IN THE INCOME TAX APPELLATE TRIBUNAL

"E" BENCH, MUMBAI

BEFORE SHRI D.K. AGARWAL, JUDICIAL MEMBER AND

SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

ITA no.1297 and 5480/Mum./2008
(Assessment Years : 2004-05 and 2005-06)

ITA no. 1001/Mum./2010
(Assessment Year : 2006-07)

Dy. Commissioner of Income Tax
Circle-10(2), Aayakar Bhavan
101, M.K. Road, Mumbai 400 020 ……………………. Appellant

v/s

M/s. Swati Energy & Projects P. Ltd.
(Formerly known as M/s. Swati
Sales & Services P. Ltd.)
207, Bhaveshwar Complex ……………………. Respondent
Vidyavihar (W), Mumbai 400 086
PAN – AABCS6672A

ITA no. 550/Mum./2008
(Assessment Year : 2004-05)

M/s. Swati Energy & Projects P. Ltd.
(Formerly known as M/s. Swati
Sales & Services P. Ltd.)
207, Bhaveshwar Complex
Vidyavihar (W), Mumbai 400 086 ……………………. Appellant
PAN – AABCS6672A

v/s

Addl. Commissioner of Income Tax
Range-10(2), Aayakar Bhavan
101, M.K. Road, Mumbai 400 020 ……………………. Respondent

C.O. no.57/Mum./2009
(Arising out of ITA no. 5480/Mum./2008)
(Assessment Year : 2004-05 and 2005-06)

M/s. Swati Energy & Projects P. Ltd.
(Formerly known as M/s. Swati
Sales & Services P. Ltd.)
207, Bhaveshwar Complex
Vidyavihar (W), Mumbai 400 086 ………………… Cross Objector
PAN – AABCS6672A

v/s

Addl. Commissioner of Income Tax
Range-10(2), Aayakar Bhavan
101, M.K. Road, Mumbai 400 020 ………………. Respondent

Revenue by : Mr. G.P. Trivedi a/w
Mr. B. Jaya Kumar

Assessee by : Mr. Pradip Kapasi

Date of Hearing – 23.6.2011 Date of Order –

O R D E R

PER J. SUDHAKAR REDDY, A.M.

Cross appeals in ITA no.1297/Mum./2008 preferred by the Revenue and ITA no.550/Mum./2008, preferred by the assessee, for assessment year 2004-05, are directed against the impugned order dated 3rd December 2007, passed by the Commissioner (Appeals)-X, Mumbai.

2. Appeals preferred by the Revenue in ITA no.5480/Mum./2008, is directed against the impugned order dated 27th June 2008, passed by the Commissioner (Appeals)-VI, Mumbai, for assessment year 2005-06 and ITA

no.1001/Mum./2010, is directed against the impugned order dated 26th November 2009, passed by the Commissioner (Appeals)-XXII, Mumbai, for assessment year 2006-07.

3. The assessee has also preferred cross objection no.57/Mum./2009, which is directed against the impugned order dated 27th June 2008, passed by the Commissioner (Appeals)-VI, Mumbai, in Revenue's appeal in ITA no.5480/Mum./2008, for assessment year 2005-06.

4. As the issues arising in all the appeals are common, for the sake of convenience, these appeals as well as cross objection were heard together and are being disposed off by way this consolidated order.

5. Brief facts of the case are that, the assessee, a company, is in the business of being a dealers in bearing and spares, filed its return of income on 16th September 2004, for assessment year 2004-05, along with tax audit report under section 44AB of the Income Tax Act, 1961 (for short *"the Act"*). The Assessing Officer completed assessment under section 143(3) of the Act on 28th December 2006, inter-alia, disallowing a part on ad-hoc basis, sales promotion expenditure claimed, disallowance of salary to Mr. Jintendra S. Modi, disallowance of sales commission to Mr. Rajesh S. Modi and disallowance of sub-agent commission paid. Aggrieved, the assessee carried the matter in appeal, wherein the first appellate authority partly allowed the appeal. Aggrieved, both the assessee and Revenue have filed these appeals for assessment year 2004-05.

6. First we take up Revenue's appeal in ITA no.1297/Mum./2008, for assessment year 2004-05, wherein grounds raised by the Revenue, read as follows:-

> *"1. On the facts and in the circumstances of the case as well as in law, the learned CIT(A) has erred in holding that expenses of ₹ 12,64,40 claimed under the head sales promotion was incurred for the purpose of business*

2. On the facts and in the circumstances of the case as well as in law, the learned CIT(A) has erred in deleting the addition of ₹ 20,64,000 on account of disallowance of salary and incentive paid to Mr. Jitendra S. Modi without appreciating the fact that the payments were very high and did not commensurate with the service rendered.

3. On the facts and in the circumstances of the case as well as in law, the learned CIT(A) has erred in holding that the amount of ₹ 44,75,200 paid to six parties as commission were incurred wholly and exclusively for the purposes of the business."

7. Before us, learned Departmental Representative, Mr. G.P. Trivedi, referring to ground no.1, submits that the assessee supplies certain material to Gujarat Electricity Board (GEB) & other Govt. agencies and, as brought out at Pages-2 to 4 of the assessment order. It claimed to have incurred expenditure for purchase of costly gift items such as watches of Switzer Land, Swarnamala Jewellers, Boss Appliances, etc. and gifted the same to the employees of PSU. He referred to Para-3.7 at Page-8 of the assessment order and submits that the assessee could not substantiate as to how the sales promotion expenses are directly linked to sales and it cannot be said that there is A direct co-relation. He submits that the assessee had failed to give names and addresses of the persons to whom such gift articles were given and that it failed to establish that high value items i.e., single piece of gold worth ₹ 80,000 to ₹ 1,20,000, as well as silver coins were necessary to be gifted for swaying business decisions in its favour. He submits that there is a statutory provision against making such gifts to Govt. employees and when such gifts are given, the prohibition in Explanation to section 37(1) comes into play and as it is against the public policy, expenditure was rightly disallowed. He referred to the impugned order passed by the Commissioner (Appeals) on this issue and submits that the same may be reversed.

8. On ground no.2, he relied on the order of the Assessing Officer and submits that the assessee company was paying a annual salary of ₹ 1,80,000 to Mr. Jitendra S. Modi, and whereas an incentive of ₹ 20,65,000, was paid which is not only astronomical but is also totally unjustified. He submits that the incentive is totally disproportionate with the salary and this was paid for

the reason that Mr. Jintendra S. Modi, has procured orders from GEB, which is also not justified.

9. Coming to ground no.3, learned Departmental Representative points out that the assessee had paid commission to six parties and the commission was paid in respect of sales to six Govt. agencies i.e., Western Coalfields Ltd., Mahanadi Coalfields Ltd., etc. He referred to assessment order from Page-14 onwards and submits that most of these Govt. agencies when questioned by the Assessing Officer, clearly stated that they are not aware of any middleman and that the transaction was carried out directly with the assessee. On these findings, the learned Departmental Representative submits that the order of the Assessing Officer should be upheld and that of the Commissioner (Appeals) be reversed.

10. Learned Counsel for the assessee, Mr. Pradip Kapasi, on the other hand, opposed the contentions and submits that the assessee had, before the Commissioner (Appeals), filed detailed evidence in the form of addresses of another designation of the person who received the gifts, etc. which was remanded to the Assessing Officer for comments. He filed paper book and drew the attention of the Bench to Pages-28 to 33, which gives the list of persons to whom gifts given who are approximately 1,920 in number which gives an average of ₹ 2,105 each gift per person. He submits that gifts are traditionally given on festive occasions as a practice of company for many years and that high value items were given to the Managing Director of the company from whom substantial purchase orders are obtained. He submits that the gifts were given to increase the goodwill of the company and that, in any case, gifts are given only to persons to whom some sales are made and, hence, the expenditure is 100% backed by orders. He vehemently contended that the Assessing Officer also accepts the requirement of incurring sales promotion expenses and that only ad-hoc part disallowance was made. He relied on the following case laws:-

- *National Industrial Corporation Ltd. v/s CIT (2002) 258 ITR 757 (Del.)*

- *Avon Cycles Ltd. v/s ACIT, 59 TTJ 75 (Chd.)*
- *Oswal Woolen Mills Ltd. v/s ITO, 26 TTJ 357 (P&H)*

11. Learned Counsel, on the issue of payment of incentives to Mr. Jitendra S. Modi, submits that Mr. Jitendra S. Modi, was appointed by the assessee company as an employee and was paid a fixed minimum salary to meet the expenditure and that he primarily works for commission for bringing sales orders. He submits that income has been shown only under the head *"Salary"* in the return of income filed by Mr. Jitendra S. Modi, and the TDS has been duly deducted. He disputed the fact that a commission has been paid for purchases made by GEB and submitted that the incentives given were based on the performance of the employees and that performance are backed by new sales orders. Comparative chart of incentives paid for several years has been furnished at Page-60 of the assessee's paper book and it was pointed out that similar incentives were paid for assessment years 2005-06, 2006-07 and 2007-08, which was allowed by the Assessing Officer. It was pointed out that the Assessing Officer does not dispute the fact that the assessee has rendered services in this case. He relied on the order of the Assessing Officer.

12. Coming to the disallowance of commission, he pointed out that similar commission was paid to the very same person in the past at a similar rate and this was accepted by the Assessing Officer. He argued that payments were made by account payee cheque only. TDS was deducted and the agents confirmed the genuineness of the payment in an inquiry under section 133(6) of the Act. He submits that these parties had rendered services relating to tendering, liaisoning with clients, sales, collection and administrative and after-sales services. He referred to Index "B" of the paper book and submits that this is enough proof to establish that representative was made by the service provider before the Public Sector Undertaking (PSU) on various issues. It was also pointed out that services were rendered in remote places and gave a list of such places. He referred to the affidavit

filed by some of the parties and relied on them. He contended that the expenditure is not personal in nature and was expended wholly and exclusively for the purposes of business. Referring to J.R. Services, he points out that 100% of the sales value was deposited with the assessee by the service provider, in advance. On the denial of customers, he submits that customers were third parties and it was only in the case of one or two PSUs that too, by the accounts department that such claims were made. There was a denial of the existence of an intermediary but that there was no denial of service providers of the assessee having done services.. He submits that all these organisations are large & faceless and the assessee was not provided an opportunity of cross examination. Though the agents have confirmed the fact of rendering of services as well as fact of having received the commission, the Assessing Officer has not examined any agent. He vehemently contended that the payments were made for services rendered to the appellant and not for services rendered to the PSUs. Coming to J.R. Services, he submits that the PSU recognised its existence and there is overwhelming evidence of rendering of services. He points out that the Assessing Officer has not challenged the genuineness of the payment as well as the existence of the payees. He submits that the expenditure is trade related expenditure and there is no evidence of the money having flown back to the assessee. He contends that the assessee discharged the onus that lay on it. He relied on the order of the Commissioner (Appeals). In supports of his arguments, he also relied on the following case laws:-

- *Anupam Synthetics P. Ltd., 104 TTJ 119 (Del.);*
- *VIP Industries v/s IAC, 36 ITD 70 (Bom.);*
- *Shri Sajjan Mills Ltd., 115 TTJ 145 (Indore) (TM); and*
- *Chicago Pneumatic India Ltd., 115 SOT 252 (Mum.)*

13. On the rule of consistency, learned Counsel relied on the following case laws:

- *Anis Ahmed & Sons, 297 ITR 441 (SC); and*
- *Radhasoami Satsang, 193 ITR 321 (SC).*

14. Coming to the assessee’s appeal, learned Counsel submits that only one ground arises and i.e., the confirmation of disallowance of sub-commission paid to Suvi Rubber P. Ltd. He submits that the Assessing Officer disallowed his claim on the ground that the assessee failed to establish that M/s. Suvi Rubber P. Ltd. is a selling agent and that the payments were in the previous year. He submits that the assessee was acting as an agent in transactions with GEB and that the Commissioner (Appeals) disallowed the same on the ground that the expenditure does not relate to this year. Learned Counsel pointes out that the sub-commission was paid to the liaisoning agent under an agreement after deduction of tax. He points out that M/s. Suvi Rubber P. Ltd. obtained a certificate under section 197 of the Act for lower deduction from the Assessing Officer. On the expenditure being booked in the current year, learned Counsel submits that the income was recognised in this year and, hence, the expenditure was claimed on matching principle. He points out that M/s. Suvi Rubber P. Ltd., in an enquiry, confirmed the factum of receipt of commission and that the payments were made by cheques. He submits that M/s. Suvi Rubber P. Ltd., is not connected with the assessee in any manner and it is an arms length payment. Learned Counsel points out that the commission was paid on a specific transaction which is a specilised order of H.B. Turbine which was imported from Russia and the expenditure was genuine, has to be allowed.

15. Learned Departmental Representative, on the other hand, relied on Para-6.3/Page-26 of the assessment order and submits that the assessee company has failed to establish that M/s. Suvi Rubber P. Ltd. is a selling agent for booking of orders of L.N.Z. and GEB who follow transparent procedure and do not entertain a role of middleman. He, accordingly, prayed that the appeal of the assessee be dismissed.

16. Rival contentions heard. On a careful consideration of the facts and circumstances of the case and on perusal of the papers on record, as well as the case laws cited before us, we hold as follows:-

17. The first issue in Revenue's appeal is the ad-hoc disallowance of sales promotion expenses.

18. We agree with the findings of the Commissioner (Appeals) that the expenditure may promote goodwill between the clients and executives. It is also true that the assessee has been incurring similar expenditure every year and the Revenue has been accepting the same. From the order of the Assessing Officer, it appears that he is not aggrieved by the fact that the assessee is incurring certain expenditure for sales promotion. The objection seems to be that of quantum of expenditure. It is not the case of the Assessing Officer that the expenditure in question was incurred for other than business purposes. The assessee on its part has filed sufficient details to demonstrate that the purchases of gift items were genuine and also to demonstrate the persons to whom such gifts have been given. As a matter of practice, the assessee has been giving gifts on special occasions such as major festivals, regional festivals, etc. The gift articles do not bear the logo of the company. Under these circumstances, in principle, the claim of the assessee for allowance of sales promotion expenditure has to be accepted. But at the same time, we observe that the assessee is dealing with Govt. and semi Govt. enterprises and it declared that it gives gifts on release of specific orders or on the payments made for bills and on delivery, etc. The details also show that the value of items which gives as gifts in some cases are very high. For e.g., on 22nd October 2003, a single idle of gold worth ₹ 1,20,000, has been purchased and gifted. Similarly, many items which values about ₹ 50,000, have been purchased and gifted. As rightly pointed out by the learned Departmental Representative, explanation to section 37(1) of the Act, clearly prohibits allowance of any expenditure incurred for any purpose which is prohibited by law. When a very costly gift is given to a person in a PSU for the purpose of obtaining an order or for the purpose of obtaining a cheque, etc., it would definitely be an act which is prohibited in law. Such expenditure cannot be allowed. The Assessing Officer, in our considered opinion, should have listed out such items from the list provided

by the assessee and after making suitable verification should have made a specific disallowance instead of ad-hoc disallowance. In our opinion, the Commissioner (Appeals) should have also considered the explanation to section 37(1) in the factual scenario, wherein the assessee is dealing with PSU for getting its work done. Customary gifts on festive occasion could be allowed. In view of the above discussions, we restore the issue back to the file of Assessing Officer for denovo adjudication in accordance with law. This ground is, thus, allowed for statistical purposes.

19. Coming to ground no.2, we find that Mr. Jitendra S. Modi, has been rendering services to the company as a employee and has been paid fixed amount of salary as well as incentive. Nowhere, has the Assessing Officer given a finding that Mr. Jitendra S. Modi, has not rendered any services. At Page-9 of the Commissioner (Appeals)'s order, a table of the incentives and salary paid to Mr. Jitendra S. Modi, on account of sale to GEB and commission received from NSK is given. The Assessing Officer has allowed these expenditure for the assessment years 2005-06 and 2006-07. Salary certificate has been issued by the assessee to this employee after deducting tax at source and the employee had filed its return of income. On these facts, we agree with the findings of the Commissioner (Appeals) at Para-2.4, which reads as follows:-

> *"2.4 I have gone through the facts in this case. Shri Jitendra Modi, is an employee and marketing director of the company. The salary and incentives paid to him are taxable under the head Income from salary. TDS has duly been deducted from the salary and shown by him in his income tax return. I do not see how the A.O. can question the amount of salary payable to Shri Modi, as the same is a business decision of the appellant company and has duly been approved by its Board. As is clear from the table given above, Shri Modi has received incentives since F.Y. 2003-04, in proportion to the sales and commissions received from GEB and NSK. The only grievance of the A.O. is that GEB has not been able to provide a certificate to the effect that Shri Modi was acting as an intermediary on behalf of the appellant. GEB is a Govt. concern and it may be having its own reasons for not giving such a certificate. The A.O. has not been able to prove that Shri Modi was not an employee of the company. The only grievance of the A.O. is that the salary paid is high and not justified. Once it has been accepted that Shri Modi is an employee of the company, it is not for*

> *the Assessing Officer to sit on the judgment as to the amount of salary and incentives payable to him as long as these are as per the terms of contract of employment. In the instant case, the incentives have been approved by the Board of the Company and to that extent they are as per the terms of employment of Shri Modi. Even otherwise, I find that there is a co-relation between the incentive paid and the sales turnover of the GEB and NSK clients. In the circumstances, the A.O. is directed to allow salary and incentives, paid to Shri Modi, as a business expenses."*

20. Keeping in view the aforesaid findings of the Commissioner (Appeals), we uphold his order and dismiss the ground raised by the Revenue.

21. Coming to ground no.3, which is disallowance of commission paid to certain concerns, we find that the Assessing Officer, in this case also, could not find any evidence that the parties have not rendered any services to the assessee. The Assessing Officer's case is that, some of the PSUs had denied that these parties have acted as intermediaries. The fact is that only two PSUs denied the participation of these commission agents. It cannot also be denied that these agents, are not related to the assessee in any way. Similar payments were made to the very same persons in the past at the same rates and this was accepted by the Assessing Officer in a scrutiny assessment. It is also fact that the customers were located in remote places viz. Chandrapur, Yavatmal, Talati, Vani in Chandrapur and several such places in other States. There is substance in the argument of the assessee that the organisations are very large and the replies filed by the department cannot be taken as conclusive and the Assessing Officer should have provided an opportunity for cross examination, in case he wanted to rely on the replies given by some of the institutions. The assessee has produced correspondences and other evidences to prove that services were rendered in relation to tendering, liaisoning, sales, etc. There is no evidence that there payments are illegal. The Assessing Officer only presumes that there is a violation of law. On these facts, we uphold the findings of the Commissioner (Appeals) vide Paras-5.14, 5.15 of his order. Consequently, the ground raised by the Revenue is dismissed.

22. In the result, Revenue's appeal in ITA no.1297/Mum./2008, is partly allowed.

23. Coming to assessee's appeal in ITA no.550/Mum./2008, we find that the Commissioner (Appeals) has sustained disallowance made by the Assessing Officer only on the ground that the payments pertained to earlier year. There is a written agreement between the assessee and LNZ Energy Ltd. and the assessee has been appointed as an agent for securing order from GEB. It receives certain commission which had offered for taxation for assessment year 2004-05. The assessee claimed sub-commission payment to M/s. Suvi Rubber P. Ltd. M/s. Suvi Rubber P. Ltd., was paid ₹ 25,50,000 on 10th July 2002, relevant to the assessment year 2003-04. The expenditure was shown as an advance and on the principle of matching concept, it was claimed in this year. The fact that M/s. Suvi Rubber P. Ltd. is regularly assessed to tax and the fact that it obtains a certificate from the Assessing Officer for lower deduction of tax, is not denied. There is no adverse finding in the order of the Commissioner (Appeals) on the plea of the assessee that M/s. Suvi Rubber P. Ltd. has rendered services for which payments have been made by account payee cheques. As already stated, the disallowance was sustained on the ground that the expenditure pertained to earlier year. We are unable to appreciate the same. Under the matching concept, both income and expenditure have to be matched for the purpose of arriving at the correct income. As the income has been recognised in this financial year, we are of the opinion that the expenditure should also be allowed in the year under consideration. Consequently, we set aside the impugned order passed by the Commissioner (Appeals) and allow the ground raised by the assessee.

24. In the result, assessee's appeal in ITA no.550/Mum./2008, is allowed.

25. Now, we take up Revenue's appeal in ITA no.5480/Mum./2008 and assessee's cross objection no.57/Mum./2009.

26. The appeal of the Revenue is on the issue of deletion of disallowance of commission payments by the Commissioner (Appeals), deletion of disallowance of sales promotion expenses and deletion of addition made under section 2(22)(e) of the Act by the Commissioner (Appeals).

27. Assessee's cross objection is on the addition made under section 2(22)(e) of the Act.

28. On the issue of disallowance of sales commission, the Assessing Officer found that the customers have denied any relationship with intermediaries and that the names of the agents are not mentioned in the invoice. The Assessing Officer held that the agents are inter-connected and deals with the clients on day-to-day basis and, hence, the customers should know the agent very well and the fact that the customers had denied knowledge of the agents showing that agents have not rendered any services. He held that the assessee has failed to prove that services rendered by the agents of the assessee. The Assessing Officer further held that more than 43% of the gross profit is paid to commission to agents and as the PSUs are located in the city and tender forms are downloaded on-line, there is no proof of any services rendered by middleman. The Assessing Officer, accordingly, rejected the claim of the assessee.

29. Being aggrieved by the stand so taken by the Assessing Officer, the assessee carried the matter before the first appellate authority, wherein the Commissioner (Appeals) allowed the claim of sales commission holding that since the assessee has filed confirmations and the payments were made by way of account payee cheques, no disallowance in this regard is called for. As regards deletion of disallowance of sales promotion expenses, the Commissioner (Appeals) held that all the expenses are duly vouched and the book results have not been rejected by the Assessing Officer. He held that, even otherwise, in the previous assessment year 2004-05, his predecessor has allowed the sales promotion expenses. He, thus, allowed the claim of the assessee. On the issue of addition under section 2(22)(e) of the Act, the

Commissioner (Appeals) held that since there is no common share holdings between the assessee and M/s. Sujyoti Bearings (I) P. Ltd., the provisions of section 2(22)(e) is not applicable. He, thus, directed the Assessing Officer to delete the addition. Aggrieved, the Revenue is in appeal before the Tribunal.

30. Before us, learned Departmental Representative, relying on the findings of the Commissioner (Appeals), submits that ₹ 4,00,00,000 have been paid as commission for the goods supplied for ₹ 20,00,00,000, which is extra-ordinary and that too when the PSUs are involved.

31. Learned Counsel, on the other hand, submits that the payments are made by account payee cheques only after deducting tax at source. All the agents confirmed the genuineness of the transactions in an inquiry under section 133(6), conducted by the Assessing Officer, confirmation of accounts of all the agents were filed, services related to tender, constant liaisoning, etc., and enough proof to establish the rendering of services was filed. Services were rendered in remote places. In fact, the submissions made in the assessment year 2004-05, were reiterated by both the parties.

32. After hearing both the parties, consistant with the view taken by us on the very same issue in earlier years at Pqage-11/Para-21 of this order, we uphold the findings of the Commissioner (Appeals) and dismiss this ground raised by the Revenue.

33. Ground no.2, is on the issue of ad-hoc disallowance of sales promotion expenditure.

34. After hearing the contentions of both the parties, we find that we have decided the identical issue in assessee's own case in earlier assessment year. Consistent with the view taken in the earlier year at Pages-8 & 9/Para-18 of this order, we restore the issue back to the file of Assessing Officer for denovo adjudication with a direction that the Assessing Officer shall examine the violation, if any, in terms of Explanation-(ii) to section 37(1) of the Act.

35. Coming to ground no.3, which relates to addition under section 2(22)(e) of the Act, both the parties agree that the addition cannot be sustained for the reason that the assessee is not a shareholder.

36. The issue before us is covered against the Revenue and in favour of the assessee by Mumbai Special Bench decision of the Tribunal in Bhaumik Colours P. Ltd., 120 TTJ 865 (Mum.), as well as the judgment of Hon'ble Jurisdictional High Court in CIT v/s Universal Medicare P. Ltd., (2010) 324 ITR 263 (Bom.). Respectfully following these judicial pronouncements, we dismiss this ground of raised by the Revenue.

37. In the result, Revenue’s appeal in ITA no.5480/Mum./2008, is partly allowed.

38. Coming to assessee’s cross objection no.57/Mum./2009, the same does not survive in view of our decision on ground no.3 of Revenue’s appeal in ITA no.5480/Mum./2008. Consequently, the ground raised in the cross objection is dismissed.

39. In the result, assessee’s cross objection is dismissed.

40. Now we take up Revenue’s appeal in ITA no.1001/Mum./2010, for assessment year 2006-07.

41. Ground no.1 is on the issue of disallowance of sales commission. The facts and arguments being similar to the facts and arguments raised in ground in assessment year 2004-05, we, consistent with the view taken by us, restore the issue back to the file of Assessing Officer for denovo adjudication with a direction that the Assessing Officer shall examine the violation, if any, in terms of Explanation-(ii) to section 37(1) of the Act. This ground is, thus, allowed for statistical purposes.

42. Ground no.2, is on the issue of disallowance of sales promotion expenses.

43. We find that the facts and arguments being identical as in the earlier assessment years and since the Assessing Officer as well as the Commissioner (Appeals) followed their own orders for earlier assessment years, we have to take a consistent view and uphold the contentions of the assessee and dismiss the ground raised by the Revenue.

44. In the result, Revenue's appeal in ITA no.1001/Mum./2010, is partly allowed.

45. To sum up, Revenue's appeal in ITA no.1297/Mum./2008, is partly allowed, assessee's appeal in ITA no.550/Mum./2008, is allowed, Revenue's appeal in ITA no.5480/Mum./2008, is partly allowed, assessee's cross objection no.57/Mum./2009, is dismissed and Revenue's appeal in ITA no.1001/Mum./2010, is partly allowed.

Order pronounced in the open Court on 12.8.2011

Sd/- **D.K. AGARWAL** **JUDICIAL MEMBER**	Sd/- **J. SUDHAKAR REDDY** **ACCOUNTANT MEMBER**

MUMBAI, DATED: 12.8.2011

Copy to:

(1) The Assessee;
(2) The Respondent;
(3) The CIT(A), Mumbai, concerned;
(4) The CIT, Mumbai City concerned;
(5) The DR, "E" Bench, ITAT, Mumbai.

TRUE COPY
BY ORDER

Pradeep J. Chowdhury
Sr. Private Secretary

ASSISTANT REGISTRAR
ITAT, MUMBAI BENCHES, MUMBAI