IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH, AHMEDABAD

BEFORE Ms. SUCHITRA KAMBLE, JUDICIAL MEMBER AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

ITA Nos.1762/Ahd/2015
Assessment Year: 2001-02

The D.C.I.T., Baroda Circle-1, Baroda.	vs.	Ambalal Sarabhai Enterprises Ltd., Wadi Wadi, Vadodara – 390 023. [PAN – AABCA 6893 K]

ITA Nos.1771/Ahd/2015
Assessment Year: 2001-02

Ambalal Sarabhai Enterprises Ltd, Wadi Wadi, Vadodara – 390 023. [PAN – AABCA 6893 K] (Appellants)	vs.	The D.C.I.T., Baroda Circle-1, Baroda. (Respondents)

Revenue by	:	Shri Vijay Kumar Jaiswal, CIT D.R.
Assessee by	:	Shri Bandish Soparkar, A.R. & Shri Parin Shah, A.R.
Date of hearing	:	05.04.2022
Date of pronouncement	:	25.05.2022

O R D E R

PER SUCHITRA KAMBLE, JUDICIAL MEMBER :

These are cross appeals filed by the Revenue and assessee against the order dated 12.03.2015 passed by the CIT(A)-1, Vadodara for the Assessment Year 2001-02.

2. The grounds of appeal are as under :

ITA No.1762/Ahd/2015 for A.Y. 2001-02 by the Revenue

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition/disallowance made by the AO on account of Buying commission to Teknoserv (Jersey) Ltd. without appreciating the findings of the assessing Officer in the assessment order and also the fact that the

buying commission payable abroad is merely a provision and has not been remitted to Teknoserve (Jersey) Ltd.

2. The Ld. CIT(A) has erred by allowing Festival allowance, Misc. Expenses, Telephone Expenses, Vehicle expenses without appreciating the findings of the assessing officer in the assessment order.

3. The Ld. CIT(A) has erred by allowing Adhoc disallowance of 5% out of selling expenses, Festival allowance, Misc. Expenses, Telephone Expenses, Vehicle expenses without appreciating the findings of the assessing officer in the assessment order.

4. The Ld. CIT(A) has erred in deleting the addition made by the AO being rent payment of Packart Press Unit and insurance of machinery of Packart Press Unit without considering the fact that the Packart Press Unit was closed and there was no business activities in this unit and also the assessee already got the order of labour commissioner for closure of such unit.

5. The Ld. CIT(A) has erred in deleting the addition made by the AO u/s. 40A(9) of the Act, previous year's expenses and foreign travel expenses.

6. The Ld. CIT(A) has erred in deleting the addition made by the AO on Transfer of Trademark and Marketing Rights.

7. The appellant craves leave to add to, amend or alter the above grounds as may be deemed necessary.

Relief Claimed in appeal

It is prayed that the order of the CIT (Appeals) be set aside and that of the Assessing Officer be restored."

ITA No.1771/Ahd/2015 for A.Y. 2001-02 by the assessee

Concise Grounds of Appeal

"Appellant craves leave to submit the following concise grounds of appeal before the Hon'ble ITAT:

1. Ld. CIT (A) erred in law and on facts in confirming disallowance of Rs.1,38,840/- of interest on bonds issued to the shareholders of erstwhile Standard Pharmaceuticals Ltd. amalgamated with the appellants pursuant to scheme of amalgamation.

2.1 Ld. CIT (A) erred in law and on facts in confirming disallowance u/s 43B(b) in respect of contribution to PF paid on or before due date for filing return of income by observing that no evidences of payment made are produced for verification.

2.2 Ld. CIT (A) erred in law and on facts in not allowing the alternative claim of the appellant to not disallow u/s 43(b) the contribution which is made on or before the due date of filing return of income.

3. Ld. CIT (A) erred in law and on facts in confirming disallowance of claim of damages of Rs.87,293/- levied u/s 14B of P.F. Act.

4. Ld. CIT (A) erred in law and on facts in confirming salaries and wages of Packart Press Division of Rs. 41,11,000/-

5. Ld. CIT (A) erred in law and in facts in confirming disallowance of leave salary of Rs.30,93,624/- and gratuity of Rs. 1,77,62,048/- paid to workers and other employees which do not form part of Voluntary Retirement Scheme (VRS). The same should be allowed u/s.37 of the Act and not be part of amortization u/s. 35DDA of the Act.

6. Ld. CIT (A) erred in law and on facts in confirming disallowance of Rs.43,014/- of sundry debit balances written off.

7.1 Ld. CIT (A) erred in law and on facts in arbitrarily holding that out of total consideration received of Rs.25 crores for transfer of veterinary trademarks, consideration of 18 crores is attributable to transfer of goodwill and balance Rs.7 crores is attributable to transfer of veterinary trademarks.

7.2 Ld. CIT (A) erred in law and on facts in holding that consideration of Rs.20 Crore and additional consideration of Rs.2 Crore received for transfer of marketing/distribution rights for veterinary products of various foreign principals is revenue receipt taxable as business income u/s.28(ii)(c) of the Income Tax Act.

7.3 Ld. CIT (A) ought to have allowed the appeal of the Appellant holding that the consideration received against transfer of trademarks and marketing rights are not taxable."

3. The assessee Company is mainly engaged in the manufacture of drugs & pharmaceuticals, it also provides marketing and consultancy activities in respect of drugs and pharmaceuticals, fine chemicals, industrial glass containers, packing materials, electronic tests and measuring instruments, consumer electronic and industrial research. There are 15 divisions including service units catering to the needs of other units of corporate body. The assessee Company filed return of income on 31.10.2001 declaring income from house property Rs.9,036/-, income from other sources Rs.1,25,40,914/- and business loss of Rs.10,26,63,568/-. The Assessing Officer made addition in respect of buying commission to Teknoserve (Jersey) Limited amounting to Rs.19,27,498/- as per the provision of Section 40(a)(i) of the Act. The Assessing Officer also disallowed interest on bonds issued on amalgamation of

Standard Pharmaceuticals Limited amounting to Rs.1,38,840/- as well as depreciation amounting to Rs.2,36,83,086/-. The Assessing Officer further made disallowance for provisions of Festival allowance, Miscellaneous expenses, PF/FPF not paid within due dates, PF damages, Selling expenses, Salary/Wages and other expenses of Packart Press Unit. The Assessing Officer also made disallowance under Section 40A(9) amounting to Rs.2,40,000/- as well as Voluntary Retirement Scheme which was claimed by the assessee amounting to Rs.5,49,22,119/-, previous year's expenses, debit balances written off in miscellaneous expenses, foreign travel expenses, disallowance out of donation made, receipt of Rs.73 crores from joint venture Company as well as other income. Thus, the Assessing Officer assessed the total income at Rs.42,97,20,946/-

4. Being aggrieved by the assessment order the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. As regards ground no.1 relating to disallowance of interest on bonds issued at the time of amalgamation of Standard Pharmaceutical Limited, the Ld. A.R. submitted that the said issue is against the assessee as per the Tribunal's decision in A.Y. 1995-96 being ITA No. 1086, 1005, 1461 and 1006/AHD/2001 order dated 14.12.2007, A.Y. 1997-98 being ITA No. 1007, 1462/AHD/2001 order dated 30.06.2008 and A.Y. 1998-99 being ITA Nos.1956, 1597/Ahd/20001 order dated 29.08.2008 as well as in A.Y. 1999-2000 ITA No. 933, 1313/AHD/2016 order dated 17.01.2019 .

6. The Ld. DR relied upon the Assessment Order, order of the CIT(A) and the orders of the Tribunal.

7. We have heard both the parties and perused all the relevant material available on record. As regards to ground no.1 of assessee's appeal is decided against the assessee for A.Ys. 1995-96, 1997-98, 1998-99 and 1999-2000. The Tribunal held as under in A.Y. 1995-96 as under:

> *"29. The first ground of the assessee's appeal relates to the issue which travels from an earlier year, with the Ld. A.R. fairly stating that the issue stands covered against the assesse by the decision of the Tribunal in its case for A.Y. 1990-91.*

> *30. We have heard the parties, and perused the material on record, including the Tribunal's order as referred. The Tribunal in that case has followed its earlier decision in the assessee's case for A.Y. 1985-86 (in ITA No. 2231/Ahd/1990 dated 17-11-2004), and confirmed the disallowance of interest on the bonds issued to the shareholders of the Standard Pharmaceuticals Ltd. (SPL) on its amalgamation with the assesse-company. The Ld. A.R. has very fairly conceded to this position of the matter, so that the same admits of no difference of opinion. Respectfully following the orders of the Tribunal in the assessee's case for the earlier years, we uphold the impugned disallowance for the current year as well. We decide accordingly."*

In the present assessment year as well the Ld. AR submitted that the factual aspect is identical to the earlier assessment years which is decided against the assessee. Therefore, Ground No. 1 of the assessee's appeal is dismissed.

8. As regards to ground no.2 relating to disallowance under Section 43B(b) amounting to Rs.9,14,094/- as employer's contribution to PF/ESIC, the Ld. A.R. submitted that the assessee has made *suo moto* disallowance of Rs.2,06,56,172/-.

9. The Ld. D.R. submitted that though the assessee made *suo moto* disallowance of Rs.2,06,56,172/- in relation to employer's contribution to PF/ ESIC etc. but the same was not being made within 20 days from the actual disbursement of salary/ wages. The CIT(A) has rightly sent back this issue to the file of the Assessing Officer to see whether the payment is made on or before the due date of filing the return and this finding is just and proper.

10. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the assessee made suo moto disallowance of Rs. 2,06,56,172/- but as regards the contribution in respect of employer, the delay whether it is within the statutory limit or not has not been demonstrated by the assessee before the Assessing Officer. Therefore, the CIT(A) has rightly set aside this issue to the file of the Assessing Officer for verifying whether payment was made on or before the due

date of filing the return or not. There is no need to interfere with the finding of the CIT(A). Ground No. 2 of the assessee's appeal is dismissed.

11. As regards to ground no.3 relating to disallowance of damages of Rs.87,293/- levied under Section 14B of the Provident Fund Act, the Ld. A.R. submitted that the same should be set aside to the Assessing Officer but alternatively submitted that if the disallowance is confirmed then the same should be 40% of allowed as compensation as held in A.Ys. 1995-96 being ITA No. 1086/Ahd/2001 order dated 14.12.2007 & A.Y. 1998-99 being ITA No. 1956/Ahd/2001 order dated 29.08.2008.

12. The Ld. D.R. submitted that related penalty and PF damage under Section 14B of the PF Act, 40% of damages levied under Section 14B of the PF Act are compensatory in nature as per various decisions and the same is not allowable expenditure as held by the Tribunal.

13. We have heard both the parties and perused all the relevant material available on record. This issue is decided by the Tribunal in A.Ys. 1995-96, 1998-99. The Tribunal in A.Y. 1995-96 held as under:

> *"17. The Revenue's eighth ground of the appeal relates to the disallowance in the sim of Rs. 11,83,110/- paid by way of damages u/s 14B of the Employee's Provident Fund and Miscellaneous Provisions Act, 1952. The same being only in the nature of fines and penalty the same stood disallowed by the A.O. In appeal, the assessee claim of a part said expenditure as being toward compensation for the delayed payment of the dues under the said Act, found acceptance by the Ld. CIT(A), with the assesse placing reliance on the decision by the Apex Court in the case of, amongst others, Swadeshi Cotton Mills Co. Ltd. vs. CIT, 233 ITR 199 (SC), wherein it stands held that where a composite levy includes both an element of compensation as also penalty, it shall be open for the Authority to allow the proportion which in its estimation is towards compensation, as a deductible business expenditure. Consequently, he determined 60% of the levy as penal in nature, so that the balance 40%, i.e., Rs. 4,73,244/- , was direct by him to be allowed. Aggrieved, Revenue is in appeal.*

18. Before us, like contentions stood raised by either side, each relying on the Order of the authority below as favourable to it.

19. We have heard the parties, and perused the material on record, including the cited case law. We find that the Apex Court has clarified the issue, and the Tribunal in the case of ITO vs. Havero Industries Ltd., 36 ITD 611 (Mum.), applying the law in the matter found 40% of the amount paid as damages u/s 14B of the EPF & MP Act, 1952, as being allowable, being in the nature of compensation. We, therefore, do not find any infirmity in the Order of the Ld. CIT(A), or any merit in the Revenue's (as well as the assessee's) appeal on this ground, and which stands therefore dismissed. So however, as it appears, the A.O. has omitted to add the said disallowance while computing the assessee's taxable income for the relevant year (refer page 15 and 16 of the relevant assessment order), so that the A.O. is directed to verify the facts and casue necessary rectification if so found. We state so as in its absence there is no question of any disallowance and resultantly no scope for any adjudication in its respect. We direct accordingly."

In the present assessment year as well the facts are identical to that the earlier assessment years, yet the excess disallowance needs to be verified and the alternative contentions of the assessee as to 40% of the amount paid as damages may be allowed as compensatory. Ground No. 3 is partly allowed.

14. As regards to Ground No. 4 of the assessee's appeal relating to disallowance of salary and wages of Rs.41.11 Lakhs to Packart Press Unit employees, the Ld. A.R. submitted that as held in A.Y. 1996-97 being ITA No. 1461/Ahd/2001 order dated 14.12.2007, 1997-98 being ITA No. 1462/Ahd/2001 order dated 30.06.2008 & 1998-99 being ITA No. 1965/Ahd/2001 order dated 29.08.2008 as well as A.Y. 1999-2000 being ITA No. 933 & 1313/Ahd/2016 order dated 17.01.2019, the same should be set aside to the file of the Assessing Officer.

15. The Ld. D.R. relied upon the decisions of the Tribunal.

16. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that this issue is set aside to the file of the Assessing Officer for proper verification and adjudication in A.Y. 1996-97, 1997-98 & 1998-99 as well as in A.Y. 1999-2000. The Tribunal in A.Y. 1996-97 held as under:

> *"49. We have heard the parties, and perused the material on record.*
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> *49.1 We find that the Revenue's case in this matter rests on two limbs. Firstly, that the said Unit is not under operation during the relevant year, so that the relevant business being closed, the claim for its expenditure would not be allowable. Secondly, of the total claim, the expenditure to the extent of Rs. 31.76 lacs does not find a reflection in the assessee's account, so that in its absence the same has no basis for allowability. We shall look into each of the two limbs separately.*
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> *49.2 In so far as the closure of the assessee's said Unit is concerned, the same does not, to our mind, represent a separate or distinct line of business being pursued by the assessee; the said Unit only manufacturing, admittedly, packaging material, viz., cartons, labels, grey board boxes, for supply to other Units, for the packaging of their goods. As such, the closure of the said Unit for the current year, or the absence of the manufacturing operations as inferred by the Revenue, would be of no consequence in-so-far as the application of section 72(1) of the Act is concerned. This, however, would be subject to the actual user of the plant and machinery or other capital assets of the said Unit for business purposes, i.e., in-so-far as the claim for depreciation is concerned, which would not be allowable otherwise.*
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> *49.3 As regards the balance expenditure, we find there to be no doubt as to its having been incurred, except for Rs. 31.76 lacs for which no provision stands made in accounts, even as the same is claimed in the return of income. Clearly, the answer to the same would, even as explained by the assessee itself, while arguing its case before the Ld. CIT(A), depend upon whether the liability in its respect had, in fact, accrued during the relevant year and outstands as it its end, i.e., 31-03-1996, for if so, no adverse inference of the non-booking of the relevant expenditure can be drawn. The nature of the expenditure, other than toward salary and wages, is not clear from the Order of*

the authorities below. Also, even in respect of the salary and wages, even though their Orders do not clarify as to the identity of the employees, it appears that the same would only be in respect of the ex-employees of the said Unit. The assessee-company has, apparently, settled the dues of its employees, for otherwise the permission from the Labour Commissioner to close its Unit would not be forthcoming. However, as the same stands contested by the Labour Union before the Tribunal, the assessee, as it appears, has provided for the claim for the said liability, even as the same stands not provided in its books, and which fact the assessee's claims to be immaterial. We do not consider so, though, by itself, that cannot be conclusive of the matter (refer: Pullangode Rubber Produce Co. Ltd. vs. State of Kerala and Others, 91 ITR 18 (SC)). As such, what would need to be seen for the purpose is whether the assessee is contractually obliged to pay the salary/wages to the (ex)employees of its said Unit, employment of whom it claims stands terminated. The same would warrant an examination of the relevant facts and the underlying contractual arrangement. The fact that the matter is sub-judice would not make a liability which has otherwise not accrued, to arise, even as the assessee may have in the facts of a particular case provided for the relevant amount in its books of account, and which is not the case in the present instance. In fact, the assessee has itself, while arguing its case qua ground # 13 of the present appeal, asserted that the liability would stand to be allowed in the year in which it gets crystallized, implying settlement or the resolution of the underlying dispute, referring to the decision by the jurisdictional High Court in the case of Saurashtra Cement & Chemicals Industries Ltd. vs. CIT (supra) for the purpose, so that the fact that the matter is sub-judice would rather suggest a postponement of the allowability to the year of the resolution of the dispute.

49.4 In view of the foregoing, we are of the clear opinion that only the expenses as stands incurred, or in relation to which the liability has, in terms of underlying contract, stands accrued, shall be allowed as an expenditure in the assessment for the current year, and set aside the matter back to the file of the A.O. to decide the same after proper examination of the relevant facts, giving reasonable opportunity to the assessee to present its case before him, and decide as per law."

The facts of the present assessment year are identical to that of earlier assessment years. Thus, we are also of the opinion that only the expenses which were incurred or has liability in terms of underlying contract, stands accrued, shall be allowed as an expenditure in the present assessment year as well. Thus, we remand back this issue to the file of the Assessing Officer for verification of the relevant facts and proper adjudication. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Ground no.4 of the assessee's appeal is partly allowed for statistical purpose.

17. As regards to ground no.5 regarding confirming the allowance of Rs.1,37,30,530/- (1/5th of Rs.6,86,52,649/-) instead of Rs.4,77,96,977/- under Section 35DDA as claimed by the assessee in respect of terminal benefit under Section 37 as revenue expenditure, the Ld. A.R. submitted that the same should be allowed as Gratuity is statutory liability which is to be paid to any employee on his retirement from service after putting a specified number of years in service. The Ld. A.R. further submitted that the leave salary represent the amount payable to any employee towards unused leave to his credit at the time of his retirement. Whether employee is retiring under VRS scheme or on his own reaching superannuation age the employer is liable to pay such retirement benefit to outgoing employees.

18. The Ld. D.R. submitted that the terms of employment vs. Scheme of Voluntary Retirement has a valid difference as only the expenditure falling in Scheme of Voluntary Retirement can be part of 35DDA amortisation and not the expenditure which are incurred as per terms of employment. Gratuity and leave encashment are not related to the Scheme of Voluntary Retirement even though they are paid alongwith the other benefit related to voluntary retirement.

19. We have heard both the parties and perused all the relevant material available on record. Gratuity has to be paid once an employee retires whether it is under superannuation or voluntary retirement. Its, employee's mandatory entitlement by rendering service to the employer. The leave encashment is also incidental to the service contract and once the service period comes to an end by superannuation or voluntarily, then the same incentive has to be paid to the employee by the employer.

The contention of the Ld. AR that the gratuity and leave encashment are terminal benefits paid by the assesse and are not any segregation of the total compensation paid pursuant to scheme offered by the assesse. The Ld. AR further submitted that Section 35DDA deals with the amortization of expenditure incurred under voluntary retirement scheme. It provides for the deduction of one-fifth of any expenditure by way of payment of any sim to an employee at the time of his voluntary retirement in computing the profits and gains of the business for that previous year and the balance in equal instalments for each of the four immediate succeeding previous years. The CIT(A) held that no copy of any agreement or contract between the assessee and the employees were submitted and therefore, the CIT(A) did not find any basis to treat the amounts of Rs. 2,08,65,672/- independent of the voluntary retirement scheme being the same terminal benefits. The CIT(A) further observed that Section 43B(f) was inserted after clause (e) of section 43B by the Finance Act, 2001 with effect from 01/04/2002. Thus, this section 43B(f) will be applicable only from assessment year 2003-04 onwards whereas the year under consideration in the case of the assessee is 2001-02. Therefore, the CIT(A) held that the entire payments of Rs. 6,86,52,649/- comprising leave salary, gratuity and compensation under the scheme have been made by the assessee to the employees under the voluntary retirement scheme as announced by it and therefore 1/5th of this amount of Rs. 6,86,52,649/- which comes to Rs. 1,37,30,530/- is only required to be allowed for the year under consideration and confirmed the deduction of Rs. 1,37,30,530/- only u/s 35DDA of the Act. The segregation done by the assesse that the entire leave salary and gratuity be allowed cannot be accepted as it is clearly a part of voluntary scheme of retirement as it is incidental to the retirement of employee. Thus, the CIT(A) has rightly allowed the deduction of Rs. 1,37,30,530/- under Section 35DDA and confirmed the other aspects. The CIT(A) has given a detailed finding and there is no need to interfere with the same. Hence Ground No. 5 of assessee's appeal is dismissed.

20. As regards to ground no.6 of assessee's appeal relating to disallowance of Sundry Balances written off, the Ld. A.R. submitted that this issue was decided in favour of the assessee for A.Y. 1995-96 being ITA No. 1086/Ahd/2011 order 14.12.2017 & A.Y. 1998-99 being ITA No. 1956/Ahd/2001 order dated 29.08.2008. Alternatively, the Ld. A.R. submitted that the said Sundry Balances written off should be allowed as business loss.

21. The Ld. D.R. relied upon the order of the CIT(A).

22. We have heard both the parties and perused all the relevant material available on record. The Tribunal in A.Y. 1995-96 held as under:

> *"26. The last and eleventh ground of the Revenue's appeal relates to the disallowance in respect of sundry debit balances written off at Rs. 38,008/-. The assessee has claimed the same to be only in the nature of a business loss, being incurred in the normal course of its business; the said sum representing tender deposit money (Rs.10,000/-) and petty cash at depot (Rs.28,008/-). In appeal, the assessee explained the said amounts to have been paid to customers in terms of tenders issued by them, so that the write-off of the said amount, on it being found not recoverable, is only a nature of business loss. Similarly, the petty cash amount at depot also represents an allowable business loss.*
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> *27. We have heard the parties, and perused the material on record. While the facts in relation to tender deposit money (Rs. 10,000/-) is clear; 'the same being paid over the years in the normal course of business, in the process of applying for or procuring orders, so that the same would only represent a trading loss, the position is not clear in respect of petty cash amount held at the Depot; there being no delineation of facts by either of the authorities or the assessee's explanation with regard to its write-off. As the appeal is being remanded back to the A.O's file qua a particular ground, we consider it only appropriate that his matter may also be re-examined by him, affording proper opportunity to the assessee to state the facts, and decide the same in accordance with law. We decide accordingly."*

Though the issue is related to sundry creditors in this assessment year as well, this is an issue which is factual centric as per each years sundry creditors, therefore, it will be appropriate to remand back this issue to the file of the Assessing Officer for adjudicating it afresh after looking into the evidences. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Ground No. 6 is partly allowed for statistical purpose.

23. As regards to ground no.7 relating to transfer of trademark, marketing rights, the Ld. A.R. submitted that the CIT(A) erred in holding consideration received for transfer of trademark as revenue receipt instead of capital receipt. The Ld. A.R. further submitted that the Revenue Authorities arbitrarily allocated total consideration into goodwill and right to manufacture of veterinary products. In regard to the second aspect of transfer of marketing rights, the Ld. A.R. submitted that Revenue Authorities erred in confirming consideration received for transfer of marketing/distribution rights for veterinary products as revenue receipt. The Ld. A.R. submitted that the joint venture has given the trademark as per the agreement and there was no transfer of trademark relating to goodwill of the business. The agreement itself shows that date of application of registration and the application of 40 trademarks were pending for registration. The Trademarks Act itself recognizes the transfer of unregistered trademark as per Section 39 of the Act. Also even the user of unregistered trademark gets the right in the trademark and can file suit for passing off. The assessee has assigned all of their 46 trademarks in a lumpsum manner for total consideration of Rs.25 crores. These being self-generated and not purchased trademarks, there is no question of showing them in balance sheet. The assessee has not relinquished its right to manufacture. In fact, the assesse has continued to manufacture for JV because once the trademarks are transferred, the assessee cannot sell the products and only the JV can. Thus, what is lost for the assesse is right to market and not right to manufacture. Section 38 of the Trademarks Act envisages only two kinds of assignment. Assignment of trademark with the goodwill of the business concerned or without the goodwill of the business concerned. The agreement between the assessee and JV is to the effect that JV can market, sell and distribute the said trademarked pharmaceuticals preparations. Therefore, very assignment of trademarks would necessarily have to take place “with the goodwill of the business concerned” only. If the assignment of the trademarks is made without the goodwill of the business, then the JV would own the trademarks but could not market, sell and distribute the said trademarked pharmaceuticals preparations and the very purpose of the agreement would be futile. The agreement between assessee and JV is therefore correctly termed along with the goodwill of the business concerned in the goods for which the said trademarks are registered. Such narration in the agreement does not give rise to transfer of goodwill in the business of the assesse taxable u/s 55(2) of the Act as explained in the various decisions. The Ld. AR submitted that what is transferred is

only trademark and not goodwill of the business as such as held in decision of Associated Electronics and Electrical Industries (Banglore)P. Ltd. vs. DCIT IT(SS)A No. 9/Bang/2000 order dated 06.02.2009. Goodwill of the business cannot be independently transferred without the transfer of the business undertaking. The facts of the assessee's case are identical as there is no transfer of the business undertaking to the JV what is transferred is only trademarks. If the transfer of such trademark was transfer of goodwill, then there was no need to legislate S. 55 (2)(a) with effect from 01.04.2002 to include transfer of trademark too as held in case of CIT vs. Associated Electronics and Electrical Industries (Banglore)P. Ltd. by the Hon'ble Karnataka High Court (2016) 65 taxmann.com 253.

24. As regards to consideration received against assignment of marketing rights, the Ld. AR submitted that the assessee and JV are separate legal entities where JV has 50% share owned by a third party. So far as the assesse is concerned, its income earning apparatus is destroyed. Only because the assessee has 50% share in JV that would mean that the assessee has retained its income earning apparatus. After the transfer of marketing rights, the assesse would not earn income out of such business. Although what is material is the destruction of the income earning apparatus and not its impact, the assesse has nonetheless suffered significant loss of revenue after the transfer. The Ld. AR further submitted that the facts of the decision of Blue Star 13 SOT 25 are completely different than the assessee's case. In the case of blue star, Blue star was exclusive agent of HP's products in India. Blue Star and HP later formed a JV for manufacture and marketing of the products and HP paid Blue Star to avoid competition with JV. In the present assessee's case, the assesse has not formed JV with the foreign principles. Instead, JV is formed with a third party Cadila and there is a simplicitor transfer of marketing rights of products of foreign principles. The case of Blue Star is distinguishable on facts in as much as there is no compensation received by the assesse on termination of agency by the principles which was in the case of the Blue Star. Thus, the Ld. AR submitted that on both the accounts the addition may be deleted.

25. The Ld. D.R. submitted that on 29.01.2000 agreement was incorporated between the ASE and Cadila Healthcare Limited was entered into for a 50:50 Joint Venture. The Ld. D.R. further submitted that Joint Venture to pay assessee Rs.73

crores plus additional compensation of Rs.10 crores for marketing rights of ABIC products. As relates to the agreement dated 15.06.2000, the same is related to Rs.20 crores for assignment of marketing rights which were claimed capital receipt not taxable, Rs.25 crores for assignment of trade mark which were claimed capital receipt and not taxable as well as Rs.28 crores for transfer of knowhow which was return of income as Revenue income. Ld. D.R. further submitted that as per agreement dated 19.05.2001 which was for changing due date of payment of additional Rs.2 crores on yearly basis. The Ld. D.R. further submitted that the Assessing Officer sought to tax consideration received against assignment of trademarks for the reason that only 6 out of 46 trademarks are registered and the balance are unregistered. In fact, unregistered trademarks do not give the owner any rights. As regards to tax consideration received against assignment of marketing rights because even after assignment there is no substantial reduction in the turnover of the assessee. The Ld. D.R. submitted that there is nothing to show that 40 trademarks were pending registration and, therefore, the Assessing Officer has only granted those trademarks which were registered. Ld. D.R. further submitted that the agreement itself does not show separate values for each trademark. In fact, the assessee had not shown these trademarks in its balance sheet. Ld. D.R. further submitted that agreement is a composite agreement for not only assignment of trademark but also for relinquishment of right to manufacture as well as transfer of goodwill. Therefore, the Ld. D.R. submitted that even if transfer of trademark is not taxable under Section 55(2), the transfer of goodwill and relinquishment of right to manufacture are taxable. Out of Rs.25 Crores of consideration, Rs.7 Crores would estimate as consideration against trademark and remaining is for the relinquishment of right to manufacture and transfer of goodwill. The Ld. D.R. submitted that the case laws relied by the CIT(A) in the case of relied Blue Star, 13 SOT 25 is distinguishable and does not apply in assessee's case. The Ld. D.R. submitted that the case law reported by the CIT(A) is very much identical to assessee's case as there is no destruction of income earning apparatus because the assessee has 50% share in JV and there was no significant reduction in the income of the assessee even after the assignment of marketing rights. The Ld. DR has given written submissions which are reproduced as follows:

> *"As permitted by this Hon'ble Court, in continuation of the oral submissions made during the course of hearing, the following written submissions in respect of the Ground No. 7 involving the issue of transfer of Trademark, Goodwill of*

the business and Marketing Rights in respect of certain veterinary products are made as under:

Transfer of Trademark/Goodwill/Marketing Rights

1. Background of the Issue

1.1 The issues under dispute trace their origin to the formation of a Joint Venture (JV) by the appellant company in collaboration with Zydus Cadila. It is not disputed such rearrangement is a product of appellant's own volition and mutual agreement. It is not a case of a compulsion such as termination etc of contract. A summary of the issues involved in Ground No.7 is as under:

Sr No	Issue Involved	Amount	Treatment By Appellant	Result Of 1st Appeal	Remarks
1	Technical Know-how	28 Cr	Revenue Receipt	--	No Dispute
2	Trademark & Goodwill of the business	25 Cr	Capital Receipt	Rs 18 Cr As Capital Gains; Rs 7 Cr as Capital Receipt	Assessee as well as Revenue in appeal.
3	Marketing Rights	20 Cr	Capital Receipt	Treated As Revenue Receipt	Assessee is in appeal.

1.3 The business rearrangement has been so that after the formation of the JV, certain products whose trademark/marketing rights were with the appellant stood transferred to the JV. The appellant, however, continues to exercise its right to manufacture the products for the JV and will, accordingly, be entitled to the profits through the JV.

1.4 It is also pertinent to note that the agreement effecting the aforementioned scheme of business rearrangement is a composite one inasmuch as there is no value based delineation of various components being reassigned. For instance, it is not palpable from the agreement as to what objective basis has been adopted for the valuation of trademark vis-à-vis that of marketing rights or, for that matter, valuation of registered trademark vs unregistered trademark and so on. There has been a composite payment of Rs 73 Crore under the transaction and breakup of this sum has no rational basis to justify value determination.

1.5 It is against this backdrop that the substance of the entire scheme deserves to be examined.

2. Transfer of Trademark & Goodwill of the Business:

2.1 Admittedly, a total of 46 trademarks have been transferred as a part of the business rearrangement. It is also not in dispute that 6 trademarks were registered and 40 were unregistered. The core controversy has two aspects to it:

i. Basis of valuation of the Trademarks

ii. Assignment of Goodwill of the business & Manufacturing Rights along with the Trademark

2.2 On the question of valuation of the Trademarks, the appellant has not been able to demonstrate any objective basis for valuation. As is manifest, out of the total consideration of Rs 73….crore, a sum of Rs 25 Crores has been arbitrarily allocated to the transfer of the 46 Trademarks, without indicating the basis of valuation as a class or whether and how differential valuation of registered vs. unregistered Trademarks has been done. There is no sincere effort on the part of the appellant either before the lower authorities or before this Hon'ble Court to establish in a concrete manner the basis of valuation of such trademarks.

2.3 As already stated, it is an admitted position of facts that the impugned transfer of Trademarks was not a consequence of a compulsion but of volition. It is not a case where Trademarks had to be surrendered as a result of a legal contest or settlement. That being the case, the appellant is under a much heavier onus to justify the valuation and tax treatment of the amount received in lieu of transfer of the Trademarks.

2.4 On a specific note, since the appellant has failed to put forward any basis of valuation at all, it goes without saying that it has also failed to show as to whether and how registered and unregistered Trademarks were differently valued. Accordingly, the appellant has also not been able to justify as to why the transferee JV has chosen not to distinguish between registered and unregistered trademarks while determining the consideration to be paid in lieu thereof. Notwithstanding that the Trademarks are being claimed to be self-generated assets, specific valuation to determine their price is a sine qua non for any genuine transfer.

2.5 The second aspect is the transfer of goodwill of the business and right to manufacture along with the Trademarks. The relevant clause of the agreement on assignment of trademark dated 15/06/2000 reads as under:

> *"…..*
>
> *AND WHEREAS the Assignee is a 50-50 Joint Venture Company established by the Assignor and Cadila Healthcare Limited for the purpose of engaging in the marketing, selling and distribution of various veterinary pharmaceutical preparations and* ***desires to acquire the said Trade Marks of the***

> ***Assignor along with the goodwill of the business concerned*** *in the goods for which the said Trade Marks are registered and/or being used by the Assignor..”*

2.6 As can be seen, there is a specific and unambiguous clause relating to the transfer of goodwill of the business also along with the Trademarks. In. fact, during the course of hearing, Ld AR himself had fairly pointed out that the relevant statute viz Trademarks Act also has an express provision to the effect that assignment of Trademarks is possible in two ways – with or without Goodwill which further supports that assignment of trademark along with goodwill of the business has been done in the present case.

*2.7 The argument of the Ld AR that goodwill could not have been assigned without transferring the entire business is not sustainable in light of the unequivocal terms of the agreement and the express provisions of Trademarks Act. It is clear that in the case of the appellant, who has been carrying out a number of business activities, one of the business ventures namely animal healthcare products has been transferred along with its goodwill. This is corroborated by the conscious use of the phrase “along with the goodwill of the business **concerned**”. Goodwill being a generic concept denoting reputation of a particular business house has, in the present case, continued to reflect itself in the very name of the new Joint Venture (SZ= Sarabhai Zydus). Accordingly, goodwill of the business concerned has manifestly been transferred to the JV.*

*2.8 The assignment of the goodwill, therefore, has to be viewed in the specific context of the composite agreement. In this regard, the appellant has placed reliance on the case of **Associated Electronics & Electrical Industries** (IT(SS) No.9/Bang/2000) [decision dated 06.02.2009] for the proposition that since the business itself has not been transferred, it is not possible to say that goodwill of the business has been transferred. The reasoning behind such contention is that goodwill cannot be transferred without the transfer of the entire business itself. This generalisation of the appellant is contrary to the facts of the case. It is submitted that appellant’s own terms of agreement (supra), the Trademark has been assigned along with the goodwill of the business concerned. On these facts, it is respectfully submitted that the ratio laid down in case cited by the appellant will not be applicable in the present case because the terms of agreement in the cited case are materially different from those in the impugned agreement. In the cited case the terms of clause were:*

> *Relating to and in **trademark** ‘sharp’*

In the present case, however, the unambiguous terms used are:

> *“….Trade Marks of the Assignor along with the **goodwill of the business concerned**...”*

This is a material distinction inasmuch as the nature of goodwill under transfer is manifestly different in the two instances. Therefore, the ratio of the decision cited by the Ld AR will not be applicable to the special factual and circumstantial matrix of the present case.

2.9 Ld CIT(A) has dealt with this issue elaborately in Para 15.8 to 15.11 (Page 86 to 91) of his order. Revenue supports the Ld CIT(A)'s reasoning in principle to the limited extent of rationally bifurcating the composite payment into its logical ingredients. In absence of anything to the contrary presented by the appellant, Ld CIT(A)'s action of bifurcation and allocation is an exercise based on objective reasoning.

2.10 At the same time, however, it is submitted that the Ld CIT(A) ought to have treated the entire sum of Rs 25 Crore as revenue receipt in light of the preceding submissions rather than treating Rs 18 Crore out of Rs 25 Crore, as capital gains. On this limited point, the Revenue is challenging the action of the Ld CIT(A) in the present appeal. It is clear that the entire agreement is composite in nature and the bifurcation of the consideration of Rs 73 Crore has been arbitrarily done by the appellant. Therefore, the entire receipts are required to be treated as revenue in nature since they represent a sum paid for compensating the appellant for the profits forgone and not loss of source of profit. It is an admitted fact that the appellant holds 50% stake in the Joint Venture and as such continues to hold a stake in the profit generating apparatus. In addition, the appellant also continues to effectively act as the contract manufacturer of the Joint Venture for the products under assignment and, hence, continues to the beneficiary of the profits of the business activity. This undisputed fact conclusively demonstrates that it is not a case of loss of source of income but merely a case of modification of the manner of deriving profit from the source that continues to subsist.

3. Issue of Reassignment of Marketing Rights

3.1 The appellant has shown receipt of Rs 20 Crore in lieu of transfer/reassignment of marketing rights of ABIC Ltd, Israel, Bomac Laboratories Ltd., New Zealand and rights of the permitted use of brands owned by Bristol-Myer Squibb Inc.,USA, to the Joint Venture. It is argued by the appellant that this transfer of Marketing Rights has resulted into a loss of the very source of income and, hence, the resultant receipts in lieu of such transfer are capital in nature.

3.2 It is pertinent to note that even in respect of the transfer/assignment of the aforementioned rights, the basis of valuation has not been explained either before the lower authorities or before the Hon'ble Bench.

3.3 Without prejudice to and in addition to the above, as regards the character of income, it is necessary to appreciate that in this composite scheme of reassignment of rights, what essentially has happened is a mere modification of the income generating apparatus and not the total loss thereof. The income generating environment consists of two major elements:

i. Source of Income

ii. Manner of Exploitation of the Source

It is trite law that matters pertaining to the very existence of the source of income fall in the capital field. At the same time, however, this is also settled law that as long as the source is intact and only the manner of its exploitation is altered or modified, the advantages arising therefrom shall be in the revenue field.

3.4 Against this backdrop, if one examines the facts of the case, the following picture emerges as a matter of fact:

i. Before the impugned reassignment, the entire income generating process was within the exclusive domain of the appellant;

ii. The appellant held both the manufacturing and marketing rights in a seamless chain of production and sale;

iii. After the impugned reassignment, the appellant parted with just the marketing and manufacturing rights without extinguishing its inherent right to manufacture, albeit on behalf of the JV;

iv. Thus, what was a single seamless process has now been rearranged in two distinct yet integral steps whereby manufacturing is done by the appellant and marketing by the Joint Venture;

v. The appellant is, therefore, very much a role player in the entire process by continuing to be the manufacturer/purchaser of the products on behalf of the JV;

vi. It is not at all the case of the appellant that as a consequence of the impugned reassignment, the JV has pushed the appellant out of business resulting into the destruction of the profit making apparatus;

vii. Even otherwise, such an argument will anyways not be available to the appellant since the entire scheme is appellant's own well-thought-out and voluntary venture;

viii. The very fact that this entire rearrangement is a voluntary exercise, leaves no doubt that the appellant has undertaken this scheme in the furtherance of its business interests. In such case,

it is counter-logical for the appellant to canvass the position that the appellant on its volition decided to extinguish its own source of income;

ix. In the result, therefore, the only inescapable rational conclusion is that the impugned scheme of reorganisation reflects appellant's conscious exercise of free will just to rearrange the different stages of income generation process. What has been forgone by the appellant is not the profit making apparatus per se but just profit making methodology;

3.5 It, thus, emerges as a matter of fact that the impugned scheme is one of voluntary rearrangement of the manner of exploiting the source of income. It is not a case of reassignment or transfer under business compulsion or survival strategy. Rather, the scheme under question is a premeditated commercial stratagem which symbolises appellant's voluntary election as to the manner in which benefits are to be derived from the source that still subsists with the appellant.

3.6 It is respectfully submitted that on the same reasoning of this being an exercise of conscious and premeditated mind, the case laws cited by the Ld AR shall not rescue the appellant's case. This is so because in the cases so relied upon, the other party had terminated asssessee's dominion over the profit making apparatus and, hence, the receipts in lieu of such termination was claimed to be capital receipt. In contrast, the present case involves a voluntary assignment of the rights to a third party and it is the third party that has made the impugned payment to the appellant in order to compensate it for the loss of profits. It is, thus, not even nearly a case where the assessee has been compensated for termination of contract etc.by the owners of the rights.

3.7 the compensatory payment has been made by the Joint Venture of the appellant and not by ABIC Ltd, Israel, Bomac Laboratories Ltd., New Zealand and Bristol-Myer Squibb Inc., USA, who were the actual right owners. This finding of fact is material not just to distinguish the case laws cited by the appellant but also to conclusively establish that the payments received are not in the nature of capital receipts coming from the owners of the rights. Once this position of facts is admitted, the question of compensation for loss of source of income shall not arise.

3.8 Ld AR has attempted to distinguish the decision of Blue Star Limited Vs DCIT 13 SOT 25 (Mum), stating that in that case there was termination of agency whereas in the present case there is no such termination of agency. It is respectfully submitted that this contention actually goes to strengthen Revenue's case.

In Blue Star case (supra), despite there being a case of termination of agency, the receipts were treated to be revenue in nature by the

Hon'ble Court. By contrast, in the present case, there is a mere rearrangement of transactions by appellant's own design and not even termination of any kind by the actual owners of the rights. Therefore, by simple reasoning, this is a much better case for treating the receipts as revenue in character. The sum and substance of Revenue's case is that the appellant has, on paper, forgone just the 'kind of 'income' (and not the source) for which the appellant has been compensated at once. In support of this proposition, Revenue also seeks to place reliance on the findings recorded by the Ld CIT(A) in Para 15.12 to 15.24 of his order.

4. Conclusion : <u>Substance Over Form</u>

4.1 It may be noted that, these being civil and quasi-judicial proceedings, even as it is not incumbent upon Revenue to conclusively establish the motive behind the impugned stratagem, a succinct portrayal of the signalling attributes of the entire scheme is attempted as under:

4.2 The transaction doesn't stand the test of ordinary prudence and human probabilities. Any genuine reassignment of Trademarks/ Goodwill/ Marketing Rights would not be undertaken voluntarily to the detriment of the very existence of the profit making apparatus. And such, the claim of loss of source of income as purported by the appellant doesn't stand the test of prudence.

4.3 The impugned scheme is essentially a case of composite agreement. Any real world transaction of reassignment shall invariably require an itemised valuation of each class of rights being transferred. It is only upon having satisfied with the correctness of valuation that any prudent assignee would agree to pay the consideration so demanded. In absence of specific and differential valuation of distinct items such as Trademarks/Goodwill/Marketing Rights, the very bona fides of the scheme become questionable falling under a strong shadow of colourability.

4.4 Considering the entirety of the transactions and manner in which they have been executed, it emerges as an objective inference that the scheme has been hatched with a view to evading tax in the hands of not only the transferor but also the transferee. The theory of 'loss of the profit making apparatus' is attractive as it holds twin advantages - on one hand the transferor payee (the appellant) doesn't suffer any taxation treating the same as capital receipt and on the other hand, the transferee payer (the joint Venture) gets to claim depreciation on the sum so paid in lieu of the reassignment.

4.5 A holistic examination of the nature of the scheme and the motive behind it readily betrays the real considerations underlying the apparent. It is respectfully submitted that facts and circumstances of the present case crave for invocation of the doctrine of substance over form so as to distil the real from the apparent.

5. In view of the facts & circumstances of the present case and the position of law as brought out in this submission, it is clear that the entire sum

of Rs 73 Crore (and not just Rs 28 Cr offered suo moto by the appellant) received by the appellant in lieu of the transfer of the technical know-how, trademarks and goodwill of the bushiness concerned and marketing rights of certain veterinary products, is liable to be treated as revenue in character.

It is prayed before the Hon'ble Bench that these submissions may kindly be taken on record and be considered while adjudicating upon the appeals please."

26. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that during the year the assessee assigned their own trademarks of veterinary products vide Deed of Assignment of Trademarks made on 15.06.2000 to Sarabhai Zydus Animal Health Limited which is a joint venture of the assessee and Cadila Healthcare Ltd. The said assignment of trademark was for a total consideration of Rs.25 Crores. The assessee also assigned marking rights to Sarabhai Zydus Animal Health Limited (JV) in respect of veterinary products of M/s ABIC Limited, Israel and M/s Bomac Laboratories Limited, New Zealand and rights of a permitted user of brands owned by Bristol-Myers Squibb Inc., USA vide Marketing Agreement made on 15.06.2000 at total consideration of Rs.20 Crores. Besides this, vide letter agreement dated 29.01.2000 and further amended by letter dated 19.05.2001, an additional consideration of Rs.2 Crores was also due and payable to the assessee by Sarabhai Zydus Animal Health Limited in respect of marketing rights of ABIC products. Accordingly, a sum of Rs.2 crores was due and payable and the same was received by the assessee during the year. This further consideration of Rs.2 Crores was due and payable every year for a period of 5 years subject to condition that in the event of agreement between assessee and ABIC is terminated or comes to an end for whatever reasons during the period of 5 years with Sarabhai Zydus Animal Health Limited i.e. the joint venture company shall not be required to make any further payments thereafter except that for the year in which agreement is terminated. Sarabhai Zydus Animal Health Limited shall pay sum equivalent to prorata amount for period during which marketing agreement was in force during that year. The contentions of the Ld. A.R. was that these are capital receipts and, therefore, are not coming under the purview of taxation and thus the Assessing Officer as well as the CIT(A) treating the same as revenue receipt are totally uncalled for. The contentions of the Ld. A.R. was also taken cognisance of the observations of the Assessing Officer that merely being a joint venture in Sarabhai Zydus Animal Health

Limited cannot be termed that the assessee itself is involved after the assignment of trademarks and marketing rights to the joint venture company. It is correct to say that the joint venture company always has separate legal entity as per Indian Law. It is an admitted fact that the assessee is not involved in sale and purchase of trademarks. The assessee has self established the trademark as per their contentions, but from the perusal of records it can be seen that the assessee in certain trademark as well as marketing rights has taken the same from M/s ABIC, Israel, M/s. Bomac Laboratories Limited, New Zealand as well as Brand owned by Bristol-Myers Squibb Inc., USA. Thus, the contentions of the assessee that the trademarks were self established and there is no expenses incurred by the assessee, appears to be not correct in totality. From the perusal of the assignment agreement related to trademarks and marketing rights as well as the understanding between the joint venture and the assessee, it can be seen that though as per the agreement, the consideration was paid to the assessee, the assessee retains the right of manufacturing the products. The assessee is not having any right over the trademark as well as marketing the product. But the joint venture has not clearly set out that the assessee will totally bequeath its right relating to marketing operations as well as relating to trademarks. In the taxation parlance capital receipts are the income generated from investments, financial activities and business and it decreases or increases the value of liability. The assessee's source of income was not solely depended upon the trademarks or the marketing rights but overall the generation of revenue from the operation of veterinary and human pharmaceutical products effectively establishing in the market in its own name and identity as well as manufacturing the same and marketing in its own name. The assessee fails to establish that the element of revenue generation does not come in the picture as contemplated by the Tax Authorities. The assessee submitted that the decision of Blue Star is completely different as the joint venture company formed by Blue Star and HP was for manufacture and marketing of the products and HP paid Blue Star to avoid competition with JV. In the present case, the gist of decision of Blue Star and its ratio is applicable as the assessee along with Cadila Healthcare Ltd. has formed joint venture. Cadila Healthcare Ltd.is not third party as projected by the assesse but is a second party to the Joint Venture. Projection of Cadila being third party is on superficial basis. The assessee while submitting its contentions stated that the assessee has suffered significant loss of revenue after the transfer of trademarks and marketing rights appears to be superficial. During the hearing before us as well

as during the assessment proceedings and the appellate proceedings before the CIT(A) the assessee at no point of time submitted that the joint venture between the assessee and Cadila Healthcare Limited has totally taken over the trademark assignment as well as assignment of marketing rights exclusively from the assessee. In fact, there are clauses in those assignment agreements which established that the assessee has made business arrangement for the benefit of its manufacturing activities and for the generation of revenue to the joint venture entered between the assessee and Cadila Healthcare Limited. The observation of the CIT(A) appears to be correct and thus there is no need to interfere with the same. As relates to the case laws submitted by the assessee, the same are harping factual centric transfer of trade mark/assignment of trademark and in many of the cases there was no peculiarity of joint venture coming in the picture wherein the assessee and the other parties are involved. The joint venture though shown as separate legal entity has not defined the separate operations from the activities of the assessee and it has participated in the activities of the assessee which was carried out earlier. Therefore, ground no.7 of assessee's appeal is dismissed.

27. Now coming to the Revenue's appeal. Ground No. 1 of Revenue's appeal relating to deletion of addition of Rs. 19,27,498 of buying commission to Teknoserv (Jersey) Ltd., the Ld. DR relied upon the Assessment Order.

28. The Ld. AR submitted that the issue is covered in favour of the assessee for A.Y. 1995-96 being ITA No. 1086/Ahd/2011order dated 14.12.2007, A.Y. 1998-99 being ITA No. 1956/Ahd/2001 order dated 29.08.2008 and A.Y. 1999-2000 ITA No. 933 & 1313/Ahd/2016 order dated 17.01.2019.

29. We have heard both the parties and perused all the relevant material available on record. The Tribunal in A.Y. 1995-96 held as under:

> *"5. The second ground of the Revenue's appeal was also claimed by the assessee to be covered in its favour by the order of the Tribunal in its case for A.Y. 1990-91 (supra) (refer para # 16) as well as that for A.Y. 1991-92 (in ITA No. 1988/Ahd/1999 and 1869/Ahd/1999) dated 16-09-2005 (refer para # 10 and 12); reference to the relevant paragraphs of which stood also made by him*

while arguing the assessee's case on the said ground. The Ld. D.R. was again unable to show any difference in the facts of the case from that of the years for which the assessee's claim stood accepted by the Tribunal. We find that the disallowance of Rs. 6,45,895/- stood effected in respect of buying commission allowed to M/s Teknoservy (Jersey) Ltd. in the assessment for A.Y. 1990-91. The Tribunal following its earlier order for A.Y. 1989-90 dated 18-11-2003 allowed the assessee's claim, observing no change in the facts from the preceding year, i.e. AY 1984-85, for which the assessee's case stood upheld by the Tribunal vide its Order in Appeal No. ITA 2392/Ahd/1990 and ITA No. 2230/Ahd/1990 dated 14-11-2003. The issue thus is repetitive, with no change in the facts being reported; even the Assessing Officer (A.O.) placing reference to the assessment order, including the reasons stated therein, for earlier years, in justification of the impugned disallowance. We therefore, respectfully following the said Orders for the preceding years; the issue arising from year to year, allow the assessee's claim, so that the Order of the Ld. CIT(A) is upheld on this ground."

In the present assessment year as well, no distinguishing facts were submitted by the revenue before us. Therefore, we are following the earlier years orders as decided by the Tribunal as facts are identical to the earlier assessment years. Thus, Ground No. 1 of Revenue's appeal is dismissed.

30. As regards to Ground No. 2 of Revenue's appeal relating to festival allowance, Misc. expenses, Telephone expenses, Vehicle expenses, the Ld. DR submitted that the CIT(A) erred in allowing these expenses.

31. The Ld. AR submitted that this issue is covered in favour of the Assessee for A.Y. 1998-99 being ITA No. 1956/Ahd/2001 order dated 29.08.2008 and A.Y. 1999-2000 being ITA No. 933 & 1313/Ahd/2016 order dated 17.01.2019.

32. We have heard both the parties and perused all the relevant material available on record. The Tribunal in A.Y. 1998-99 held as under:

"9. Ground No. 3:- So far as issue involved in ground No. 3 is concerned, the same has been decided by the CIT(appeals) as per his findings contained in paragraph No. 6.2. of the appellate order, which are in the following terms:-

> *"6.2 After hearing the appellant's counsel and on verification it is found that the addition made on account of similar disallowance has been deleted by me in the appellant's own case for the assessment year 1996-97 in Appeal No. CAB/I-127/98-99 and, therefore, following the said order the addition of Rs. 5,56,982/- on account of disallowance of Festival Allowance is deleted and the appellant gets relief of Rs. 5,56,982/- ".*

10. The ld. DR has supported the order of the Assessing Officer, whereas the ld. Counsel for the Assessee submitted that the issue raised in this ground of Revenue's appeal stands covered in favour of the Assessee and against the Revenue by the decision of ITAT Ahmedabad Bench "B" in assessee's case, i.e. in ITA No. 1086/Ahd/2001 for Asstt. Year 1995-96 (Revenue's appeal), dated 14/12/2007, wherein the Tribunal has decided the issue in assessee's favour as per its findings contained in paragraph No. 7, which read as under:-

> *7. We have heard the parties, and perused the material on record. We find that the ground for the disallowance of the assessee's claim in respect of the 'Provision for Festival Allowance' (Rs. 19,84,342/-) by the A.O. is his inferring the same to be only in the nature of bonus, named differently, and to which therefore, the provision of section 43B would apply. Similar argument stood also raised on the Revenue's behalf for the preceding years, with the Appellate Authorities finding the same as without basis on facts, so that the said impugned disallowance could not be said to be a bonus as contemplated u/s 36(1)(ii) of the Income-tax Act, 1961 ('the Act' hereinafter), so as to be covered by the provision of Section 43B of the Act. The facts for the current year being no different, we find no reason for any interference with the Order of the Ld. CIT(A) and, resultantly, uphold the same, following the decision of the Tribunal in the assessee's case for the preceding years."*

11. After careful consideration of the rival submissions and the facts and circumstances of the case, we are of the opinion that the Revenue having not brought to our notice any decision contrary to the aforesaid decision of Tribunal in assessee's case, the issue raised by the Revenue in this ground is decided in favour of the Assessee and against the Revenue, after following the order of the Tribunal in assessee's case for Asstt. Year 1996-97 (supra). Revenue's this ground is rejected."

The facts in the present assessment year is also identical to these disallowance related to festival allowance under section 43B of the Act. No distinguishing facts were submitted by the Ld. DR in the present assessment year. Hence, festival allowance is properly allowed by the CIT(A). Now as regards to Misc. expenses, Telephone expenses, Vehicle expenses, the Tribunal observed as under:

"24. Ground No.8:- So far as issue involved in ground No. 8 is concerned, the same has been decided by the CIT(Appeals) as per his findings contained in paragraph No. 7.5 of the appellate order, which are in the following terms:

> *"7.5 After hearing the learned counsel for thee appellant and after going through the material on record, I find considerable force in the appellant's arguments and after taking into consideration the Tribunal decisions relied upon by the appellant referred to above I restrict the disallowance to 5% of miscellaneous expenses of Rs. 45,38,660/- amounting to Rs. 2,26,933/- as done in earlier years and delete the disallowance of Rs. 2,81,435/- made on adhoc basis out of Rs. 5,08,368/-. Thus the appellant gets relief of Rs. 2,81,435/-. As regards the disallowance out of telephone and vehicle expense, the same are deleted relying on the above mentioned decisions of Hon'ble ITAT, Ahmedabad."*

25. The ld. DR has supported the order of the Assessing Officer, whereas the ld. Counsel for the Assessee submitted that the issue raised in this ground of Revenue's appeal stands covered in favour of the Assessee and against the Revenue by the decision of ITAT Ahmedabad Bench "B" in assessee's case, i.e.

in ITA No. 1461/Ahd/2001 for Asstt. Year 1996-97(Revenue's appeal), dated 14/12/2007, wherein the Tribunal has decided the issue in assesse's favour as per its findings contained in paragraph No. 42, which read as under:

> *"42. We have heard the parties, and perused the material on record. The A.O. has, we find, adopted a global approach, in the matter and not brought about the instances where the assesse was unable to substantiate its claim of the relevant expenditure being incurred only and exclusively for business purposes. No presumption, it is trite, can hold, and it is only on a determination of the discrepancies in the assessee's claim can he proceed to estimate the same by applying a percentage that he considers justified, also delineating the reason for the same, so that the appellate authority would, while adjudicating on quantum, i.e., where required to do so, be aware of the same, and consider it on merits. Under the circumstances, we find no infirmity in the Order of the Ld. CIT(A), and uphold the same on this ground."*

26. After careful consideration of the rival submissions and the facts and circumstances of the case, we are of the opinion that the Revenue having not brought to our notice any decision contrary to the aforesaid decision of Tribunal in assessee's case, the issue raised by the Revenue in this ground is decided in favour of the Assessee and against the Revenue, after following the order of the Tribunal in assessee's case for Asstt. Year 1995-96(supra). Revenue's this ground is rejected."

The facts in the present assessment year is also identical to these disallowance related to Misc. expenses, Telephone expenses and Vehicle expenses. No distinguishing facts were submitted by the Ld. DR in the present assessment year. Hence, Misc. expenses, Telephone expenses and Vehicle expenses are properly allowed by the CIT(A). Ground No. 2 of Revenue's appeal is dismissed.

33. As regards to Ground No. 3 of the Revenue's appeal relating to adhoc disallowance of 5% out of selling expenses, the Ld. DR submitted that the CIT(A) erred in allowing these expenses and relied upon the Assessment Order.

34. The Ld. AR submitted that this issue is covered in favour of the Assessee for A.Y. 1995-96 being ITA No. 1086/Ahd/2001 order dated 14.12.2007, A.Y. 1997-98 being ITA No. 1462/Ahd/2001 order dated 30.06.2008 & 1998-99 being ITA No. 1956/Ahd/2001 order dated 29.08.2008.

35. We have heard both the parties and perused all the relevant material available on record. The Tribunal in A.Y. 1995-96 held as under:

"20. The Revenue's ninth ground relates to disallowance in the sum of Rs. 5,93,641/- effected @ 5% of its total claim toward selling expenses, i.e., Rs. 1,07,59,497/-. The A.O. found the assessee's claim of selling expenses as inclusive of the following sums aggregating to Rs. 29,68,209/-:

i)	*Gifts expenses*	*1,74,031*
ii)	*Entertainment expenses*	*7,257*
iii)	*Conference expenses*	*6,26,648*
iv)	*Exhibition expenses*	*1,31,043*
v)	*Other sales promotion expenses*	*2,54,802*
vi)	*Expenses on deals*	*9,64,512*
vii)	*Liaison work expenses*	*8,09,916*
		29,68,209

As the assessee gave only the broad details in respect of these expenses, but not the complete details, the A.O. inferred an element of non-business expenditure therein, which he estimated by applying a rate of 5% of the total expenditure. Before the Ld. CIT(A) the assesse explained the nature of each of the stated expenditure along with the modus operandi and the manner of its incurring, pleading that the same to be only genuine business expenditure, so that no part thereof merits to be disallowed, and that the A.O. had only adopted a summary approach in the matter and, accordingly, stood allowed relief by it. Aggrieved, the Revenue is in appeal.

21. Before us, like contentions stood raised by either side, each relying on the Order of the authority below as favourable to it.

22. We have heard the parties, and perused the material on record. The Revenue has not brought any infirmity before us in the Order of the Ld. CIT(A), while it challenged, and on which the assesse has placed reliance, with the Ld. CIT(A) giving definite finding after recording the assessee's explanation for each of the said expenditure, as under:-

> *"16.3 I have considered the above referred submissions of the appellant and I am of the view that the entire selling expenses referred to above amounting to Rs. 29,68,209/- are incurred wholly and exclusively for the purposes of the business and, therefore, are of allowable nature. Moreover, the Assessing Officer has also not any adverse cogent material on record to prove that some of these expenses are of disallowable nature. On the other hand, the appellant itself has disallowed the expenses wherever the same were of disallowable nature. In view of this fact, hold that the ad hoc disallowance of 5% out of the said selling expenses amounting to Rs. 5,93,641/- is not justified and the same stands deleted."*
>
> *We, therefore, find no reason to interfere with his findings and, consequently, his order, which gets upheld as a result of this ground."*

The facts are identical in the present assessment year as well and the Ld. DR could not controvert the same. Hence, Ground No. 3 of Revenue's appeal is dismissed.

36. As regards to Ground No. 4 of the Revenue's appeal relating to deletion of addition of rent and insurance payment of Packart Press unit without considering the unit was closed and there was no business activities, the Ld. DR relied upon the Assessment Order.

37. The Ld. AR submitted that this issue was set aside in the previous assessment years to the file of the Assessing Officer. The said issue was decided in A.Y. 1996-97 being ITA No. 1462/Ahd/2001 order dated 14.12.2007, A.Y. 1997-98 being ITA No. 1462/Ahd/2001 order dated 30.06.2008 & 1998-99 being ITA No. 1965/Ahd/2001 order dated 29.08.2008.

38. We have heard both the parties and perused all the relevant material available on record. This issue was already decided in A.Y. 1996-97, 1997-98 and 1998-99 and the Tribunal's directions are mentioned hereinabove in respect of A.Y. 1996-97 while deciding Ground No. 4 of the assessee's appeal. Hence, the issue is remanded back to the file of the Assessing Officer for verification of the relevant facts and proper adjudication accordingly. Needless to say, the assesse be given opportunity of hearing by following principles of natural justice. Ground 4 of Revenue's appeal is partly allowed for statistical purpose.

39. As regards to Ground No. 5 of the Revenue's appeal relating to deletion of addition made u/s 40A(9) of the Act regarding the previous year's expenses and foreign travel, the Ld. DR relied upon the assessment order.

40. The Ld. AR submitted that this issue was decided in favour of the assesse in A.Y. 1997-98 being ITA No. 1462/Ahd/2001 order dated 30.06.2008 and in A.Y. 1999-2000 being ITA No. 933 & 1313/Ahd/2016 order dated 17.01.2019 as well as this issue was also allowed by the CIT(A) in A.Y. 2009-10 wherein the department has not preferred any appeal.

41. We have heard both the parties and perused all the relevant material available on record. The assessee provides medical facilities to the assessee's employees through the Ambalal Sarabhai Foundation which is set up by the assessee. The assesse do not pay any fixed contribution to the Foundation and the Foundation is set up for the welfare of the employees of the assessee. The assessee only reimbursed the expenses incurred by the employees relating to medical facilities provided by the Foundation. Such expenses does not come under purview of Section 40A(9) of the Act. Thus, CIT(A) rightly allowed these expenses. As relates to previous year's expenses, during the year, assessee accounted for bills / debit notes of some parties for interest, price difference etc. pertaining to earlier years. There were disputes between the assessee and these parties during the previous year and some disputes were settled during the previous year. Therefore, liability is crystallized during the year on account of settlement with those parties in current year as the assesse is follows mercantile system of accounting. The said expenses were also allowed in previous

assessment years by the Tribunal as well. Hence, the CIT(A) has rightly allowed the previous period expenses. As regards to foreign travel expenses, the assessee placed on record all the details that the expenses were incurred for business purpose only and the same evidence was before the Assessing Officer. Thus, the CIT(A) has rightly allowed foreign travel expenses. Therefore, Ground No. 5 of Revenue's appeal is dismissed.

42. As regards to Ground No. 6 of Revenue's appeal relating to deletion of addition made on transfer of Trademarks and Marketing rights, the Ld. DR submitted that this issue is identical to Ground No. 7 of assessee's appeal and the contentions taken in that ground be taken herein as well. The Ld. AR also stated the same.

43. We have heard both the parties and perused all the relevant material available on record. Since we have already decided this issue in assessee's appeal in respect of ground no.7, the same reasoning is applicable herein and hence ground no.6 of Revenue's appeal is dismissed.

44. As regards to Ground No.7 of Revenue's appeal, the same is General in nature, hence dismissed.

45. In the result, appeal of the assesse and the Revenue are partly allowed for statistical purpose.

Order pronounced in the open Court on this 25th day of May, 2022.

Sd/-	*Sd/-*
(WASEEM AHMED)	**(SUCHITRA KAMBLE)**
Accountant Member	Judicial Member

Ahmedabad, the 25th day of May, 2022

PBN/*

Copies to: *(1)* *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*

(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad