

आयकर अपीलीय अधिकरण, मुंबई "के" खंडपीठ

Income-tax Appellate Tribunal -"K"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं सी. एन. प्रसाद,न्यायिक सदस्य

Before S/Sh.Rajendra,Accountant Member and C.N. Prasad,Judicial Member

आयकर अपील सं./ITA/5474/Mum/2009,निर्धारण वर्ष /Assessment Year: 2004-05

DCIT, Circle-9(1) Churchgate,Mumbai-400 020.	Vs.	Gharda Chemicals Limited 5/6, Jer Mansion, W.P. Varde Marg, Off Turner Road, Bandra (W), Mumbai-50. PAN: AAACG 1255 E
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आयकर अपील सं./ITA/5348/Mum/2009,निर्धारण वर्ष /Assessment Year: 2004-05

Gharda Chemicals Limited Mumbai-400 050.	Vs.	DCIT, Circle-9(1) Aayakar Bhavan, Mumbai-400020.
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आयकर अपील सं./ITA/8376/Mum/2010,निर्धारण वर्ष /Assessment Year: 2005-06

Gharda Chemicals Limited Bandra (W),Mumbai-50.	Vs.	DCIT, Circle-9(1) Aayakar Bhavan, Mumbai-400020.
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आयकर अपील सं./ITA/8758/Mum/2010,निर्धारण वर्ष /Assessment Year: 2005-06

DCIT, Circle-9(1) Churchgate,Mumbai-400 020.	Vs.	M/s.Gharda Chemicals Limited Mumbai-400 018.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri Debashish Chandra

Assessee by: Ms. Vasanti Patel & Shri Gopal Bohra

सुनवाई की तारीख / Date of Hearing: 13.04.2016
घोषणा की तारीख / Date of Pronouncement: 29.04.2016

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश
Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order,dated 23.07.2009 and 14.10.2010, of the CIT(A)-14 and CIT(A)-15,Mumbai,the Assessing Officers (AO.s)and the assessee have filed the cross-appeals for the years under consideration,raising various grounds of appeal.Assessee-company,engaged in the business of manufacture and sale of pesticides and insecticides, weedicides,veterinary-drugs and polymers and sale

of pesticides, insecticides etc. The details of filing of returns, returned incomes etc. for both the years can be summarised as under:

A.Y.	ROI filed on	Returned Income(Rs.)	Assessment dt.	Assessed Income(Rs.)
2004-05	01.11.2004	48,08,34,392/-	27.12.2006	60,31,96,429/-
2005-06	31.10.2005	77,28,70,724/-	26.12.2008	178,30,01,600/-

I.T.A./5474/Mum/2009-AY.200405:

2.The first effective ground(GOA-1&2)of appeal,raised by the AO,is about deletion of disallowance of interest amounting to Rs.1.76crores.During the assessment proceedings,the AO observed that an amount of Rs.11.78 crores were shown as Capital Work in Progress (CWIP)as on 31/03/ 2004,that the assessee had claimed interest expenditure of Rs.15.80 crores.He directed the assessee to show cause as to why proportionate interest relatable to CWIP should not be disallowed.After considering the submission of the assessee, the AO disallowed the sum of Rs.1,76, 81,096/-out of the interest expenditure, as interest relatable to CWIP.He computed the disallowance at the rate of 15% of the amount of CWIP.

2.1.Aggrieved by the order of the AO,the assessee preferred an appeal before the First Appellate Authority(FAA).After considering the submission of the assessee, he held that the issue had been decided in favour of the assessee by his predecessor in the immediately preceding year, that the appeals filed by the Department against the order of his predecessor for the AY.s.2000-01 and 2001-02 had been dismissed by the Tribunal , that there was no change in facts during the year as compared to the facts in the earlier years.Therefore,he directed the AO to delete the disallowance of interest relatable to CWIP.

2.2.During the course of hearing before us,Authorised Representative(AR)and Departmental Representative(DR)agreed that the issue stands decided in favour

of the assessee by the orders of the Tribunal for the AY.s2000-01,2001-02 and 2003-04.We would like to re-produce the relevant portion of the order of the Tribunal dealing with the issue dealt with in the appeal for the AY.2003-04 (ITA/4405&4246/Mum/2007-dtd.16.01.2015)and same reads as under:

9.2.Before us,Representatives of both the sides agreed that the issue is covered by the order of the Tribunal for the earlier years.(ITA/2146-47/M/2007/-dated 12.12.2008,AY.2000-01,2001-02.).We have heard the rival submission.We find that in the earlier years identical issue had arisen in the appeal filed by the AO and the Tribunal had held as under:

“6.We have heard the learned representatives of the parties and perused the record.We find that the issue is squarely covered by the judgment of Hon'ble Supreme Court in the case of Core Health Ltd. (supra),on which the assessee has placed reliance. We respectfully follow the law laid down by the Hon'be Supreme Court in the said case and in the light of that we confirm the orders of the CIT(A) in both the assessment years 2000-01 and 2001-02.”

Respectfully following the above,we decide ground.no.1-3 against the AO.”

Following the above mentioned orders of the Tribunal,we decide the first effective ground of appeal against the AO.

3.Next ground of appeal is about deleting the addition of Rs.Rs.3.14crores on account of unutilised modvat credit.During the assessment proceedings,the AO observed that assessee was accounting for purchase on net of moderate credit, the unutilised Modvat credit balance as on 31/03/2005 was Rs.4.51 crores,that the amount was not included in the valuation of closing stock of raw material and work in progress as per section 145A of the Act. Accordingly he added the amount in question to the value of closing stock and consequently to the total income of the assessee.

3.1.During the course of hearing before us,representatives of both the sides agreed that the issue stands decided in favour of the assessee by the order of the

Tribunal for the earlier years. The AR further relied upon the cases of Indo Nippon Chemicals Ltd.(261ITR275)and Mahalaxmi Glassworks Private Ltd. (318ITR116).We find that the Tribunal vide its order dated 30/11/ 2009, in the assessee's own case for the AY. 2002-03 had restored the matter to the file of the AO for giving effect to the provisions of section 145A in entirety and not restricting its operation to the value of closing stock alone, that in the set aside matter, the AO did not grant any relief, that the FAA granted relief to the assessee holding that no addition was required if one strictly followed the provisions of section 145 A of the Act,that the AO filed an appeal before the Tribunal challenging the order of the FAA,that the Tribunal vide its order dated to 2/05/2013 dismissed the appeal, filed by the AO.We find that while deciding the appeal for the AY.2003-04(supra)has held as under:

“2.2.Before us,Authorised Representative(AR)stated that the Tribunal vide order dated 30.11.2009 (ITA2242/Mum/2006/-AY.2002-03)had restored back the matter to the file of the AO,that the AO did not give effect to the order of the Tribunal in the manner it was argued,that the assessee had approached the FAA,that he allowed the relief sought for,that the AO had challenged the order of the FAA before the Tribunal,that the Tribunal had dismissed the appeal of the AO on 22. 05.2013,that matter could be restored to the file of the AO for the year under appeal also.He relied upon the decision of jurisdictional High Court delivered in the case of Mahalakshmi Glass Works(P)Ltd.(381ITR116).He referred to page no.1 to 4 of the paper book.Departmental Representative(DR)stated that he had no objection if the matter was sent back to the AO.

2.3.We have heard the rival submissions and perused the material before us.We find that at page no.4 of the paper book, the assessee has given the impact of the adjustment of Modvat Credit to the Profit & Loss Account for the year under consideration.In our opinion, in the interest of justice matter should be restored back to the file of the AO for fresh adjudication.He is directed to decide the issue after considering the order of the Tribunal dated 22.05.2013 and the decision of the Hon'ble jurisdictional High Court in the case of Mahalakshmi Glass Works (P) Ltd.(supra). Ground no.1 is decided in favour of the assessee, in part.”

3.Second ground of appeal also deals with unutilised Modvat credit as on 31.03.2002.Before us,the AR stated that if the ground no.1 is restored back to the file of the AO,ground no.2 would become infructuous.As we have already remitted the issue raised in ground no.1 to the file of the assessee,so,we are dismissing ground no.2 as infructuous.

Considering the above,issue restored back to the file of the AO for fresh adjudication.He is directed to decide the issue as per the directions given in the order for the AY.2003-04.Ground no.3 is decided in favour of the AO,in part.

4.Ground No.4 pertains to excise duty to closing stock related to Ground No.3,amounting to Rs.13.66 Crores.

4.1.Before us,the AR argued that the closing stock of finished goods included excise duty,that further addition would result in disallowance of the same amount already considered in the closing stock.While deciding the ground no.3,we have restored back the issue to the file of the AO for fresh adjudication.Following the same the issue of excise duty on closing stock is also remitted back to the file of the AO.He would decide the issue after hearing the assessee.Ground no.4 is decided in favour of the assessee,in part.

5.Fifth ground of appeal is about exclusion of 90% of the certain business receipts from the profit of the business for the purpose of computing deduction u/s. 80 HHC of the Act.While computing the deduction available 80HHC of the Act,the AO excluded Insurance Claim(Rs. 24.11 lakhs),Sales of Chemicals and Scrap(Rs.1.33 Crores),Sales tax set off(Rs.67.04 lakhs), Registration charges written back(Rs.5.53 Crores)and Sales tax Refund(Rs.43.69 lakhs).The FAA deleted the exclusions made by the AO.

5.1. Before us, DR stated that the matter could be decided on merits. The AR stated that issues regarding the Insurance claim and sale of chemicals and scrap was decided by the Hon'ble Bombay High Court in the case of Pfizer Limited (330 ITR 62). She also referred to the case of Sony India (P.) Ltd. (118 TTJ 865). With regard to Sales tax refund and sales tax set off she relied upon the case of Alfa Laval (India) Ltd. (295 ITR 451). For registration charges written back the AR relied upon the cases of Bisazza India Ltd. (ITA No. 1027 of 2010) and Extrusion Process Private Ltd. (106 ITD 336).

5.2. We have heard the rival submissions and perused the material before us. We find that the Hon'ble Bombay High Court has discussed the issue of exclusion of insurance claim in the matter of Pfizer Limited (supra) as under:

A contract of insurance was a contract of indemnity. The insurance claim in essence indemnifies the assessee for the loss of the stock-in-trade. The indemnification that was made to the assessee must stand on the same footing as the income that would have been realized by the assessee on the sale of the stock-in-trade. In these circumstances, the insurance claim on account of the stock-in-trade did not constitute an independent income or a receipt of a nature similar to brokerage, commission, interest, rent or charges. Hence, such a receipt would not be subject to a deduction of ninety per cent. under clause (1) of Explanation (baa). In determining the profits of the business for the purposes of Explanation (baa), the incomes which were susceptible to a reduction of ninety per cent. were those incomes referred to in clauses (iiia), (iiib) and (iiic) of section 28 and receipts by way of brokerage, commission, interest, rent, charges or receipts of a similar nature included in such profits. Therefore, before a receipt was liable to be excluded to the extent of ninety per cent., it must be a receipt of a nature similar to brokerage, commission, interest, rent or charges. Therefore the claim on account of insurance for the stock-in-trade did not constitute a receipt of a similar nature within the meaning of Explanation (baa) and was therefore not liable to be reduced to the extent of ninety per cent."

Respectfully, following the above we uphold the order of the FAA with regard to insurance claim.

It is found that issue of sales tax refund and sales tax set off has been decided in favour of the assessee by the Hon'ble Apex Court in the case of Alfa Level (India) Ltd.(supra) in following manner:

“....interest from customers and sales tax set off received by the assessee, being profits of the business under the head “Profits and gains of business or profession”, could not be excluded while calculating the deduction under section 80HHC.”

Respectfully, following the above judgment we decide the issue of sales tax set off against the AO.

As far as exclusion of sale of scrap is concerned it is found that in the case of Sony India Pvt.Ltd.(supra)the issue has been discussed as under:

“7. As regards the other issue raised in ground No. 2 of the Revenue's appeal relating to the inclusion of miscellaneous income of Rs. 2,16,97,607 in profits of the business for the purpose of computing deduction under s. 80HHC, it is observed that while computing the deduction allowable to the taxpayer company under s. 80HHC, the miscellaneous income of Rs. 2,16,97,607 was excluded by the AO from the profits of the business relying on Expln. (baa) below s. 80HHC. Before the learned CIT(A), it was contended on behalf of the taxpayer company that the miscellaneous income received by it did not constitute any receipts of a nature similar to the items given in Expln. (baa). It was contended that the said income was comprised of receipts by way of sale of scrap, amounts written back, sale of spare parts, etc. and the same being derived directly from the business activities of the taxpayer company, they could not be excluded from the profits of the business for the purpose of computing deduction under s. 80HHC. Reliance in support of this contention was placed on behalf of the taxpayer company on the decision of Hon'ble Bombay High Court in the case of CIT vs. Bangalore Clothing Co. (2003) 180 CTR (Bom) 127. In the said decision, it was held by the Hon'ble Bombay High Court in this context that if any receipt forms part of the operational income of the taxpayer having regard to its dominant business, the same would be entitled to be included in the profits of the business for the purpose of computing deduction under s. 80HHC. According to the learned CIT(A), all the receipts i.e. sale of scrap, amounts written back and sale proceeds of spare parts included in the miscellaneous income of the taxpayer company were directly related to its dominant business. He, therefore, held that the same forming part of its

operational income was liable to be included in the "profits of the business" for the purpose of computing deduction under s. 80HHC.

*8.After considering the rival submissions and perusing the relevant material on record, we find no infirmity in the impugned order of the learned CIT(A) holding that the miscellaneous income of the taxpayer was eligible for inclusion in the profits of the business for the purpose of computing deduction under s. 80HHC. As rightly held by him, the said income **comprising of sale of scrap**, amounts written back and sale proceeds of spare parts was directly related to the dominant business of the taxpayer company and the same, therefore, represented its operational income which, as held by Hon'ble Bombay High Court in the case of Bangalore Clothing Co. (supra) was entitled for inclusion in the profits of the business for the purpose of computing deduction under s. 80HHC. The said decision of Hon'ble Bombay High Court thus clearly supports the taxpayer's case on this issue and the learned CIT(A), in our opinion, was fully justified in deciding the same in favour of the taxpayer relying thereon. His impugned order on this issue is therefore upheld and ground No. 2 of the Revenue's appeal is accordingly dismissed.”*

We find that the issue of registration charges written back was decided in favour of the assessee by the Tribunal while deciding the case of Extrusion Process Private Ltd.(supra).

Considering the above we hold that there is no legal infirmity in the order of the FAA.So,confirming the same,we decide ground no.5 against the AO.

6.Ground No.6 and 7 regarding profit after reducing unabsorbed depreciation. Before us,the AR fairly conceded that the issue stand decided against the order of the Tribunal for the AY.2003-04,dated 16.01.2015 (supra).We find that the Tribunal had dealt the issue as under:

“4.Ground no.3 is about disallowance of deduction u/s.80HHC of the Act.During the assessment proceedings the AO found that the assessee had made claimed deduction u/s.80HHCof Rs.10,22, 55,280/-against the gross total income of Rs.34,59,62,609/-,that it had also made a claim of brought forward losses and depreciation of Rs.93,08,73,001/-,that the gross total income had been considered before the set off of brought forward losses and depreciation. As per the AO it was an incorrect

method, that the assessee was required to set off the brought forward losses and depreciation from the gross total income before the claim of deduction under Chapter VIA in view of provisions of Section 32(2) r.w.s.72(2) of the Act, wherein the same was to be considered first before allowing any deduction u/s.80HHC. He referred to the judgment of the Hon'ble Supreme Court in the case of Ipca Laboratories Limited (266 ITR 521) and held that while computing deduction u/s.80HHC brought forward loss is to be reduced before claiming deduction, that the assessee's income became NIL after considering the unabsorbed brought forward depreciation it would not be entitled to any deduction u/s. 80HHC. In short, the claim of deduction u/s 80HHC was disallowed. He further held that the exporters having export turnover exceeding Rs. 10 Crores during the previous year had an option to choose either duty draw back or duty free replenishment certificate being duty Remission Scheme, that the assessee's export turnover exceeded Rs.10 crores, that it did not fulfill the above mentioned conditions, that DEPB benefit could not be considered for working out deduction u/s. 80HHC. As such in view of NIL profit as discussed above the assessee company is not entitled for deduction u/s. 80HHC.

4.1. *In the appellate proceedings, the FAA held that in light of the judgment of Ipca Laboratories Ltd. (supra), order of the AO had to be upheld.*

4.2. *Before us, the AR fairly conceded that the issue is decided against the assessee by the order of the Tribunal dated 30.11.2009 (supra). We find that the Tribunal has, at page 2 para 4 of the order, held as under:*

4. Ground No.2 is against confirmation of disallowance of deduction under section 80HHC.

At the very outset, the ld.counsel for the assessee fairly conceded that in the absence of any profit available to the assessee from exports, the benefit of deduction under section 80 HHC was rightly not available. In our considered opinion the ld CIT(A) was justified in rejecting the ground of the assessee on the claim of deduction under section 80HHC in the absence of any eligible profit. This ground is therefore, not allowed.

Respectfully, following the above, we dismiss the ground no.3 against the assessee.

Ground no.6-7 are decided in favour of the AO.

7. Ground no.8 is about disallowance of Rs. 6.94 lakhs. During the assessment proceedings, the AO found that the assessee had made certain purchases from a sister concern, namely Gujarat Insecticides Ltd (GIL). He called for the relevant details of purchases and examined the same. The AO observed that assessee had purchased 27,392 cases of a product namely phase transfer catal (PTC) at the rate of Rs.126.67 per Kg., aggregating to Rs.34.70 lakhs from GIL. In order to justify the reasonableness of the price paid for purchase of PTC, the assessee filed a copy of invoice in respect of purchase of same material from an unrelated party namely Tatva Chintan (TC). The AO found that the name of the product in the bill issued by TC, was Triethyl Benzyl Ammonium Chloride. As the name of the product purchased by the assessee from GIL and the name mentioned in the invoice of TC did not match, the AO held that the assessee had failed to provide the necessary and comparable evidence relevant to purchase of PTC from its sister concern. He, accordingly, disallowed 20% of the purchase value i.e. Rs.6.94 lakhs invoking the provisions of section 40A(2)(b) of the Act.

7.1. During the appellate proceedings, before the FAA, the assessee submitted that product name PTC and Triethyl Benzyl Ammonium Chloride was one and the same product, that the AO was factually wrong in stating that assessee did not provide the necessary and comparable evidence with regard to purchase from a sister concern. The assessee filed a copy of a certificate issued by TC before the FAA, wherein it was certified that the first was the common name whereas the second was specific name of the product. As per the assessee, that the said evidence was made available to the AO. After considering the submission of the assessee and the assessment order, the FAA held that the disallowance had been made by the AO on the premises that the assessee did not produce the necessary and comparable evidence, that from the copy of certificate issued by TC it was clear that the necessary and comparable evidence was furnished to the AO.

7.2.The DR left the issue to the discretion of the bench. The AR supported the order of the FAA.

We have heard the rival submissions. We find that the assessee had produced a reliable evidence in form of a certificate issued by TC, that the AO did not discuss anything about it and made the disallowance. In our opinion, the order of the FAA does not suffer from any legal or factual infirmity. He had decided the issue after considering the certificate that was relevant to decide the issue. Therefore upholding his order, we decide ground no.8 against the AO.

8.Ground 9 relates to adjustment u/s.92CA for Rs.2,60,75,487/-. During the year the assessee had exported 4.62 lakhs Kgs. of Dicamba to its AE at a total consideration of Rs.30.38 Crores. It justified the transaction on the basis of TNMM. However, the TPO used Comparable Uncontrolled Price (CUP) method by comparing the Dicamba sold to non-AEs with average sale price charged to its AE, and proposed adjustment of Rs.2,60,75,487/-. Based on the order of the TPO, the AO made an addition of Rs. 2.60 crores on account of sale of goods to AE.

8.1.Aggrieved by the order of the AO, the assessee preferred an appeal before the FAA. It was argued before him that Gharada-USA (G-USA) had incurred losses out of transactions with the assessee, that there was no shifting profits, that provisions of chapter of the Act should not be applied for the transactions in question, that the ALP should have been determined using RPM, that for applying RPM the AE was treated as tested party, that if the transfer pricing of G-USA's prospective was at arm's length than as a corollary the prices charged by the assessee should be regarded at arm's length, that the customs authorities in the USA had accepted the assessee's export price as the ALP, that same constituted an appropriate benchmark for Indian TP regulations. The assessee

also objected to use of CUP method and contended that there were various differences between the transaction entered into by the assessee with its AE and that entered with unrelated entity viz. difference in geographical markets difference on account of reseller versus end-user, that out of total volume sold 74% of the volume was sold to G-USA,that remaining export was made to the non-AE entities.

Alternatively,it was submitted that in case party wise computation of price/Kg. of Diacamba sold to non-AE.s was to be considered then only those parties should have been considered to whom more than 5000 Kg.s of Diacamba was sold, that in such a case the average price charged to non-AE.s was USD 14.64 per Kg.,that the average price charged by the assessee to G-USA was USD 14.11,that it would meet the arm's length principle by exercising the provision to section 92C(2),that the TPO had not made adjustment in the price for certain differences such as custom duty registration,cost selling and distribution expenses,that the assessee had incurred expenses like commission freight and warehousing,while making sales to non-USA market, that USA and non-USA market were completely different, that while determining the ALP,for the year 2002-03,the TPO had allowed the adjustment for the same expenses incurred by the assessee in respect of sales of Diacamba,that the adjustment of selling and distribution expenses of USD 0.65 per Kg.to the average sale.

8.2.After considering the submission of the assessee and the order of the TPO, the FAA held that the assessee was basically an Indian company, that it had set up an AE in USA,that from the local registration prospective it was essential for the assessee to have a USA entity, that accordingly G-USA was set up to carry out registration marketing and distribution functions, that the AE was based in USA where the marginal rates were higher than that of India, the AE at USA had suffered a loss,there would not be any saving or avoidance of tax by the assessee by shifting profits to USA,that from the risk metrics point of view it

was a very low-risk or no risk case, that the TPO had made adjustment using CUP method without considering the various factors that would affect the CUP, that the TPO ignored the provisions of Rule 10B/10C of the Rules, that the sale of Diacamba to unrelated parties was a transaction between a manufacturer and an end-user that the AO had not paid any attention to the fact that assessee had sold approximately 74% of Diacamba to its AE and remaining 26% was sold to non-AE.s, that one would not have to incur selling and distribution expenses while making sales to AE, that an adjustment should have been made to the prices charged to non-AE.s for selling and distribution expenses, that even in sale price to non-AE.s final result was the transaction proved to be done at fair market value, that the same was less than the average sale price charged by the assessee to G-USA (USD 14.11 per Kg.), that the transaction of export of goods to its AE would meet the arm's length principle. Finally, he deleted the addition proposed/made by the TPO/AO.

8.3. Before us, the DR supported the order of the TPO and the AR relied upon the order of the FAA.

We have heard the rival submissions and perused the material before us. We find that the assessee wanted to sell Diacamba in USA, that from the local registration prospective it was essential to have a USA entity, that it set up G-USA which could carry out registration marketing and distributing functions, that it had applied the TNMM four determining the ALP of the transactions, that G-USA dealt only in the products of the assessee and had no other business activity, that any profit/loss occurring to the AE was on account of the products purchased from the assessee, that the AE had incurred a net loss of 10.98% on sales, that 74% of the sale was made to G-USA, that there was no evidence of shifting of profit by the assessee to its AE, that it had charged USD 14.11 per Kg. from its AE for the goods supplied, that the average sale price to non-AEs of USD 14.64 per Kg. resulted in adjusted APL of USD 13.99 per Kg. In our,

opinion there is no legal or factual infirmity in the order of the FAA. Therefore, confirming the same we decide ground no.9 against the AO.

ITA/5348/Mum/2009-AY.2004-05:

9.Grounds of appeal No.1 & 2,filed by the assessee,deals with Un-utilised modvat credit.While deciding the appeal filed by the AO(GOA-3)we have decided the issue against the AO,in part and matter has been restored back to the file of the AO.Following the same first two grounds stand allowed in favour of the assessee,in part.AO has to verify the facts as directed in the earlier part of our order.

10.Ground No.3 is with regard to confirming reduction of 90% of business receipts while computing business profit for the purpose of deduction u/s. 80HHC which includes consultancy expenses, sundry credit balance written back,penalty recovered,analysis charges, interest & Brokerage on FD, Sundry income and other miscellaneous income.The FAA had upheld the exclusion of various items while computing the deduction u/s.80HHC of the Act.

10.1.During the course of hearing before us,the AR of the assessee stated that out of seven receipts the assessee wants to pursue three receipts only i.e. consultancy services(Rs. 12.91 lakhs)sundry creditors balances written back (Rs.1.01lakhs) and sundry income (Rs. 39.88 lakhs).With regard to consultancy services,it was argued that issue has been decided by the Hon'ble Bombay High Court in the case of Pfizer Ltd(330 ITR 62), that in the cases of TV Sundaram Iyengar & Sons Ltd.(222 ITR 344),Eastern International Hotel Ltd.(93 ITD 233) the issue of sundry credit balances written back has been decided in favour of the assessee, that in the cases of Alfa Lavel (India)Ltd.(295ITR451)& Abhishek Industries Ltd.(217Taxmann104),the issue of sundry income for the

purpose of computing deduction u/s. 80HHC has been decided against the revenue. The DR left the issue to the discretion of the Bench.

10.2. We have heard the rival submissions we find that the AO had excluded consultancy services, sundry credit balances written back, penalty recovered, analysis charges, interest and brokerage on FD, sundry income and other miscellaneous income from the profits of the business while computing the deduction u/s. 80HHC, that the FAA had upheld the order of the AO. We find in the case of Pfizer Ltd. (supra) the Hon'ble Bombay High Court has discussed the facts of the case and has decided the issue as under:

“The assessee was engaged in the manufacture of pharmaceuticals and animal health products. For the AY. 2000-01, the assessee claimed deduction under section 80HHC of the Income-tax Act, 1961. The Assessing Officer, while computing the deduction excluded 90 per cent. of the amount of an insurance claim which was related to the stock-in-trade of the assessee. The Commissioner (Appeals) confirmed the order of the Assessing Officer. The Tribunal noted that for the AY. 1998-99 it had come to the conclusion that there was no justification to exclude 90 per cent. of the insurance claim. Besides this, the Tribunal held that the insurance claim formed part of the income of the business of the assessee and was liable to be considered as part of the profits of the business in view of Explanation (baa) to section 80HHC and held that 90 per cent. of the insurance claim could not be excluded. On appeal :

Held, (i) that if the stock-in-trade of the assessee were to be sold, the income that was received from the sale of goods would constitute the profits of the business as computed under the head of profits and gains of business or profession. The income emanating from the sale would not be liable to a reduction of ninety per cent. for the simple reason that it would not constitute a receipt of a nature similar to brokerage, commission, interest, rent or charges. A contract of insurance was a contract of indemnity. The insurance claim in essence indemnifies the assessee for the loss of the stock-in-trade. The indemnification that was made to the assessee must stand on the same footing as the income that would have been realized by the assessee on the sale of the stock-in-trade. In these circumstances, the insurance claim on account of the stock-in-trade did not constitute an independent income or a receipt of a nature

similar to brokerage, commission, interest, rent or charges. Hence, such a receipt would not be subject to a deduction of ninety per cent. under clause (1) of Explanation (baa). In determining the profits of the business for the purposes of Explanation (baa), the incomes which were susceptible to a reduction of ninety per cent. were those incomes referred to in clauses (iiia), (iiib) and (iiic) of section 28 and receipts by way of brokerage, commission, interest, rent, charges or receipts of a similar nature included in such profits. Therefore, before a receipt was liable to be excluded to the extent of ninety per cent., it must be a receipt of a nature similar to brokerage, commission, interest, rent or charges. Therefore the claim on account of insurance for the stock-in-trade did not constitute a receipt of a similar nature within the meaning of Explanation (baa) and was therefore not liable to be reduced to the extent of ninety per cent.”

We further find that the issue of sundry credit balances written back has been dealt by the Hon’ble Apex court in the case of TV Sundaram Iyengar & Sons Ltd. (supra) as follow

“if a commonsense view of the matter were taken, the assessee, because of the trading operation, had become richer by the amount which it transferred to its profit and loss account. The moneys had arisen out of ordinary trading transactions. Although the amounts received originally were not of income nature, the amounts remained with the assessee for a long period unclaimed by the trade parties. By lapse of time, the claim of the deposit became time-barred and the amount attained a totally different quality. It became a definite trade surplus. The assessee itself had treated the money as its own money and taken the amount to its profit and loss account. The amounts were assessable in the hands of the assessee”

Similarly, the issue of sundry income has been dealt in the case of Alfa Level (India) Ltd. (Supra) as under:

.....interest from customers and sales tax set off received by the assessee, being profits of the business under the head “Profits and gains of business or profession”, could not be excluded while calculating the deduction under section 80HHC”

Respectfully, following the above referred judgments, we hold the 90% of the receipts of the assessee under the above three heads should not be excluded from the profit of the business for the purpose of computing deduction u/s.80

HHC of the Act. We uphold the order of the FAA for the remaining four receipts. Ground number 3 is decided in favour of the assessee, in part.

11. Next ground deals with reduction of profits eligible for deduction u/s. 80HHC for the purpose of calculating book profits u/s. 115JB of the Act. During the course of hearing before us, representatives of both the sides agreed that identical issue has been decided in favour of the assessee by the Tribunal, while adjudicating the appeal for the AY. 2003-04 (supra). We find that the issue was dealt by the Tribunal as under:

“12. Next ground of appeal pertains to deduction u/s. 80 HHC of the Act for purpose of calculating book profits u/s. 115JB of the Act. While deciding GOA no. 4 filed by the assessee, we have narrated the facts related with the question under consideration.

12.1. Before us, Representative of both the sides conceded that issue was decided by the Tribunal in favour of the assessee. We find that originally the question was decided against the assessee. But, later on an application was filed by the assessee u/s. 254 (2) of the Act before the Tribunal, who recalled its order. By its order dated 25.01. 2012, the Tribunal relying upon the decision of the Hon'ble Apex Court in the case of Bhari Information Technology systems Pvt. Ltd. (17 taxmann.com.62), decided the issue in favour of the assessee.

12.2. Respectfully following the above, we also hold that deduction claimed u/s. 80HHC had to be worked out on the basis of adjusted book profit u/s. 115JA and not on the basis of profits computed under regular provisions of law applicable to computation of profits and gains of business.

Respectfully, following the above order, 4th ground of appeal is decided in favour of the assessee.

12. Ground number 5, raised by the assessee, was not pressed by the AR during the course of hearing before us. Hence, the same stands dismissed, as not pressed.

ITA/8758/Mum/2010-AY.2005-06:

13.The first effective ground of appeal is about deletion of disallowance of interest amounting to Rs.7.12 crores.During the assessment proceedings,the AO observed that an amount of Rs. 47.49 crores were shown as Capital Work in Progress(CWIP)as on 31/03/2005,that the assessee had claimed interest expenditure of Rs.15.45 crores.He directed the assessee to show cause as to why proportionate interest relatable to CWIP should not be disallowed.After considering the submission of the assessee, the AO disallowed the sum of Rs.7,12,38,331/- out of the interest expenditure, as interest relatable to CWIP. He computed the disallowance at the rate of 15% of the amount of CWIP.

13.1.While adjudicating the appeal for the earlier year,we have decided the issue against the AO.Following the same First ground is dismissed.

14.Next ground of appeal is about deleting the addition of Rs. 5.25 crores on account of unutilised modvat credit.Considering our orders for the earlier AY.,issue of unutilised modvat credit is restored back to the file of the AO for fresh adjudication.He is directed to decide the issue as per the directions given in the order for the AY.2004-05.Ground no.2 is decided in favour of the AO,in part.

15.Third ground deals with deleting the addition of Rs. 24.35 crores on account of excise duty on closing stock.Like earlier AY.the issue(GOA-4)is being restored back to the file of the AO for fresh adjudication.

16.Next ground of appeal pertains to deletion of addition of Rs.44.52 Crores made u/s.2(22) (e) of the Act.It was brought to our notice that identical issue was decided by the Tribunal, while deciding the appeal for the AY.2002-03 (ITA/916/Mum/2010 dtd.03.12.2010).Relevant portion of the order reads as follow:

“11. Even on merits there is no case for the Revenue. In fact the CIT(A) has analysed this issue elaborately and came to a conclusion that provisions of section 2(22)(e) are not attracted in the case of normal business transactions. The same principle was upheld by the Hon'ble Delhi High Court in the case of CIT vs. Raj Kumar 318 ITR 462 wherein this issue was elaborately discussed as under: -

"Section 2(22)(e) of the Income-tax Act, 1961, shows that a payment would acquire the attributes of a dividend within the meaning of the provision if the following conditions are fulfilled : (i) the company making the payment is one in which the public are not substantially interested ;

(ii) money should be paid by the company to a shareholder holding not less than ten per cent. of the voting power of the company. It would make no difference if the payment was out of the assets of the company or otherwise ; (iii) the money should be paid either by way of an advance or loan or it may be "any payment" which the company may make on behalf of or for the individual benefit of any shareholder or also to any M/s. Gharda Chemicals Ltd.

concern in which such shareholder is a member or a partner and in which he is substantially interested ; and (iv) the limiting factor being that these payments must be to the extent of accumulated profits, possessed by such a company.

The immediate precursor to section 2(22)(e) is found in section 2(6A) of the Indian Income-tax Act, 1922.

The purpose of insertion of sub-clause (e) to section 2(6A) in the 1922 Act was to bring within the tax net monies paid by closely held companies to their principal shareholders in the guise of loans and advances to avoid payment of tax. Therefore, sub-clause (e) of section 2(22) of the 1961 Act, which is in pari materia with sub-clause (e) of section 2(6A) of the 1922 Act, plainly seeks to bring within the tax net, accumulated profits which are distributed by closely held companies to its shareholders in the form of loans. The purpose being that persons who manage such closely held companies should not arrange their affairs in a manner that they assist the shareholders in avoiding the payment of taxes by having these companies pay or distribute, what would legitimately be dividend in the hands of the shareholders' money in the form of an advance or loan. The word "advance" has to be read in conjunction with the word "loan". Usually attributes of a loan are that it involves the positive act of lending coupled with acceptance by the other side of the money as loan : it generally carries interest and there is an obligation of repayment. On the other

hand, in its widest meaning the term "advance" may or may not include lending. The word "advance" if not found in the company of or in conjunction with a word "loan" may or may not include the obligation of repayment. If it does, then it would be a loan. Thus, arises the conundrum as to what meaning one would attribute to the term "advance". The rule of construction which answers this conundrum is noscitur a sociis. The rule has been explained both by the Privy Council in the case of Angus Robertson v. George Day [1879] 5 AC 63 by observing "it is legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them" and the Supreme Court in the case of Rohit Pulp and Paper Mills Ltd. v. Collector of Central Excise, AIR 1991 SC 754 and State of Bombay v. Hospital Mazdoor Sabha, AIR 1960 SC 610. The principles with regard to the applicability of the rule of construction are briefly as follows : (i) does the term in issue have more than one meaning attributed to it, i.e., based on the setting or the context one could apply the narrower or wider meaning ; (ii) are the words or terms used found in a group totally "dissimilar" or is there a "common thread" running through them ; (iii) the purpose behind inserting of the term. In the instant case (i) the term "advance" has undoubtedly more than one meaning depending on the context in which it is used ; (ii) both the terms, that is, "advance" or "loan" are related to the accumulated profits of the company ; and (iii) the purpose behind the insertion of the term "advance" was to bring within the tax net payments made in the guise of loan to shareholders by companies in which they have a substantial interest so as to avoid payment of tax by the shareholders. The word M/s. Gharda Chemicals Ltd.

"advance" which appears in the company of the word "loan" could only mean such advance which carries with it an obligation of repayment. Trade advances which are in the nature of money transacted to give effect to a commercial transaction would not fall within the ambit of the provision of section 2(22)(e) of the Act.

The assessee was in the business of manufacturing customized kitchen equipment. The assessee was also the managing director and held nearly 65 per cent. of the paid-up share capital of C. A substantial part of the business of the assessee, which was nearly 90 per cent. was obtained through C. For this purpose, C would pass on the advance received from its customers to the assessee to execute the job work entrusted to the assessee. The Assessing Officer was of the opinion that the money received by the assessee was in the nature of a loan given by C to the assessee who admittedly held more than 10 per cent. of the shares in C. The Assessing Officer concluded that

the money received by the assessee was deemed dividend within the meaning of the provisions of section 2(22)(e). The Commissioner (Appeals) reversed the order of the Assessing Officer. The Tribunal sustained the decision of the Commissioner (Appeals).On appeal :

Held, that the trade advances given to the assessee by C could not be treated as deemed dividend under section 2(22)(e)."

12. The Hon'ble Delhi High Court in fact followed the principles established by the jurisdictional High Court in the case of CIT vs. Nagindas M. Kapadia 177 ITR 393. The same principles were also reiterated by the Hon'ble Delhi Court in the case of CIT vs. Ambassador Travels P. Ltd. 318 ITR 376. In view of these principles, we are of the view that the commercial transactions between two companies could not be brought within the purview of the provisions of section 2(22)(e). Accordingly on merits also we find no case to interfere with the order of the CIT(A) on this issue. The grounds 1,2 & 3 are therefore rejected.

13. In the result, appeal of the Revenue is dismissed."

As the issue is covered by the above order of the Tribunal,so,ground no.6 is decided against the AO.

17.Ground No.7 pertains to deletion of addition of Rs.5,18,210 made u/s. 92 CA (3)of the Act.During the assessment proceedings,the AO found that the assessee had entered into an international transactions with its associated enterprise (AE),Gharada Australia(G-Aus.).The AO made a reference to the TPO to determine the arm's length price(ALP) of the said transaction.On 23/1/2008,the TPO passed his order proposing certain adjustments.In pursuance of the order of the TPO,an adjustment of Rs. 5.18 lakhs was determined in respect of usage charges paid to G-Aus.

17.2.Before the FAA,in the appellate proceedings,the assessee explained that sale of chemicals in Australia compulsorily required a product registration and it was to be held by a company in Australia,that G-Aus was set up for the sole purpose of holding product registration to enable Gharada India sale in that

region,that the Australian-AE held registration of certain products in Australia, that it had entered into an agreement with it on 18.12.2012 pursuant to which G-Aus allowed the it to use the said product registration held by the AE,that in lieu thereof it was agreed that assessee would pay usage charges products registration to its AE,that the usage charges was calculated in order to cover the general and administrative costs incurred by the AE for its operation,that for selling chloropyriphos(CPF)the AE procured registration data from Makhteshim Agan (Australia)Pty Ltd (MAA),that MAA was an unrelated third party,that as per the agreement for procuring registration data the AE had to pay US\$ 0.25 per Kg unit sold and debit note would be raised on it by MAA,that the AE had charged the assessee 0.35 USD for the sale of CPF product, that it included the 0.25 USD charged to the third party and further 0.10 USD in order to cover its general and administrative cost,that for all other products the AE held product registration and did not procure registration data from any other third-party, that the AE was not rendering any service to the assessee except as a holder of product registration,that the AE was not entitled to any markup on the cost that had been incurred,that the expenses were incurred only on a pass through basis and therefore had to be reimbursed at cost.The FAA,after considering the submissions of the assessee and the order of the TPO,deleted the addition following his order for the earlier year.

17.3.Before us,the DR supported the order of the TPO/AO,and the AR relied upon the order of the FAA.

We find that that the Australian-AE was set up to obtain and hold registration rights of certain products in Australia as was required to enable the assessee to make sale of its products in Australia,that the Australian-AE would pay usage rights received from the assessee to MA-AUS,after keeping some portion,that the TPO did not consider the basic fact that the assessee made direct sales to third parties and the resultant profit was accounted for directly in its books of

accounts, that the expenses pertaining to making those sales had to be booked in its P&L a/c., that the role of the Australian-AE was limited, that AE did not have any other business.

18. Ground No.8 pertains to second TP adjustment and it is about depreciation of registration rights amounting to Rs.5,76,55,986/- and registration rights, valued at Rs.67,99,06,271/-. During the TP proceedings, the TPO found that the assessee had acquired the registration rights for total amount of Rs.67.99 crores based on assets revalued in the books of G-USA, as on 1.10.2004 which on 30/09/2004 before the valuation was equivalent to Rs. 44.92 crores. He held adjustment of the 23.06 crores will have to be made, that the adjustment would result in reworking of capital loss on liquidation of assets and the same time the claim of depreciation on intangible assets being registration rights would have to be reduced.

On a query by the AO in that regard, the assessee stated that in the event the TP adjustment proposed by the TPO were to be accepted capital loss on liquidation of investment held by the assessee in G-USA had to be recomputed, that after disallowance of revaluation of registration rights there would be a loss of Rs. 23.06 crores, that the loss should be allowed to be carried forward and set off in the subsequent assessment years.

After considering submission of the assessee, the AO held that the assessee had computed long term capital loss on shares of G-USA on liquidation of investment, the AE was hundred percent subsidiary company of the assessee, that it had taken over the 100% subsidiary company and all the assets and liabilities were taken over, that as per the provisions of section 47(iv)/ (v) transactions from the holding company to subsidiary company or vice versa were not regarded transfer, that provisions of section 45 of the Act were not applicable, that the computation of capital gains could not be carried out in respect of transactions with the AE, that adjustment of Rs.23.06 crores would

result in reworking of capital loss, that the value of registration had to be reduced to Rs.44.92 crores, that there was a loss of capital to the assessee. He further held that the adjustment was not called for computation of income under the head capital gains in view of the provision of section 47 of the Act, that assessee was not entitled to carry forward of long-term capital loss and the claim made by it in that regard had to be rejected. He held that depreciation was to be allowed in respect of registration right taking the value before the revaluation of Rs.44.92 crores. He worked out the depreciation @ 25% (Rs.11.23 crores) is against the assessee's claim of Rs.16.99 crores. He disallowed the claim of access depreciation of Rs.5.76 crores and added the same to the total no of the assessee. Finally the WDV of registration was revised at Rs.33.69 crores as on 31.03/2005.

18.1. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, it was argued that the assessee had wholly owned subsidiary in USA, that it had registration right in CFS and Diacamba, that the registration rights were restated in its books of accounts by the AE as on 30/09/2004 on the basis of valuation analysis carried out by an independent expert, that the AE was dissolved on the last day of September, 2004, that upon dissolution all the assets and liability of the AE were distributed to the assessee at book value, that post liquidation the assessee continued the business in USA through its branches, that the assets were taken over by the assessee included intangible assets-being to registration rights of CFS and Diacamba, that the book value of the registration was Rs.67.99 crores, that the pesticide market of US was a very mature market with the strong regulatory requirements, that pesticide registration was a pre-requisite for any operation, that as per the prevalent laws of USA assesseees were required to obtain a registration from the US environmental protection agencies, that for a registration the applicant would be required to submit a Dossier, that the AE had

obtained registration,that the product registration was reviewed on a periodic basis for safety to human beings,animals and the environment,that fees were payable annually to maintain the registrations, that the AE had incurred significant registration cost for the production registration amounting to USD 1,28,6,995.33,that the above value was duly reflected as gross block in the books of the AE,that the valuer had considered the actual expenditure incurred on acquisition of registration rights as above while valuing the registration rights,that the AE had membership of three professional task force agencies formed under federal insecticide,fungicide,and rodenticide Act,that the membership of the above agencies was essential to maintain the registration of CPF and Diacamba, that the eligibility to sell the products by the assessee in USA depended solely on the ownership of the registration rights of the products as required by the law of that country, that the AO/TPO had made an adjustment of Rs. 23.06 crores by rejecting the valuation of registration rights by an independent expert value, that the TPO had not read the valuation report in proper perspective, that the assessee had requested the valuer to further clarify the valuation report, that the valuer had reported that accurate determination of actually study costs paid by the that order was key in preparing the basis for valuing the total negotiated settlement paid by the fellow on registration, that the assessee had incurred cost of USD1,28,16,995 and further sum of USD30,62,311 was also spent,that AE had incurred expenditure of USD 1,58,79,306 and not USD 97,33,679 as adopted by the TPO,that the business of the assessee was growing from year to year. During the appellate proceedings, the assessee made an application for admission of additional evidences under rule 46Aof the income tax rules, 1962.After admitting the additional evidences, the FAA forwarded a copy of the documents to the TPO for his comments. The TPO filed his comments in that regard.

After considering the available material,the FAA held that the assessee had a wholly owned subsidy in USA,that the AE held registration rights in two

products, that the rights were revalued in the books of the AE as on 1.1.2004 based on valuer's report, that the registration rights were revalued from Rs. 44.29 crores to Rs. 67.99 crores, that the AE was dissolved on 30/09/2004, that upon dissolution all the assets and the liabilities of the AE were taken by the assessee at the book value which included value of registration rights are to be 67.99 crores, that the TPO had made an adjustment of Rs. 23.06 crores to the consideration paid by the assessee on acquisition of the assets and liabilities of the AE by ignoring the revaluation of the registration rights, that a sum of USD30,62,311 was spent on membership fees and incidental expenses, that those expenses were incurred much prior to the year 2004, that there was inflation and risk premium factor attached to it, that same had to be factored in, that the TPO in his remand report had not disputed the actual expenditure incurred by the AE, that he had also not disputed the contents of the various clarifications provided by the valuer, that the AE was in a position to transfer or assign the registration to its successor or to any third party which acquired respective registrations, that the observations made by the TPO about non-transferability of the registration and restriction on sale of registration data were not in accordance with the facts on record, that the AE was dissolved and by operation of law licenses for the two products devolved on the assessee and they were not acquired by it, the book value of registration rights taken over by the AE as USD1,47,30,136, that it was much lower value compared to the valuation made by the valuer at USD15.6 million, that the book value was also lower compared to the actual expenditure incurred of USD1,58,79,306 on the registration of those products, that the TPO had merely rejected the valuation done by the valuer on the surmise without considering the evidences on record, that the adjustment made by the TPO by rejecting the revaluation of the registration right was not proper. Finally, he held that the consideration for registration rights, as adopted by the assessee as per the book value of Rs.67.99 crores in the books of the AE, had to be accepted.

18.2. Before us, the DR relied upon the order of the TPO. The AR made the same submissions that were made before the FAA and supported his order.

We have heard the rival submissions and perused the material before us. We find that the wholly owned subsidiary of the assessee held registration rights in two products, that it had paid registration charges for selling those products in the US markets, that it had also paid other fees as required by the US laws, that it had incurred total expenditure of USD 1,58,79,306 under the head registration charges, that the AE got the assets revalued as on 01.01.2004, that registration rights were revalued from Rs. 44.29 crores to Rs. 67.99 crores by the independent valuer, that on 30.09.2004 the AE was dissolved, that the assessee took over the assets and liabilities of the AE at the revalued price, that the payment for registration rights and other fees were paid much before the revaluation, that it adopted lesser value of the rights as compared to the value determined by the valuer, that further clarification were called from the valuer, that in the remand report the TPO agreed that payment was made by the AE for the rights in earlier years, that there was no discrepancy in the method of valuation, that the TPO pointed out element of non transferability in the valuation report for supporting the adjustment, that the FAA has given a categorical finding of fact that the TPO was factually incorrect in arriving at the conclusion of non transferability, that the AE had right to transfer the rights to others also. Considering the above facts, we are of the opinion, that the order of the FAA does not suffer from any legal or factual infirmity. Therefore, confirming his order, we decide ground no.8 against the AO.

19. Last Ground is about computation of interest u/s. 234B of the Act and is consequential in nature.

ITA/8376/Mum/2010(05-06) Assessee's Appeal :

20.First ground of appeal is about non-adjudication of the ground relating to computation/re-computation of capital loss on liquidation of investment held by the assessee in G-USA. In the return of income, the assessee had computed long-term capital loss of Rs. 18.22 crores on liquidation of Gharda USA. Vide its letter, dated 18/11/2008 the assessee, without prejudice, submitted that in the event of transfer pricing adjustment proposed by TPO is accepted and TP adjustment were to be made, then the capital loss had to be recomputed at Rs.23.06 crores. However, the AO held that as per the provisions of section 47 (iv)/(v) of the Act, transaction from holding company to subsidiary company or vice versa were not regarded as 'transfer', that the provisions of section 45 of the Act were not applicable. Accordingly, the AO did not carry out computation of capital gain/loss at all. Before the FAA, the assessee, vide its letter dated 6/4/2010, stated that computation of capital gain was made under section 46 (2) of the Act on the assets received on liquidation of the G-USA at fair value. The FAA did not adjudicate the ground raised by the assessee on the basis that the ground was linked to TP adjustment of Rs.23.06 crores and held that he had decided the issue in favour of the assessee, that the ground was consequential and had lost its relevance.

20.1.Before us, the AR submitted that TP adjustments and recalculation of long-term capital loss were two different things, that they were not linked with each other, that separate adjudication was required with regard to allowability or otherwise of the long-term capital loss. The DR left the issue to the discretion of the bench.

20.2.After hearing the rival submissions, we are of the opinion that the FAA should have decided the issue raised by the assessee. The TP adjustments do not deal with computation/ re-computation of capital loss. Such computation will have its own consequences. The assessee had specifically mentioned that loss

would have to be computed at Rs. 23.06 crore as against Rs.18.2 to crores. As the FAA has not adjudicated the issue,so,in the interest of Justice,we are restoring back the issue to the file of the FAA for fresh adjudication.He is directed to afford a reasonable opportunity of hearing to the assessee.First ground of appeal is decided in favour of the assessee,in part.

21.Second ground of appeal is about not allowing additional deduction of 50% (i.e 150% -100%) u/s.35(2AB)(1) of the Act in respect of the expenditure of Rs. 15.57 crores incurred on in-house research and development activity carried out its Dombivili R&D facility.

21.1.During the course of hearing before us, the AR stated that the CBDT had issued the certificate on 30.3.2009,that assessee was entitled for deduction.He referred to the pages 216 and 217 of the paper book.He relied upon the cases of Claris Life Sciences Ltd.(326ITR251)and Sandan Vikas(India)Ltd.(335ITR117).The DR left the issue to the discretion of the bench.

21.2.We find that the CBDT had issued the certificate on 30.3.2009 .We find that similar issue had arisen in the AY.2003-04 and the Tribunal had restored back the issue to the file of the AO for fresh adjudication.We would like to reproduce the relevant portion of that order(supra)and same reads as under:

*“8.**Additional ground** of appeal filed by the assessee,is about claim made by the assessee u/s.35(2AB)of the Act. In the return of income filed by it for the year it claimed a deduction for 100% of the expenditure incurred by it which qualified for deduction u/s. 35(2AB) of the Act.*

It was argued before us,that all details relating to the said expenditure were available in the Tax Audit Report filed by it,that deduction was allowable at the rate of 150% of the expenditure for the year under consideration,that the AO should be directed to allow the difference.

After going through the submissions made by the assessee, we are of the opinion that the matter should be restored back to the file of the AO. He is directed to decide the allowability of the claim made by the assessee after affording a reasonable opportunity of hearing to it. Additional ground of appeal is decided in favour of the assessee, in part.

As the AO/FAA did not have benefit of the certificate issued by the Board at the time of assessment/deciding the appeal. So, following the above order of the Tribunal, matter is restored back to the file of the FAA to decide the issue afresh. Second ground of appeal is decided in favour of the assessee, in part.

As a result, appeals filed by the AO and the assessee for the AY.s. stand partly allowed.
फलतः निर्धारिती और निर्धारण अधिकारी द्वारा दाखिल की गई दोनों नि.व.की अपीलें अंशतः मंजूर की जाती हैं.

Order pronounced in the open court on 29th April, 2016.
आदेश की घोषणा खुले न्यायालय में दिनांक 29 अप्रैल, 2016 को की गई।

Sd/-

Sd/-

(सी. एन. प्रसाद, /C.N. Prasad)

(राजेन्द्र/Rajendra)

न्यायिक सदस्य/Judicial Member

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 29.04.2016.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR "K " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अधि.मुंबई
- 6.Guard File/गार्ड फाइल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.