is paid after achieving the sales volume up to which MG Royalty is paid) without appreciating the fact that the entire amount which is being paid to the producer in the form of MG Royalty and other Royalties, is the purchase price of "**music**" which is the raw material. If a part of the purchase price (other royalties) is allowable as revenue expenditure as held by the Assessing Officer, another part (MG Royalty) should also be revenue expenditure. It is submitted that a part of the purchase price of raw material cannot be treated as capital and another part as revenue. In this connection it may be humbly pointed out that the Assessing Officer has failed to understand the principle laid down by the Hon'ble Tribunal in appellant's own case (i.e. music is the raw material to appellant's business and based on this fact royalty paid for purchasing the music was allowable) and therefore has wrongly commented that the said decision of the Hon'ble Tribunal is not applicable to the instant case.

The attention of the learned CIT(Appeals) is drawn to the decision of the Hon'ble Mumbai Tribunal rendered in the case of **Tips Cassettes & Record Co. vs. ACIT [76 TTD 396, (Mum.)]** applying the principles laid down by the Hon'ble Supreme Court in **Empire Jute Co. Ltd. vs. CIT [124 ITR 1 (SC.)]** and **Alembic Chemical Works Ltd. vs. CIT [177 ITR 377 (SC.)]** it has been held that payment made by assessee, a

manufacturer and seller of audio cassettes and COs for acquiring copyrights of original sound-tracks of films by assignment from film producers for a fixed sum being payment for procurement of raw material was revenue expenditure. It may be kindly noted that in the aforesaid case before the Hon'ble Mumbai Tribunal, the assessee was manufacturer of audio cassettes and CDs and acquired sound tracks commonly known as "**audio rights**" from producers and for consideration the copyrights owned by the film producers were assigned to the assessee by way of written agreements. While deciding the issue, the Hon'ble Mumbai Tribunal had referred to the decision of the Hon'ble Supreme Court in R.B.Seth Mulchand Suganchand vs. CIT [86 ITR 647 (SC.)] where the case was that of mining leases where minerals are part of the land and have to be won, extracted and brought to the surface, expenditure for acquiring the right over or in the land to win the minerals would be of capital nature. It was also held that however, the mineral has already been gotten and is on the surface, expenditure incurred for obtaining the right to acquire the raw materials i.e. would be revenue expenditure. The Hon'ble Mumbai Tribunal held that in the case of production of audio cassettes the master cassette represents the original sound music is like the mineral which has already been gotten on the surface. The assessee had incurred expenditure for obtaining the right to acquire this music i.e. raw material and therefore applying the principle laid down by the Supreme Court the said expenditure was held to be revenue in nature.

Reference in this regard is also made to the decision of the Hon'ble Delhi Tribunal In Super cassettes Industries (P) Ltd. vs. CIT [41 ITD 530 (Del)] where besides making payment of royalty some initial payments was also made which has also been treated as revenue expenditure on the ground that the payment was made to obtain raw material for the business of the assessee. It was held that the "**master plate**" could be termed as raw material and the activity of the assessee was absolutely that of jobber. The plate in these circumstances would not be termed to be capital in nature. In para 11 of the order it is mentioned that: "**the initial payment of lump sum also does not change its basic character as elucidated above.**"

The attention of the learned CIT (Appeals) is drawn to the decision of the Hon'ble Supreme Court rendered in Gotan Lime Syndicate vs. CIT [59 ITR 718 (SC.)] wherein it has been held that the reason why the royalty has to be allowed as a revenue expenditure is the relation which it has to the raw material to be excavated or extracted: the more it is taken the more royalty is paid and the minimum payment or the dead rent also have the same characteristic. The Hon'ble Supreme Court in the said decision of Gotan Lime (Supra) has also held that "**on the facts of this case, we must hold that the royalty payment, including the dead-rent, have relation only to the lime deposits to be got. We, therefore, hold that the yearly payment of Rs.96,000/- should be treated as revenue expenditure.**"

The Hon'ble Supreme Court in Gotan Lime Syndicate (supra.) followed another Supreme Court decision In the case of Abdul Kayoom vs. CIT [44 ITR 689(SC.)] wherein it has been held that it is not the law in every case, that if an enduring advantage is obtained the expenditure for securing it must be treated as capital expenditure, for in the ordinary case, the cost of the material worked up in a manufactory is not a capital expenditure, it is a current expenditure, and does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of lump sum down secures supply of the raw material for a period extending over several years.

It is submitted that the aforesaid decisions of the Hon'ble Jurisdiction Tribunal In the appellant's own case, Hon'ble Mumbai & Delhi Tribunal which are directly on the issue and the decisions of the Hon'ble Supreme Court which laid down the principle

apply on all fours to the facts of the case and following the said decisions the learned CIT(Appeals) is requested to delete the disallowance of Rs.19,62,00,000/-, representing MG Royalty paid for the purpose of purchasing raw material i.e. music."

06. DECISION:

1. I have carefully examined the grounds 1(a) to 1(c) which arise on account of the action of the Ld AO in making a disallowance of **Rs.19,62,000/-** claimed by the appellant-company as Minimum Guarantee Royalty (**M G Royalty**). The Ld AO has treated the claimed expenditure as partaking the nature of Capital Expenditure, inter-alia on account of the following reasons:

a. The assessee-company has accepted that MG royalty is paid for acquiring absolute right for the reproduction of the music cassette/CD on a particular film as per agreement with various parties, and therefore the benefit coming to the assessee out of investment/expenditure is a capital asset.

b. The observation/decision of the Hon'ble ITAT in the assessee's case for the **A.Y 1984-85 [reported in 48 ITD 145, 156, 157 (Cal)]** is distinguished because in that case the issue considered was royalty as a whole but in the instant case, it is, with respect to minimum guaranteed royalty without which the assessee cannot proceed to produce music/cassettes/CD etc. and this right cannot be withdrawn.

c. The general royalty is related to expenses made after the production of specified number as mentioned in the agreement. The general royalty may be considered of revenue nature because it is paid at a specified rate on sales which means that the amount of royalty is variable with quantum of sale but in this case it is fixed and contractual and the company is competent to produce music only after entering the contract and making payment at the initial stage. In other words, the MG royalty is purchase price to acquire that right.

d. Again, it can be inferred that even if no production of music/cassette is made even then MG royalty is to be paid because without making this payment company is not competent to produce the music cassette/CD.

2. The detailed counter arguments of the appellant-company / Ld. A.Rs for the appellant, both during assessment proceedings as well as during appeal have been reproduced supra. In summary, it is the claim of the appellant-company that:

a. The appellant is engaged inter-alia in the business of manufacturing and sale of music cassettes, compact discs (CDs) etc. as stated above. For this purpose, the appellant enters into agreements with various producers etc. for purchasing the right to reproduce film-music (hereinafter referred to as "**music**") on payment of royalty. Under the terms of these agreements the appellant purchases the music, reproduces it in cassettes and CDs and sale the same to the public at large. It may be pertinent to mention that in the nature of business in which the appellant is engaged, **such right to the music obtained by the appellant under these agreements from the respective producers constitutes its basic raw material.**

b. In some of the agreements entered by the appellant with the respective producers, the music is purchased on the terms that a minimum guaranteed payment (hereinafter referred to as "**MG Royalty**") would be made to the producers till a specific sale volume is reached. After such specified sale volume, the producers are entitled to receive further royalty depending on the

sale volume achieved by the company. Copy of such agreements with the Producers is enclosed herewith (**Pgs.1 - 114**).

c. For the purpose of its accounts, the appellant consistently treats the MG royalty paid during the year in terms of the said agreements as deferred revenue expenditure and amortizes the same over a few years. In computing its income under the provisions of the Income Tax Act, the appellant had claimed expenditure incurred on account of MG royalty amounting to Rs.19,62,00,000/- as revenue expenditure to be allowed under section 37(1) of the Act. In its return of income for the year under appeal while arriving at its income chargeable to tax under the provision of the Act other than section 115JB, the appellant added back the entire amount of Rs.33,72,15,567/- debited in its profit & loss A/c. under the account-head '**royalty**' and claimed deduction of an aggregate amount of Rs.34,50,15,567/- which related to royalty accrued during the year. The said amount included MG royalty of Rs.19,62,00,000/- accrued during the year under appeal. A copy of the computation annexed with the return (**Pg. 115**).

d. On specific query raised by the Assessing Officer during the course of the assessment proceedings, the appellant duly furnished copies of agreements of MG Royalty and explained its contention towards allow ability of such MG royalty as revenue expenditure while computing its income chargeable to tax. The Assessing Officer however rejected the contention of the appellant by holding that the expenditure incurred towards MG Royalty is a capital expenditure as the same has been incurred to acquire the absolute right for reproduction and sale of cassettes.

e. At the outset we would like to submit that the said issue has been decided by your kind self in favour of the appellant In Assessment Year 2002-03. Your kind self in the said order has held that MG royalty is allowable as revenue expenditure. Copy of the order dated 02-08-2005 for Assessment Year 2002-03 is attached (**Pgs. 116-125**). Further we would like to submit as follows: **(i)** Raw Material is Music: The appellant's business is that of manufacturing of recorded music cassettes and COs which it sells to the public at large and in the normal course of its business the appellant requires music as its raw material. Such music is obtained from various sources including through the subject agreements under which the right to reproduce music is transferred and assigned to the appellant by the respective producers. Since the appellant's business itself consists of reproducing and selling recorded music, the MG Royalty payment for the purchase of the original music is payment towards purchase of such raw material. The expenditure has been incurred out of business necessity and further the payment is related to the conduct of the appellant's business that it must be regarded as an integral part of the profit earning process and not for acquisition of any asset or any right of a permanent character.

f. The learned CIT(Appeals) may kindly note that the issue in hand is squarely covered in favour of the assessee by the decision of the Hon'ble Kolkata Tribunal in the assessee's own case for assessment year **1984-85**. A copy of the said order of the Kolkata Tribunal bearing **ITA.No.1528/Cal/89** dated 13th July, 1993 is enclosed herewith (**Pgs. 126-144**).Attention of the learned CIT(Appeals) is drawn to the decision of the Hon'ble Kolkata Tribunal in the appellant's own case for assessment year 1984-85 wherein it has been held at pages 15 - 16 s.. 17 (**Pgs. 140-142**) that "**Considering the nature of the assessee's business, music must be treated as its raw-material. The**

royalty payment is therefore directly related to the raw-material. It is for the purpose of obtaining the raw material. In the present case, applying the test laid down in the aforesaid decision, it is found that the assessee has to obtain music for the purpose of its business. The assessee's business itself consists of purchasing of music, reproducing the same in gramophone records and music cassettes and selling them to the public. The Hon'ble Supreme Court itself in the aforesaid decision has laid down that the question whether a particular expenditure is capital or revenue must be decided in the larger context of business necessity or expediency. Since the assessee's business itself consists of reproducing and selling recorded music, the royalty payment for the purchase of the original music, which forms the raw material, is an expenditure incurred out of business necessity just as a sugar manufacturer would require sugarcane as its raw material. The payment is so related to the conduct of the assessee's business that it must be regarded as in integral part of the profit earning process and not for acquisition of any asset or any right of a permanent character. "

g. The learned CIT (Appeals) attention is drawn to page 13 (**Pg. 138**) of the aforesaid Hon'ble Tribunal's order where the agreement based on which the royalty paid has been stated at **Paragraph 11**. The said paragraph read as follows -

"The agreement with the producers of films for the purpose of obtaining the copyright in the film songs and music of the original sound track also contains the following clause:

(3)(A) The Producer hereby assigns and transfers and agrees to assign and transfer to the company absolutely and bona fide for the world:-

(i) The copyright for making records of all contract works which are made available to the Company under the terms of this Agreement and the copyright, performing right and all other rights title and Interest In and to the literary dramatic and musical works embodied In the Producers Films including all rights of publication, sound and television broadcasting public performance and mechanical reproduction of the said works.

(ii) The sole and exclusive right to make or authorise the making of any record embodying the contract recordings, either alone or together with any other recordings"

h. On perusal of the said clause of the agreement stated hereinabove, the learned CIT(Appeals) would appreciate that in the case before the Hon'ble Kolkata Tribunal In appellant's own case for earlier year, the copyright and rights were transferred and assigned by the producers to the company as has been done in. the present case. Considering all these facts, the Hon'ble Tribunal held that royalty paid for purchasing of music was to be allowed as revenue expenditure as the said music was used as raw material in assessee's business. The Hon'ble Tribunal has held that the payment is so related to the conduct of the assessee's business that it must be regarded as in **integral part of the profit earning process** and not for acquisition of any asset or any right of a permanent character. It is submitted that the principle laid down by the Hon'ble Tribunal would apply to all payments for purchase of raw material.

i. It may be pertinent to mention that the said decision of the Hon'ble Kolkata Tribunal has attained finality as no appeal was preferred by the Revenue Authorities against subsequent rejection of its reference application under section 256(2) of the Act by the Hon'ble Calcutta High Court. It is submitted that as the Department has accepted the decision of the Hon'ble Tribunal, it is not open to the Department to agitate on the same issue again without just cause. Reliance in this regard is placed on the decisions of the **Hon'ble Supreme Court in Berger Paints India Ltd. vs. CIT [266 ITR 99 (SC.)], CIT vs. Shivsagar Estate [257 ITR 59 (SC.)] and CIT vs. Narendra Doshi [254 ITR 606 (SC.)]** wherein it has been held that if the Revenue has not challenged the correctness of the law and has accepted it, then it is not open to the Revenue to challenge its correctness without just cause.

j. On perusal of the order of the Hon'ble Tribunal, it is clear that music is a raw material of the assessee company and purchasing of music (raw material) is made to reproduce the same in music cassettes and CDs for selling them to the public. The Hon'ble Tribunal has also compared the situation with a sugar manufacturer who would require sugarcane as its raw material. Since purchase of sugarcane for the purpose of manufacture of sugar (**i.e. for the production**) is a revenue expenditure, purchase of music for the purpose of reproducing the same in the music cassettes and CDs would also be revenue expenditure. The learned CIT (Appeals) would appreciate that by whatever method the payment is made (i.e. in the form of MG Royalty till a specified sale and then further royalty on achieving different sales volume), the payment is made for the purchase of the music i.e. the basic raw material and therefore the same should be allowed as revenue expenditure.

k. Moreover, the **Assessing Officer had contradicted to his own stand** by holding that "**so far as general royalty is concerned this expenditure is of revenue nature**" (**by general royalty, he meant that royalty which is paid after achieving the sales volume up to which MG Royalty is paid**) without appreciating the fact that the entire amount which is being paid to the producer in the form of MG Royalty and other Royalties is the purchase price of "**music**" which is the raw material. If a part of the purchase price (**other royalties**) is allowable as revenue expenditure as held by the Assessing Officer, another part (MG Royalty) should also be revenue expenditure. It is submitted that a part of the purchase price of raw material cannot be treated as capital and another part as revenue. In this connection it may be humbly pointed out that the Assessing Officer has failed to understand the principle laid down by the Hon'ble Tribunal in appellant's own case (**i.e. music is the raw material to appellant's business and based on this fact royalty paid for purchasing the music was allowable**) and therefore has wrongly commented that the said decision of the Hon'ble Tribunal is not applicable to the instant case.

l. The attention of the learned CIT(Appeals) is drawn to the decision of the Hon'ble Mumbai Tribunal rendered in the case of **Tips Cassettes & Record Co. vs. ACIT [76 TTJ 396,(Mum.)]** applying the principles laid down by the **Hon'ble Supreme Court in Empire Jute Co. Ltd. vs. CIT [124 ITR 1 (SC.)] and Alembic Chemical Works Ltd. vs. CIT [177 ITR 377 (SC.)]** it has been held that **payment made by assessee, a manufacturer and seller of audio cassettes and COs for acquiring copyrights of original sound-tracks of films by assignment from film producers for a fixed sum being payment for procurement of raw material was revenue expenditure**. It may be kindly noted that in the aforesaid case before the Hon'ble Mumbai Tribunal,

the assessee was manufacturer of audio cassettes and CDs and acquired sound tracks commonly known as "**audio rights**" from producers and for consideration the copyrights owned by the film producers were assigned to the assessee by way of written agreements. While deciding the issue, the **Hon'ble Mumbai Tribunal had referred to the decision of the Hon'ble Supreme Court in R.B.Seth Mulchand Suganchand vs. CIT [86 ITR 647 (SC.)]** where the case was that of mining leases where minerals are part of the land and have to be won, extracted and brought to the surface, expenditure for acquiring the right over or in the land to win the minerals would be of capital nature. It was also held that however, the mineral has already been gotten and is on the surface, expenditure incurred for obtaining the right to acquire the raw materials i.e. would be revenue expenditure. The Hon'ble Mumbai Tribunal held that in the case of production of audio cassettes the master cassette represents the original sound music is like the mineral which has already been gotten on the surface. The assessee had incurred expenditure for obtaining the right to acquire this music i.e. raw material and therefore applying the principle laid down by the Supreme Court the said expenditure was held to be revenue in nature.

m. Reference in this regard is also made to the decision of the Hon'ble Delhi Tribunal in Super Cassettes Industries (P) Ltd. vs. CIT [41 ITD 530 (Del)] where besides making payment of royalty some Initial payments was also made which has also been treated as revenue expenditure on the ground that the payment was made to obtain raw material for the business of the assessee. It was held that the "master plate" could be termed as raw material and the activity of the assessee was absolutely that of jobber. The plate in these circumstances would not be termed to be capital in nature. In para 11 of the order it is mentioned that: "**the initial payment of lump sum also does not change its basic character as elucidated above.** "

n. The attention of the learned CIT (Appeals) is drawn to the decision of the Hon'ble Supreme Court rendered in Gotan Lime Syndicate vs. CIT [59 ITR 718 (SC.)] wherein it has been held that the reason why the royalty has to be allowed as a revenue expenditure is the relation which it has to the raw material to be excavated or extracted: the more it is taken the more royalty is paid and the minimum payment or the dead rent also have the same characteristic. The Hon'ble Supreme Court in the said decision of Gotan Lime (Supra) has also held that "**on the facts of this case, we must hold that the royalty payment, including the dead-rent, have relation only to the lime deposits to be got. We, therefore, hold that the yearly payment of Rs.96,00/- should be treated as revenue expenditure**". The Hon'ble Supreme Court in Gotan Lime Syndicate (supra.) followed another Supreme Court decision in the case of Abdul Kayoom vs. CIT [44 ITR 689(SC.)] wherein it has been held that it is not the law in every case, that if an enduring advantage is obtained the expenditure for securing it must be treated as capital expenditure, for "in the ordinary case, the cost of the material worked up in a manufactory is not a capital expenditure, it is a current expenditure, and does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of lump sum down secures supply of the raw material for a period extending over several years.

o. It is submitted that the aforesaid decisions of the Hon'ble Jurisdiction Tribunal in the appellant's own case, Hon'ble Mumbai & Delhi Tribunal which are directly on the issue and the decisions of the Hon'ble Supreme Court

which laid down the principle apply on all fours to the facts of the case and following the said decisions the learned CIT(Appeals) is requested to delete the disallowance of Rs.19,62,00,000/-, representing MG Royalty paid for the purpose of purchasing raw material i.e. music.

3. After carefully perusing the action of the Ld.AO and the submissions of the Ld. A.Rs, I find that the identical issue has travelled to the Hon'ble ITAT on different occasions. The matter has also been decided in favour of the appellant-company for the A.Y 2001-02 by the First Appellate Authority in **Appeal No 902/CIT(A)- 1/C-3/2014-15 dated 11th March, 2015**. For the A.V 2002-03, the matter had travelled to the ITAT. The Hon'ble ITAT-"D"-Bench in their decision in **ITA No.2236 (Kol) / 2005** for the A.Y 2002-03 dated 22.06.2007 have adjudicated the matter in favour of the appellant-company. The relevant portion of the order of the **Hon'ble ITAT** is reproduced as under:

[quote]

"5. We have carefully gone through the arguments of the parties, the facts of the case and the documents on record and are Inclined to accept the order passed by the Ld CIT(Appeal) holding M G Royalty as revenue expenditure. In our considered view, given the nature of business of the assessee in the present case, it cannot be disputed that music is a raw material in the case of the assessee, a fact which has been confirmed by the Tribunal in A.Y 1984-85. It purchases music on payment of royalty and reproduces the same In musical cassettes, CDs manufactured and sold by It. Any payment for procuring raw material for one's business is an expenditure in the revenue field Irrespective of the mode of payment. Payment of a minimum guarantee and then recurring royalty thereafter for music (**raw material**) is nothing but mode of payment for purchase of raw material out of business. We find support in our above conclusion from the decision of the Hon'ble supreme Court in Gotam Lime Syndicate's case, wherein at page 726 of the Report, the Hon'ble Court held that " He had no doubt In his mind that rent and royalty payments would be deductible as revenue expenditure. In Pingle Industries Ltd Vs Commissioner of Income Tax, the assessee has already been allowed payments of royalty as revenue expenditure and the only dispute was regarding lump sum payment The reason **why royalty has to be allowed as revenue expenditure** must be the relation which the royalty has to the raw material which is going to be excavated or extracted. The more you take, the more royalty you pay, and the minimum payment or dead rent has also the same characteristic "**(emphasis ours)**". Further, we also find support to our above conclusion in the order passed by this Tribunal In the assessee's own case for the A. Y 1984-95, which is reproduced hereunder-

"12. In the present case, applying the test laid down in the aforesaid decision, it is found that the assessee has to obtain music for the purpose of its business. The assessee's business itself consists of purchasing of music, reproducing the same in gramophone records and music cassettes and selling them to the public. The Hon'ble Supreme Court itself in the aforesaid decision has laid down that the question whether a particular expenditure is capital or revenue must be decided in the larger context of business necessity or expediency. Since the assessee's business itself consists of reproducing and selling recorded music, the royalty payment for the purchase of the original music, which forms the raw material, is an expenditure incurred out of business necessity just as a sugar manufacturer would

require sugarcane as its raw material. The payment is so related to the conduct of the assessee's business that it must be regarded as an integral part of the profit earning process and not for acquisition of any asset or any right of a permanent character. "(emphasis ours)

We are of the considered view that the aforesaid principle emerged from the said order of the Hon'ble tribunal in the assessee's own case would also hold good in the case of the assessee for M G Royalty paid for purchase of music, i.e. raw material in the year under consideration. In this respect we must point out that expenditure incurred for purchase of raw material is always revenue expenditure irrespective of mode of payment viz. minimum guarantee royalty or recurring royalty & therefore mode of payment cannot change the basic character of the expenditure i.e., expenditure incurred for purchase of raw material (music in the present case) which is always revenue. One has to see for what the expenditure has been made. In the present case, the expenditure has been incurred to purchase music and therefore the same is allowable as revenue expenditure. We would also like to add in this regard that as we have already noted that a reference application u/s 256(2) filed by the Department against the said order passed by this Tribunal has been dismissed by the Hon'ble Calcutta High Court and the department has accepted the same. Furthermore, the AO has himself allowed M G Royalty as revenue expenditure in the assessment order passed in the case of the assessee for the A. Y 2004-05. With regard to the decision of the Hon'ble Supreme Court in Mewar Sugar Mill's case which has been relied upon by the Ld. D/R, we are constrained to state that in our view, the facts of the case do not apply to the facts of the present case rather, as already held by us, the issue is covered in favour of the assessee by the decision of this Tribunal in the assessee's own case for the A.Y 1984-85 and also Supreme Court referred by us herein above. Moreover, we also agree with the Ld A/R that the issue is also covered in favour of the assessee by the decisions of the ITAT, Delhi Bench in Super cassettes Industries P. Ltd [41 ITD 530] and that rendered by Bombay Bench in Tips Cassettes & Record Co, Vs ACIT [76 TTJ 396] wherein expenditure on acquisition of right to reproduce music have been held to bear the character of revenue expenditure."

.....

.....

"Dismissing Grounds No.1 to 4 of the appeal filed by the Department and respectfully following the decision of the Hon'ble Supreme Court in Gotam Lime Syndicate's decision (supra), decision of this Tribunal in the assessee's own case for the A. Y 1984-85 and decisions of the Delhi & Mumbai Tribunals, we hold that the expenditure of Rs.1.88 crore incurred during the year by the assessee towards M G Royalty is allowable as revenue expenditure."

[unquote]

In view of the above judgment of the Hon'ble ITAT for the A.Y 2002-03, it is seen that the matter has been decided in favour of the appellant-company, as the expenditure towards Minimum Guarantee Royalty has been held to be revenue expenditure. Accordingly, respectfully following this judgment [**also affirmed by the Hon'ble High Court for an identical issue for the A.Y 1984-85, as mentioned in the order of the Hon'ble ITAT**], it is to be said that the action of the Ld AO in disallowing an amount of Rs.19,62,000/- claimed by the appellant-company as Minimum Guarantee Royalty CM G Royalty, cannot be sustained, and is ordered to be **deleted**."

5. Learned CIT-DR vehemently contends during the course of hearing that the CIT(A) has erred in law and on facts in deleting the impugned minimum guarantee royalty relating to acquisition of music rights as revenue expenditure. Mr. Meena is very fair in not disputing the clinching fact that the instant issue is no more *res integra* since the assessee has succeeded *qua* the same up to hon'ble jurisdictional high court in earlier assessment years (*supra*). He seeks to pin-point an exception in assessee's impugned minimum guaranty royalty claim based on per cassette-wise payment. His case is that since it has undertaken to pay the impugned royalty based on cassette sales in addition to the former limb of lump sum figure as per the agreement clauses, this said component; even if treated as revenue expenditure, ought to have been booked in the year of music / cassette / CD records' sales. We find no merit in Revenue's instant argument. The fact remains that the assessee's impugned cassettes sale-wise royalty is payable on achieving the fixed target component sufficiently suggests that the sales pertaining to the instant limb remain uncertain going by the corresponding market trend dynamic of music industry. Be that as it may, hon'ble apex court's recent decision in *Taparia Tools vs. JCIT* (2015) 55 taxmann.com 41 ITR 481 (SC) has settled the law that of a revenue expenditure is otherwise allowable, the mere fact that the same ought to have been split up or claimed lump sum is not the deciding factor. Their lordships yet another landmark decision in *Chainrup Sampatram vs. Commissioner of Income Tax* (1953) 23 ITR 481 (SC) also held long back that the principles of conservatism consideration of prudence in the accounting treatment require that no anticipated profits be treated as income only if the same are utilized and converse is not true as anticipated losses can be allowed to be deducted from commercial profits at the first sight of reasonable possibility. We wish to make clear in light of the foregoing facts that the assessee had every reason to raise the impugned minimum guarantee royalty claim pertaining to acquisition of music rights in the year of actual payment going by the music industry market trends. We conclude in

this backdrop of facts that the Revenue's latter argument also carries no substance. This issue is accordingly decided in assessee's favour.

6. Same reasoning to follow in Revenue's appeal(s) **ITA No.471 to 473/Kol/2017** for assessment year(s) 2004-05 to 2006-07 raising first, fifth and first substantive grounds; assessment year-wise whilst seeking to revive the corresponding minimum guarantee royalty disallowance /addition(s) of ₹14,42,59,141/-, ₹11,17,007/- & ₹2,09,06,044/-; respectively in absence of any distinctions in facts or law indicated therein.

7. We revert back to assessment year 2003-04 once again. It has already been made clear that the Revenue's 2nd to 5th as well as assessee's 1st to 4th substantive grounds challenge correctness of CIT(A)'s identical action restricting advertisement and sales promotion, consultancy, *ad hoc* head(s) and recording expenditure disallowance(s) from 10% made by the Assessing Officer to 2% in the lower appellate proceedings. We notice herein as well that all these issues are also no more *res integra* since this tribunal's co-ordinate bench's order (supra) in earlier assessment year(s) has affirmed 2% disallowance only. Learned CIT-DR vehemently contended herein as well that the Assessing Officer had rightly invoked the impugned disallowance @ 10% since the assessee had made cash payments thereof to "... other profits. His case therefore is that the Assessing Officer had rightly noted the above twin discrepancies in all these four heads to estimate 10% disallowance therein. We find no substance in Revenue's instant argument seeking to revive the impugned *ad hoc* disallowance under four head(s). Apart from the fact that the earlier co-ordinate bench's order(s) (supra) have already upheld the CIT(A)'s identical action, we note that the assessing authority itself is very fair in estimating the impugned disallowance @ 10% meaning thereby that assessee's claim(s) stand accepted in principle @ 90%. We therefore adopt judicial consistency to affirm CIT(A)'s findings restricting all four disallowance(s) items from 10% to 2% only. The Revenue as well as

assessee's corresponding grounds fail therefore as a necessary corollary. The assessee's main appeal **ITA No.309/Kol/2017** rejected these four issues fails.

8. The Revenue's sixth substantive ground pleads that the CIT(A) has erred in law and on facts in holding that the assessee's training and development expenses amounting to ₹19,82,000/- are revenue in nature as against that held as capital in the assessment order dated 23.03.2006. Suffice to say, we find no substance in Revenue's grievance at the threshold itself since *Motor Sales vs. Commissioner of Income Tax* (1973) 87 ITR 595 (All) has already decided the issue in assessee's favour. The CIT(A)'s findings under challenge to this effect are affirmed therefore.

9. The Revenue's seventh substantive ground seeks to revive the Assessing Officer's action disallowing / shortage of stock / breakage (pre-recorded cassettes) disallowance of ₹54,00,000/- made by the Assessing Officer and deleted in the lower appellate proceedings. The Revenue fails to dispute the clinching fact that the assessee's corresponding receipts derived from the corresponding of scrap sales on account of broken cassettes have been accepted. This tribunal's decision dated 22.06.2007 in **ITA No.2236/Kol/2005** for assessment year 2002-03 has already decided this very issue in assessee's favour. We therefore adopt judicial consistency to affirm the CIT(A)'s findings under challenge. This Revenue's first appeal **ITA No.470/Kol/2017** raising as many above stated seven substantive grounds fail therefore.

10. Same order to follow in Revenue's appeal ITA No.471/Kol/2017 for assessment year 2004-05 raising the second substantive grievance of shortage stock / breakage of pre-recorded cassettes & CDs involving corresponding of ₹21,86,535/- since we have already decided the former issue of minimum guarantee royalty (supra).

11. Next comes the assessee's cross appeal ITA No.310/Kol/2017 for assessment year 2004-05 raising sole substantive ground of challenging addition on account of rent to the tune of ₹9,90,000/- made in both the lower proceedings. The CIT(A)'s findings under affirming the Assessing Officer's action to this effect reads as under:-

Ground 10(a)-10(b): Addition on account of rent (Rs. 990,000/-)

The appellant had given a property on rent to Sprint RPG for last few years. The appellant "had all along offered the said rental income to tax in respective years. During the course of assessment proceedings, on specific query raised by the assessing officer, the appellant had submitted that rent amounting to Rs.7,50,000 was booked during the year on account of Sprint RPG. However, pursuant to the downward rate revision during the year in respect of the rent for earlier period, there was an adjustment/reversal of Rs.12,50,000. Accordingly, a net amount of Rs.(-) 500,000/- (income for the year Rs.7,50,000/- less Rs.12,50,000/- adjustment/reversal during the year) was considered while computing the total rent chargeable to tax for the year. Copy of the letters dated 13 November, 2006 and 12 September, 2006 filed during the course of assessment proceedings is marked as Annexure-3 & 7 (refer Pg 210-219 and Pg 245-248 of the WS), respectively.

The Assessing Officer, without appreciating the facts of the case, has inflicted an addition of Rs.990,000/- which has no basis whatsoever and is liable to be deleted summarily.

By making the above adjustment, the AO has virtually taxed a notional income which is not allowable. Your kindself will note that the actual income of the company from Sprint RPG is (Rs. 500,000) [i.e. Rs.12,50,000/- on reversal less Rs.7,50,000/- income booked during the year]. The appellant has already offered the rental income of Rs.12,50,000/- to tax in earlier years, hence to pay tax on real income, the adjustment was carried out. By rejecting the adjustment, the Assessing Officer has ignored the principle of tax on real income.

It is submitted that for the purpose of income-tax, what is to be taxed is the real income which is to be deduced on the basis of the accounting system regularly maintained by the assessee and that was done by the appellant in the present case. The attention of the learned CIT(Appeals) is drawn to the decision of the Hon'ble Supreme Court in the case of CIT vs Shoorji Vallabhdas and Co. [46 ITR 144, 148 (SC.)], wherein It has been held that-

"Income - tax is a levy on income. Though the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt, yet the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book - keeping, an entry is made about a "hypothetical income", which does not materialize. Where, however, the Income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account. "

This principle has been followed by the Hon'ble Apex Court again in the decision of CIT vs. Birla Gwalior (P.) Ltd. [89 ITR 266, 273 (SC.)]. Prayer:

In this regard, your appellant humbly requests that necessary direction may please be given to Assessing Officer to delete the disallowance of Rs. 9,90,000 in the interest of justice.

33. DECISION:

1. I have carefully considered the action of the Ld. AO in making an addition of **Rs.9,90,00/-** on account of rent. In summary, the Ld. AO has based his findings only on the TDS certificates, and has not accepted the submission of the appellant-company that for the year under consideration, there was a downward revision of rent charged to one of its tenants, a sister concern. The Ld. AO has not given cognizance to the submission on grounds that the appellant was unable to produce a copy of the computation and treatment given to such rent paid by the sister concern.

2. On the other hand, during the appeal stage, the appellant-company has pleaded as under:

a. The appellant had given a property on rent to Sprint RPG for last few years. The appellant had all along offered the said rental income to tax in respective years.

b. During the course of assessment proceedings, on specific query raised by the assessing officer, the appellant had submitted that rent amounting to Rs.7,50,000 was booked during the year on account of Sprint RPG. However, pursuant to the downward rate revision during the year in respect of the rent for earlier period, there was an adjustment/reversal of Rs.12,50,000. Accordingly, a net amount of Rs.(-) 500,000/- (income for the year Rs.7,50,000/- less Rs. 12,50,000/- adjustment/ reversal during the year) was considered while computing the total rent chargeable to tax for the year. Copy of the letters dated 13 November, 2006 and 12 September, 2006 filed during the course of assessment proceedings is marked as **Annexure-3 & 7** (refer Pg 210-219 and Pg 245-248 of the WS), respectively.

c. The Assessing Officer, without appreciating the facts of the case, has inflicted an addition of Rs.990,000/- which has no basis whatsoever and is liable to be deleted summarily. By making the above adjustment, the AO has virtually taxed a notional income which is not allowable. Your kind self will note that the actual income of the company from Sprint RPG is **(Rs.500,000) [i.e. Rs.12,50,000/- on reversal less Rs.7,50,000/- income booked during the year]**. The appellant has already offered the rental income of Rs.12,50,000/- to tax in earlier years, hence to pay tax on real income, the adjustment was carried out. By rejecting the adjustment, the Assessing Officer has ignored the principle of tax on real income.

d. It is submitted that for the purpose of Income-tax, what is to be taxed is the real income which is to be deduced on the basis of the accounting system regularly maintained by the assessee and that was done by the appellant in the present case. The attention of the learned CIT(Appeals) is drawn to the decision of the Hon'ble Supreme Court in the case of **CIT vs Shoorji Vallabhdas and Co. [46 ITR 144, 148 (SC.)]**, wherein it has been held that-"Income - tax is a levy on income. Though the Income- tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt, yet the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book - keeping, an entry is made about a "**hypothetical income**", which does not materialize Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the

books of account." This principle has been followed by the Hon'ble Apex Court again in the decision of **CIT vs. Birla Gwalior (P.) Ltd. [89 ITR 266, 273 (SC.)]**.

3. I have carefully examined the action of the Ld.AO and the submissions made by the appellant-company. I have also examined the submissions made during the stage of scrutiny by the appellant, as available at Annexure-3 & 7 of the Paper Book filed before me. As brought out in the submission filed by the appellant, the rent amounting to Rs.7,50,000 was booked by the appellant-company during the year on account of M/s Sprint RPG, a sister-concern which was a tenant with the assessee. It has been submitted that pursuant to the downward rate revision during the year in respect of the rent for earlier period, there was an adjustment/reversal of Rs.12,50,000, as is apparent from the rental agreements. Therefore, according to the appellant, a net amount of Rs. (-) 500,000/- (**income for the year Rs.7,50,000/- less Rs. 12,50,000/- adjustment/ reversal during the year**) was considered by the appellant while computing the total rent chargeable to tax for the year. Be that the case, the deductions available for house property income have been specified in the Income Tax act under Sec 24, and the Ld AO has quite correctly, in my considered opinion allowed the necessary deductions and disallowed the balance amount of Rs.9,90,000/-.

In summary, the addition made by the Ld. AO stands confirmed, and the ground is decided against the appellant-assessee. The ground of appeal stands **dismissed.**"

12. We have given our thoughtful consideration *qua* above stated sole issue of rent amount addition. Both the learned representatives are *ad idem* during the course of hearing that the assessee's claim of impugned downward revision of rent charge and received in case of its sister concern requires necessary factual verification / computation once again in view of the learned lower authorities alleged failure in getting all the settlement records to this effect. We therefore deem it appropriate to restore the same back to the Assessing Officer to decide afresh as per law within three effective opportunities of hearing. The assessee's main appeal ITA No.310/Kol/2017 is accepted for statistical purposes.

Assessment year 2005-06:-

13. The Revenue's former two substantive grounds in ITA No.472/Kol/2017 seek to revive the Assessing Officer's action disallowing / adding ₹9,21,706 and ₹1,82,197/- pertaining to turnover mis-match in TDS certificates (**in case of CESC and Indea Streamz**) as well as part TDS credit; respectively. It fails to dispute the clinching fact that the CIT(A) has directed the Assessing Officer to finalize the consequential reconciliation / factual verification *qua* the former

and to allow the TDS credit in the year in which the corresponding income offered for assessment; respectively. Mr. Meena's only case is that such an option is no more available to the CIT(A) as per law amended sec.251(1)(a) w.e.f. 01.06.2001. After giving our thoughtful consideration, we find that although the Revenue's instant technical argument deserves to be accepted the fact also remains that the Assessing Officer had not taken into consideration all the foregoing aspect(s) whilst making the impugned disallowance(s) / addition(s). We therefore conclude in this factual backdrop that the instant issue has been rightly restored back to the assessing authority for afresh computation as per law. We make it clear that the issues as to whether the assessee deserves credit of the impugned TDS in the year when it offers the corresponding income for assessment is fairly conceded by the department during the course of hearing. We accordingly affirm the CIT(A)'s findings *qua* these two former issues.

14. The Revenue's fifth substantive ground of minimum guarantee royalty already stand declined (*supra*).

15. The Revenue's fourth and sixth substantive grounds raised in the instant appeal seek to revive the Assessing Officer's action disallowing ₹5,03,740/- and ₹ 10 lakh *qua* expenditure on share investments and interest free loans given to sister concern. It has come on record that the assessee has not derived any exempt income in the impugned assessment year. Hon'ble jurisdictional high court's decision in ITAT 100 of 2014 GA No. 2122 of 2014 *Commissioner of Income Tax vs. M/s Ashika Global Securities Ltd.* dated 1106.2018 holds that the impugned disallowance does not come into play in case of absence of exempt income. Coming to latter aspect of interest free loans to sister concern, we notice that assessee had no interest free funds in the nature of share capital, reserves and surplus of ₹60.26 crores as against interest free loans of ₹24.17 crores; respectively. The CIT(A) has followed hon'ble's Bombay high court's decision in *CIT vs. Reliance Utilities*

and Power Ltd. in (2009) 313 ITR 340 (Bom) that the necessary presumption in such an instance is of utilization of interest free funds only. We accordingly affirm the CIT(A)'s findings under challenge. This Revenue's appeal **ITA No. 472/Kol/2017** is dismissed.

Assessment Year 2006-07:-

16. This fourth assessment year 2006-07 involves Revenue's appeal in ITA No.473/Kol/2017. Its first substantive grievance of minimum guarantee royalty of ₹2,09,06,044/- already stand rejected (supra).

17. Next comes the Revenue's second substantive ground that the Assessing Officer had rightly invoked sec. 14A r.w. Rule 8D administrative expenditure disallowance of ₹80 lakh *qua* the assessee's dividend income of ₹24.23 lakhs. There can hardly be any quarrel that hon'ble Bombay high court's judgment in *Godrej & Boyce Manufacturing Company Ltd. vs. DCIT* 328 ITR 81 (Bom) as upheld in hon'ble apex court's has made it clear that Rule 8D carries prospective effect only from assessment year 2008-09. We notice that the CIT(A) has restricted the impugned disallowance to 1% of the exempt income only; coming to ₹23,230/- in his lower appellate order under challenge. The assessee's share capital and reserves against the exempt investments read figures ₹84.13 crores and ₹59.99 cores; respectively. The CIT(A) has followed a catena of case law *Income Tax Officer Ward-12(1) Kolkata vs. Nupur Carpets Ltd.*, in **ITA No.783/Kol/2014** (AY 2005-06) decided on 01.07.2015 that necessary disallowance @ 1% prior to assessment year 2008-09 is just and proper. We therefore decline the Revenue's instant second substantive grievance as well.

18. Lastly comes the bad debt / business advance disallowance of ₹46,65,000/- made in the course of assessment and deleted in the lower appellate proceedings. We notice that the Assessing Officer had made the impugned disallowance after holding that there was no evidence of the

impugned debt sums to have become actually bad. This this issue is no more *res integra* in view of in *T.R.F. vs. Commissioner of Income Tax* (2010) 323 ITR 396 (SC) that sec. 36(1)(vii) no more requires w.e.f 01.04.1989. The Revenue's instant last substantive grievance as well as its main appeal **ITA No.473/Kol/2017** are rejected therefore.

19. This leaves us with assessment year 2010-11 involving assessee's appeal **ITA No.312/Kol/2017**. Its former substantive ground seeks to reverse both the lower authorities by making administrative expenditure disallowance of ₹12,86,840/- over and above *suo motu* figure(s) ₹ 7lakh qua exempt income from dividends to the tune of ₹61,80,942/-. Learned senior counsel's only case is that the same ought to have been restricted to exempt income yielding investment only as per the tribunal's co-ordinate bench's decision in *REI Agro Ltd. vs. DCIT* (2013) 144 ITD 141 (Kol) as upheld in hon'ble jurisdictional high court. Learned CIT-DR fails to rebuttal the crucial fact that lower authorities have taken into account the assessee's non exempt income yielding investment as well. The fact also remains that we are dealing with an indirect head of expenditure wherein some kind of proportional location on estimate basis is always involved. We therefore deem it appropriate that a lump sum disallowance of ₹8 lakh including *suo motu* figure of ₹ 7 lakh would be just and proper with a rider that same shall not be treated as a precedent in any other assessment year. The assessee gets part relief. Necessary computation to follow as per law.

20. Lastly comes assessee's latter substantive ground that the lower authorities have erred in law and on fact in disallowance its leave encashment provision of ₹13,52,190/- u/s 43B(f) for want of actual payment. Both parties inform us during the course of hearing that hon'ble jurisdictional high court's decision in *Exide Industries Ltd. vs. Union of India* (2007) 292 ITR 470 (Cal) quashing the statutory provision itself to be *ultra vires* stands has stayed on 08.05.2009 in hon'ble apex court. Therefore the instant issue restored back to

the Assessing Officer to be decided afresh after final outcome in *Exide Industries Ltd.* case. This last substantive grievance of assessee is accepted for statistical purposes. This assessee's last appeal ITA No.312/Kol/2017 is partly allowed in above terms.

21. To sum up, Revenue's appeal(s) **ITA No.470 to 473/Kol/2017** are dismissed whereas assessee's appeal(s) ITA No.s 309/Ko/2017 is dismissed, **ITA No.310/Kol/2017 & ITA No.312/Kol/2017** are partly allowed for statistical purposes & partly allowed in above terms; respectively. **A copy of this common order be placed in the respective case file(s).**

Order pronounced in the open court 29/01/2020

Sd/-
(लेखा सदस्य)
(A.L.Saini)
(Accountant Member)
Kolkata,

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
(Judicial Member)

*Dkp

दिनांक:- 29/01/2020 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-M/s Saregama India Ltd, 33, Jessore Road, Dum Dum, Kolkata-28
2. राजस्व/Revenue-DCIT, Cir-3(1), Aaykar Bhawan, 7th /4th Fl. R.No.19, P-7, Chowringhee Square, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।