

आयकर अपीलीय अधिकरण “K” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “K” BENCH, MUMBAI

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.195/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2007-08)

Castrol India Limited Technopolis Knowledge Park Makali Caves Road, Chakala Andheri(East) Mumbai 400093	बनाम/ v.	The Deputy Commissioner of Income Tax – Range 8(3) Income Tax Office Aayakar Bhavan, M.K. Marg, Mumbai – 400 020.
स्थायी लेखा सं./PAN : AAACC4481E		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No. 13/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2007-08)

The Deputy Commissioner of Income Tax – Range 8(3) Income Tax Office Aayakar Bhavan, M.K. Marg, Mumbai – 400 020.	बनाम/ v.	Castrol India Limited Technopolis Knowledge Park Makali Caves Road, Chakala Andheri(East) Mumbai 400093
स्थायी लेखा सं./PAN : AAACC4481E		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.5671/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2008-09)

Castrol India Limited Technopolis Knowledge Park Makali Caves Road, Chakala Andheri(East) Mumbai 400093	बनाम/ v.	The Deputy Commissioner of Income Tax – Range 8(3) Income Tax Office Aayakar Bhavan, M.K. Marg, Mumbai – 400 020.
स्थायी लेखा सं./PAN : AAACC4481E		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No. 5846/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2008-09)

The Deputy Commissioner of Income Tax – Range 8(3) Income Tax Office Aayakar Bhavan, M.K. Marg, Mumbai – 400 020.	बनाम/ v.	Castrol India Limited Technopolis Knowledge Park Makali Caves Road, Chakala Andheri(East) Mumbai 400093
स्थायी लेखा सं./PAN : AAACC4481E		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Apurva K. Shah and Sh. Dhanesh Bafna
Revenue by :	Shri N.K.Chandna, CIT-DR

सुनवाई की तारीख /**Date of Hearing** : 20-07-2016घोषणा की तारीख /**Date of Pronouncement** : 18-10-2016आदेश / ORDER**PER BENCH:**

1. The assessee and Revenue have filed cross appeals against the order of learned CIT(A) for the assessment year 2007-08 and 2008-09.
2. Since common grounds are involved in both the years under consideration, therefore, all these four appeals were heard together and are now disposed of by this consolidated order.
3. First we shall take up the assessee's appeal in ITA no. 195/Mum/2012 for the assessment year 2007-08. In the assessment year 2007-08, the first grievance of the assessee relates to the disallowance of IT costs i.e. COE3 related expenses to the tune of 50% of the expenses 70,02,606/- out of the total expenses of Rs. 1,40,05,212/- claimed by the assessee.

3.1 The CIT(A) deleted the disallowance partly to the tune of 50% while upholding disallowance to the tune of 50% of IT Costs i.e. COE3 related expenses with the following observations:-

“ 3.3.3 I have considered the facts of the case , written submission and oral arguments of the appellant as against the observations/findings of the TPO/AO in their orders u/s. 92CA(3) / 143(3) of the Act. The submission and contention of the appellant are being discussed decided as under:-

- i. The TPO had also called for the details of IT costs and their basis for allocation. The Appellant submitted the relevant information, to the extent available in its possession.
- ii. The Appellant provided most of the information that the TPO had called for which was available in its possession. However, details relating to the basis of allocation were available with the Associated Enterprises(AE's) only. The Appellant had requested its AE's to provide such details during the course of the assessment proceedings with the TPO on specific request. To the extent the Appellant could provide these details , the same were accepted to be at arm's length by the TPO.
- iii. The TPO has , in his order u/s 92CA(3) determined the arm's length price in respect o DCT Central Charges as NIL against the book value of Rs.1,40,05,712 on the ground that the Appellant did not submit relevant document and details for calculation of the said expenses.
- iv. During the year ended March 31, 2005 , significant IT costs were incurred related to a Common Operating Environment System ('COE3') deployed by the BP group worldwide. COE3 offers significant benefits to the participating entities and results in efficient functioning of the business. These costs were allocated to group companies participating in the system, on the basis of number COE3 enabled computers installed at each entity and/or an appropriate allocation key.
- v. The Appellant submitted various details on COE3 to the TPO and the same were summarized below:
 - Explanation of the services received
 - The basis of allocation of the costs;(except in the case of DCT Central charges)
 - Copies of invoices
- vi. The Appellant highlighted the level of information submitted by the Company . It submitted that it had furnished plethora of information to the TPO. Further,the payments made by Castrol India have all been made through normal banking channels . Accordingly, the genuineness of the payments is not in doubt. Moreover, the receipts of services and benefits derived by Castrol India has itself not been challenged by the TPO/AO. Therefore, just because a small part of the information is not available with the Company, it did not merit disallowing the entire

amount . The service clearly has a value and an arms length charge for the same cannot be NIL as computed by the TPO.

- vii. The total amount relating to cost sharing was Rs.6,23,22,885 out of which the Appellant was able to submit details of basis of allocation in respect of all the amount except for Rs.1,40,05,212 . On the basis of the said details the cost allocations were considered to be at arm's length .With regards to the disallowance of Rs.1,40,05,212 the Appellant had requested to determine the arm's length price in accordance with the provisions of section 92C(1) and 92C(2) of the Act. Since, the genuineness of the payments is not in doubt and the receipt of services and benefits derived by Castrol India has itself not been challenged by the TPO/AO , the ALLP of relating to the same cannot be determined to be Nil and some value needs to be attributed. It would be unjust to the Appellant to disallow the entire amount of expenditure and determine the arm's length price as Nil. For want of adequate details, this international transaction cannot be benchmarked strictly as per the provisions of section 92C(1) and 92C(2) of the Act. In the immediate preceding year, under similar circumstances , 50% of the transaction value was adopted as ALP . Keeping in view the facts of the case and also the precedence in the case and the since most of the details were submitted except the basis of allocation , the ALP is held to be 50% of the transaction value of Rs.1,40,05,212 i.e. Rs.70,02,606. The Appellant gets partial relief.

According this ground of appeal is partly allowed.”

- 3.2 Learned AR placed on record order of Tribunal in assessee's own case for the assessment years 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 wherein the matter was remanded back to the file of the AO/TPO for deciding the matter afresh wherein the observations of the Tribunal in ITA no. 8359/Mum/2010 for assessment year 2005-06 vide orders dated 14-11-2014 are as under:-

“6.In the appeal filed by the Revenue, the Revenue is aggrieved for deleting the disallowance in relation to IT cost.

6.1 The CIT(A) deleted the disallowance partly after having the following observation :-

“3.10 I have perused the TPO's order and the written submission. The total amount relating to cost sharing was Rs 2,24,25,081 out of which the Appellant was able to submit details of basis of allocation amounting to Rs 2,21,34,295. On the basis of the said details the cost allocations are considered to be at arm's length. With regards to the disallowance of Rs.290,786, the Appellant had requested to determine the arms

length price in accordance with the provisions of section 92C(1) and 92C(2) of the Act. Since, the genuineness of the payments is not in doubt and the receipt of services and benefits derived by Castrol India has itself not been challenged by the TPO/AO, the ALP relating to the same cannot be determined to be Nil and some value needs to be attributed. It would be unjust to the Appellant to disallow the entire amount of expenditure and determine the arm's length price as Nil. Since most of the details were submitted except the basis of allocation, the ALP is held to be 50% of the transaction value of Rs. 290,786 i.e Rs. 145,393. The Appellant gets partial relief.”

6.2 Learned AR placed on record order of Tribunal in assessee's own case for the A.Ys.2002-03, 2003-04 & 2004-05, wherein the matter was remanded back to the file of the TPO for statistical purposes. The precise observations of the Tribunal are as under :-

14. After considering the rival submissions & perusing the relevant material on record, it is observed that similar issue was involved in the case of the assessee for A.Y. 2002-03 and the same was restored by the Tribunal to the file of the AO/TPO with the following observations/ directions as contained in paragraph no.7 of its order dated 14th September 2012 passed in ITA No. 3938/Mum/2010.

“In so far as the allocation/reimbursement of COE3 expenses to the extent of Rs. 1,68,80,675/- is concerned, the learned counsel for the assessee has submitted before us that there is no dispute about the fact that significant costs were incurred related to COE3 project deployed by the BP group worldwide and the assessee company as a part of the said group had derived benefit thereof. As submitted by him, the dispute is about the basis of allocation and want of details in this regard. He has submitted that the copies of invoices raised in this regard by the AEs were furnished by the assessee along with respective allocation keys. Keeping in view this submission made by the learned counsel for the assessee as well as on perusal of the relevant details available on record, we agree with the contention of the learned counsel for the assessee that there is no justification in the action of the TPO in ignoring all these details and taking the ALP of the relevant transactions at Nil. In our Opinion, it is incumbent upon the TPO to work out the ALP of the relevant transactions by following some authorized method and the entire cost borne by the assessee cannot be disallowed by taking the ALP at Nil keeping in view the facts and circumstances of the case

and the relevant details furnished by the assessee. The learned counsel for the assessee in this regard has submitted that in the subsequent years i.e. assessment years 2005-06 and 2006-07, a similar issue was involved in the assessee's case and the learned CIT(Appeals) has allowed the expenses allocated to the extent of 50%. We have perused the orders of the learned CIT(Appeals) passed in the assessee's case for assessment years 2005-06 and 2006-07. It is noted that no convincing or sound basis has been given by the learned CIT(Appeals) therein in support of the 50% cost allocation accepted by him and such estimate has been made purely on adhoc basis. In our opinion, the exercise of ascertaining ALPs has to be done by the TPO keeping in view the well laid down scheme in the relevant provisions of the Act and addition, if any, on account of TP adjustment, has to be made only after doing such exercise. We, therefore, restore this issue to the file of the AO/TPO with a direction to do such exercise and make addition, if any, on this issue after completing such exercise in accordance with law. Ground N6.2 of the assessee's appeal is accordingly treated as allowed for statistical purposes."

16. As the issue involved in the year under consideration i.e. 2003-04 as well as all the material facts relevant thereto are similar to A.Y. 2002-03, we respectfully follow the order of the Co-ordinate bench of this Tribunal for A.Y. 2002-03 and restore this issue to the file of the AO/TPO for deciding the same afresh as per the same directions as given by the Tribunal in A.Y. 2002-03. Ground no. 5 of the assessee's appeal is accordingly treated as allowed for statistical purposes."

6.3 We have considered rival contentions. As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal in assessee's own case, we restore the matter back to the file of AO for deciding afresh in terms of observation given by the Tribunal in aforementioned assessment years on similar issue. We direct accordingly."

3.3 The learned DR relied upon decision of the Hon'ble Punjab and Haryana High Court in the case of M/s Knorr –Bremse India Private Limited v. ACIT in ITA no. 182 of 2013(O&M) vide orders dated 06-11-2015.

3.4 We have considered rival contentions and perused the material on record including case laws. As the facts and circumstances during the year under consideration are same as were in preceding years, Respectfully following the orders of the Tribunal in assessee's own case in the preceding years, we restore the issue /matter back to the file of AO for deciding afresh in terms of observations given by the Tribunal in aforementioned assessment years on similar issue. We order accordingly.

4. The next grievance of the assessee relates to claim of unutilized CENVAT credit u/s 145A of the Act.

4.1 We found that exactly similar issue has been dealt with by the Tribunal in its order for the assessment year 2006-07 in ITA no 8371/Mum/2010 vide orders dated 14-11-2014 . The relevant observations of the Tribunal at para 13 page 12 are as under:-

“13.The next grievance of the assessee relates to claim of CENVAT u/s.145A.

13.1 We found that exactly similar issue has been dealt by the Tribunal in its order for A.Y.2003-04. The relevant observation of the Tribunal at para 16 page 24 is as under :-

“24 As regards the issue raised in ground no. 8 relating to addition made on account of MODVAT credit by including the same in the value of closing stock, the Id. Representatives of both the sides have agreed that a similar issue has already been decided in assessee's own case for A.Y. 2001-02 wherein the same was restored by the Tribunal to the file of AO vide order dated 30th July 2009 passed in ITA No. 2363/Mum/2005 with a direction to make the adjustment on account of excise duty also to the value of opening stock as well as sales and purchase in accordance with section 145A. Respectfully following the said order of the Tribunal, we restore this issue to the file of AO for deciding the same afresh as per same directions as given by the Tribunal in A.Y. 2001-02. Ground no. 8 of the assessee's appeal is accordingly treated as allowed for statistical purposes.”

13.2 We have considered rival contentions and gone through the order of the Tribunal in assessee's own case for A.Y.2003-04 as reproduced above. As the facts and circumstances of the case during the year under consideration are same, we restore this issue back to the file of AO with regard to claim of CENVAT u/s.145A for deciding afresh in terms of direction given by the Tribunal in aforementioned order. We direct accordingly."

4.2 We have considered rival contentions and gone through the order of the Tribunal in assessee's own case for the assessment year 2006-07 as reproduced above. As the facts and circumstances of the case during the year under consideration are same, we restore this issue back to the file of AO with regard to claim of CENVAT u/s.145A for deciding afresh in terms of direction given by the Tribunal in aforementioned order. We direct accordingly.

5. The next grievance of the assessee relates to the re-computation of the claim of depreciation on assets located at Silvassa unit although the assessee had specifically not claimed depreciation in the past.

5.1 The assessee did not claim depreciation on Silvassa unit for the assessment year 1997-98 to 2001-02 while the Revenue allowed the depreciation suo-motu for assessment year 1997-98 to 2001-02. Thus, the depreciation was allowed by the Revenue over the years. The AO disallowed the excess depreciation of Rs.1,66,79,488/- claimed by the assessee owing to adjustment of written down value due to grant of depreciation by the Revenue not so claimed by the assessee, which order of the AO was confirmed by the learned CIT(A) by holding as under:-

"3.9.3 I have considered the facts of the case, written submission and oral arguments of the appellant as against the observation /

findings of the AO in his order u/s. 143(3) of the Act. The Hon'ble ITAT , while adjudicating the assessee's appeal for Assessment Year 2001-02 (ITA no. 2363/Mum/2005) has disallowed the appeal of the Assessee on this issue and a similar view had been taken by my predecessor while adjudicating the appeal for Assessment Year 2002-03 . The jurisdictional High Court has , since then, also taken a similar view in the Full Bench decision delivered in the case of Plastiblends Ltd. Vs. Additional CIT reported at 318 ITR 352. Consistent with this view and with the view taken by my predecessor , while deciding the appeal for Assessment Year 2005-06 , 2002-03 and 2004-05, I uphold the action of the Assessing Officer."

5.2 The learned AR placed on record order of the Tribunal in assessee's own case for the assessment year 2003-04 and 2005-06, wherein the issue has been decided against the assessee and in favour of the Revenue . The observation of the Tribunal in assessee own's case in ITA No. 8191/Mum/2010 vide orders dated 14-11-2014 are as under:

"4. The next grievance of the assessee relates to claim of depreciation which has been dealt by the AO at para 14 and by CIT(A) at para 16.

4.1 Learned AR placed on record order of Tribunal in assessee's own case for the A.Y.2003-04, wherein the issue has been decided by the Tribunal partly against the assessee. The precise observations of the Tribunal at page 20 para 35 are as under :-

"35. As regard the issue raised in ground no. 13 of the assessee's appeal relating to disallowance of depreciation on the assets of Silvasa Unit, the Id. Representatives of both the sides have agreed that this issue is squarely covered against the assessee and in favour of the Revenue by the order of the Tribunal dated 13th April 2009 (Supra) passed in assessee's own case for A.Y. 2001-02, wherein the similar issue was decided against the assessee by following the decision of the Hon'ble Bombay High Court in the case of Scope Industries Pvt. Ltd. 289 ITR 195 as well as that the Tribunal in assessee's own case for A.Y. 2000-

01. Respectfully following these judicial pronouncement we decide this issue against the assessee and dismissed ground no. 13 of its appeal.

4.2 We have considered rival contentions. The issue with regard to claim of depreciation of assets of Silvasa unit was declined by the Tribunal in assessee's own case by following the decision of Hon'ble Bombay High Court in the case of Scope Industries Pvt. Ltd., 289 ITR 195. Respectfully following the order of the Tribunal, we confirm the action of the lower authorities for decline of claim of depreciation on assets of Silvasa unit."

We have considered the rival contentions and perused the material on record. The issue with regard to claim of depreciation of assets of Silvasa unit was declined by the Tribunal in assessee's own case by following the decision of Hon'ble Bombay High Court in the case of Scope Industries Pvt. Ltd., 289 ITR 195. Respectfully following the order of the Tribunal in preceding years, we confirm the action of the lower authorities for decline of claim of depreciation on assets of Silvasa unit . We order accordingly.

6.The next grievance of the assessee is with respect to the applicability of Section 50C of the Act . The authorities below have adopted stamp duty value adopted by stamp duty authorities for the properties sold by the assessee as the full value of consideration for computing capital gains as against the actual sale consideration received by the assessee as accruing from the sale of the properties. The assessee disputed the adoption of stamp duty value as adopted by stamp duty valuation authorities as full value of consideration u/s 50C(2) of the Act and the learned AO referred the matter to the DVO for determination of fair market value of the property. The valuation report of the DVO was not received till the conclusion of the appellate proceedings before the learned CIT(A). The said report was received subsequently and the assessee is challenging and disputing the said valuation report of DVO on many counts which has been raised vide additional ground before the

Tribunal, after receiving the valuation report of the DVO by the assessee. The said additional grounds are admitted in the interest of justice . The assessee is contending when the authorities below passed the orders , they did not had the benefit of valuation report of the DVO and in the interest of justice , the matter may be set aside and restored to the authorities below for de-novo determination of the issue on merits after considering the valuation report of DVO and the objections of the assessee. The ld. DR submitted that the matter may be set aside to the file of authorities below for de-novo determination of the issue on merits after considering the valuation report of the DVO.

We have considered the rival contentions and perused the material on record. In our considered view and in the interest of justice, this issue of determination of full value of consideration for computation of capital gains in respect of properties sold need to be set aside and restored to the file of the AO for fresh adjudication of the issue on merits after consideration of the valuation report of the DVO and also objections of the assessee . The AO shall give proper and adequate opportunity of being heard to the assessee in accordance with principles of natural justice and the assessee shall be allowed to file all necessary evidences and material in support of its contentions including objections to the DVO valuation report which shall be evaluated on merits to compute capital gains payable by the assessee in accordance with provisions and scheme of the Act. We order accordingly.

The assessee is also aggrieved by treatment of long term capital gains earned on sale of properties which were held for a period of more than three years as short term capital gains and bringing to tax at the normal rate of tax i.e. 30% keeping in view provisions of Section 50 of the Act as the properties being depreciable assets while the tax rate applicable as per the assessee is concessional tax rate as applicable to long term capital gains@20% as provided u/s 112 of the Act. It is the say of the assessee that for working out

capital gains , a deeming fiction is created by Section 50 of the Act for computing capital gains in the case of depreciable assets whereby the said capital gains shall be deemed to be arising from transfer of short term capital assets, but thereafter for purposes of applying tax rate the same shall be treated as long term capital gains and concessional tax rate @20% as provided u/s 112 of the Act shall be applicable. The assessee has raised this grievance vide additional ground raised before the Tribunal which are admitted in the interest of justice. The learned counsel for the assessee relied on the decision of the Tribunal in the case of Smita Conductors Limited v. DCIT in ITA no. 4004/Mum/2011 for the assessment year 2006-07 vide orders dated 17.09.2013. The learned DR on the other hand submitted that Section 50 of the Act is a non-obstante clause and the gains arising therefrom are to be treated as short term capital gains chargeable to tax at the normal rate as applicable for short term capital gains and not concessional rate as provided u/s 112 of the Act.

We have considered the rival contentions and perused the material on record including case laws relied upon. We are of considered opinion that Section 50 of the Act is a provision with deeming fiction whereby for the purposes of computing capital gains in the case of depreciable assets , the gains arising from the transfer of the said assets has to be treated as capital gains arising from transfer of short term capital assets u/s 50 of the Act, but for the purpose of applicability of tax rate it has to be treated as long term capital gain if held for more than three years and brought to tax at rate@20% as stipulated u/s 112 of the Act. This proposition is supported by the order of co-ordinate benches of the Tribunal in the case of Smita Conductors Limited v. DCIT in ITA no. 4004/Mum/2011 for assessment year 2006-07 vide orders dated 17.09.2013. We order accordingly.

7. Now we will take Revenue appeal in ITA no 13/Mum/2012 for the assessment year 2007-08
8. The first grievance of the Revenue is with respect to the learned CIT(A) allowing 50% of IT charges i.e. COE3 expenses being Rs.70,02,606/- out of total disallowance of COE3 expenses to the tune of Rs.1,40,05,712/- by the AO. This issue has already been adjudicated by us in the Assessee's appeal in ITA no. 195/Mum/2012 for assessment year 2007-08 in preceding para number 3 of this order. Our aforesaid decision shall apply mutatis mutandis to this issue in the Revenue's appeal in ITA no. 13/Mum/ 2012. We order accordingly.
9. The second grievance of the Revenue is with respect to the decision of learned CIT(A) in deleting the disallowance made by the AO with respect to Royalty Payment amounting to Rs.77,60,843/- made u/s 92CA of the Act , by the Transfer Pricing Officer/Assessing Officer. The learned CIT(A) held as under :

3.2.3 I have considered the facts of the case, written submission and oral arguments of the appellant as against the observations/findings of the TPO/AO in their orders u/s. 92CA (3) /143(3) of the Act. The submission and contention of the appellant are being discussed and decided as under:-

- i. The question involved here is of interpreting the SIA approval. As per the benchmarking analysis carried out by the appellant, the arithmetical mean of royalty rates of royalty rates of comparable transactions was 4.5%. The approval requested and obtained by the assessee from the SIA for payment of Royalty was for a lower rate (3.5% of internal sales) as compared to the results of the benchmarking analysis. Accordingly, the arm's length price/rate at which royalty is paid is not in dispute here.
- ii. The Appellant being a public limited company and taking into account corporate governance considerations, has voluntarily restricted the payment of royalty to 10% of its profit in the TCA between the Appellant and Castrol Ltd., UK . As per the said agreement , the amount of Royalty payable shall be 3.5% of internal sale which was further capped to 10% profits. The alternative limit of 10% of profits is voluntary limit that has been self-imposed by the Appellant. The Appellant highlighted that the

Royalty actually based on 10% of profits is substantially lower than what it would have been based on the SIA approval. Had the appellant paid [royalty@3.5%](#) on internal sales, the payment of royalty would be almost Rs.35.37 crores more than what it has actually paid. The effective royalty paid by the appellant works out to 1.29% of sales as against the approval obtained of 3.5% of internal sales. Also as per the agreement, the appellant is required to pay royalty on “profits” as long as the royalty payment does not exceed 3.5% of sales. The term “profits” as defined in the TCA does not distinguish between domestic or export profits.

- iii. In the application made to the SIA, the Appellant had explicitly mentioned that royalty payable would be 3.5% of sales, and it shall be capped to 10% of Castrol India’s profit in any relevant financial year. The Appellant had also submitted to SIA details of total foreign exchange inflow and outflow during the period of collaboration. In the said working, the Appellant had evidently brought out foreign exchange outflow on account of Royalty @10% of profits before taxes.
- iv. The payments made by the appellant through the authorized dealers(bankers) are made in accordance with the prevalent exchange control regulations. Had the company made any excess payments, it would have been objected to by the authorized dealers, who have the delegated authority under the Foreign Exchange Management Act, 1999 to administer compliance with exchange control laws in India.
- v. Viewed in the above background, the TPO’s interpretation of the SIA approval was erroneous. The TPO has erred in disallowing royalty of Rs. 77,60,843. Accordingly, the Appellant’s appeal is allowed and the adjustment made by the TPO is directed to be deleted.”

Both the parties agree that the issue is covered by the Tribunal’s decision in the earlier years and the facts are identical. The learned DR however submitted that the assessee did not furnish the comparable data in respect of uncontrolled transactions which are similar to the transactions of the assessee as to the AE and the assessee is merely relying on SIA/ RBI approvals which do not take into account TP issues and relevant law as mandated under the Act to determine ALP. The learned DR relied on decision of the Tribunal in the case of SKOL Breweries Limited v. ACIT (2013) 29 taxmann.com 111(Mum-Trib.)

We have observed that the Tribunal in the preceding assessment year 2006-07 in the assessee's own case in ITA No.8371/Mum/2010 vide orders dated 14-11-2014 has observed as under:

“7. The CIT(A) has also deleted the disallowance of royalty payment after having the following observation :

“2.20 I have gone through the submissions made by the appellant. The question involved here is of interpreting the SIA approval. As per the benchmarking analysis carried out by the appellant, the arithmetical mean of royalty rates of comparable transactions was 4.75%. The approval requested and obtained by the assessee from the SIA for payment of Royalty was for a lower rate (3.5% of internal sales) as compared to the results of the benchmarking analysis. Accordingly, the arms length price/ rate at which royalty is paid is not in dispute here.

The Appellant being a public limited company and taking into account corporate governance considerations, has voluntarily restricted the payment of royalty to 10% of its profit in the TCA between the Appellant and Castrol Ltd., UK. As per the said agreement, the amount of Royalty payable shall be 3.5% of internal sale which was further capped to 10% of profits. The alternative limit of 10% of profits is voluntary limit that has been self imposed by the Appellant. The Appellant highlighted that the Royalty actually paid based on 10% of profits is substantially lower than what it would have paid based on the SIA approval. Had the Appellant paid royalty @ 3.5% on internal sales, the payment of royalty would be almost Rs. 23.94 crores more than what it has actually paid. The effective royalty paid by the appellant works out to 1.68% of sales as against the approval obtained of 3.5% of sales. Also as per the agreement, the appellant is required to pay royalty on "profits" as long as the royalty payment does not exceed 3.5% of sales. The term "profits" as defined in the TCA does not distinguish between domestic or export profits.

2.21 In the application made to the SIA, the Appellant had explicitly mentioned that royalty payable would be 3.5% of sales, and it shall be capped to 10% of Castrol India's profit in any relevant financial year. The Appellant had also submitted to SIA details of total foreign exchange inflow and outflow during the period of collaboration. In the said working, the appellant had evidently bought out foreign exchange outflow on account of Royalty @ 10% of profits before taxes. Accordingly, the TPO's allegation that there is no question of any "implicit" approval seems to be erroneous.

The payments made by the appellant through the authorized dealers (bankers) are made in accordance with the prevalent exchange control

regulations. Had the company made any excess payments, it would have been objected to by the authorized dealers, who have the delegated authority under the Foreign Exchange Management Act, 1999 to administer compliance with exchange control laws in India.

Viewed in the above background, the TPO's interpretation of the SIA approval was erroneous. The TPO has erred in disallowing royalty of Rs.40,25,954. Accordingly, the Appellant's appeal is allowed and the adjustment made by the TPO is directed to be deleted.”

7.1 We found that the issue regarding disallowance of royalty has been decided by the Tribunal in favour of assessee in A.Y.2003-04 & 2004-05. The precise observations of the Tribunal at para 11 & 43 are as under :-

“11. We have considered the rival submissions and perused the relevant material on record. It is observed that the impugned royalty was paid by the assessee company to its AE namely Castrol Ltd. UK at 3.5 % of the net ex- factory sale price of products manufactured and sold in India as per the technical collaboration agreement. This international transaction involving payment of royalty to its AE was benchmarked by the assessee by following CUP method in its TP study report and since average rate of royalty of three comparables selected by it was higher at 4.67% than the rate at which royalty was paid by the assessee to its AE, the transaction involving payment of royalty was claimed to be at arm's length. A perusal of the order passed by the TPO u/s 92CA (3) of the Act shows that neither these comparables selected by the assessee in its TP study report were rejected by her nor any new comparables were selected by her by making a fresh search in order to show that the payment of royalty by the assessee to its AE was not at arm's length. She simply relied on the approval of SIA to hold that any royalty paid by the assessee on exports and other income was not allowable and disallowed the royalty payment to the extent of Rs. 40,51,486/- treating the same as the royalty paid by the assessee in respect of exports sale and other income. We are unable to agree with this strange method followed by the TPO to make a TP adjustment in respect of royalty payment which is not sustainable either in law or on the facts of the case. She has neither rejected the method followed by the assessee to benchmark the transaction in respect of payment of royalty nor has been adopted any recognized method to determine the ALP of the said transactions. The approval of SIA adopted by the TPO as basis to make TP adjustment in respect of royalty payment was untenable and even going by the said basis wrongly adopted by the TPO, no TP adjustment in respect of royalty payment was liable to be made. As per the said basis, the net sales of the

assessee after excluding export sale and other income were to the extent of Rs. 1118.70 crores and the royalty paid thereon at Rs. 24.38 crore being less than the rate of 3.5% approved by SIA, there was no case of any excess payment made of royalty by assessee than approved by SIA to justify its disallowance by way of TP adjustment. In our opinion, the Id. CIT (A) could not appreciate these infirmities in the order of the TPO despite the same were specifically brought to his notice on behalf of the assessee and confirmed the TP adjustment made by the TPO in respect of royalty payment which was totally unjustified. We therefore, delete the addition made by the AO/TPO and confirmed by the Id. CIT on account of TP adjustment in respect of royalty payment and allow ground no. 3 of the assessee's appeal.

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x x x x x

43 The first issue raised by the Revenue in its appeal for A.Y. 2004-05 relating to deletion by the id. CIT(A) of the addition made by the AO/TPO on account of TP adjustment in respect of royalty payment is similar to the one involved in ground no. 3 of the assessee's appeal for A.Y.2003-04 which has already been decided by us in foregoing portion of this order. Following our conclusion drawn in A.Y. 2003-04 on the similar issue, we uphold the impugned order of the Id. CIT(A) for A.Y. 2004-05 deleting the addition made by the AO/TPO on account of TP adjustment in respect of royalty payment and dismiss ground no. 1 of the Revenue's appeal.

7.2 We have considered rival contentions and gone through the order of the Tribunal in assessee's own case as stated above. The facts and circumstances during the year under consideration are same. Respectfully following the decision of the Tribunal, as stated above, we do not find any infirmity in the order of CIT(A) for deleting the disallowance of royalty payment."

We have considered rival contentions , perused the material on records including case laws and gone through the order of the Tribunal in assessee's own case as stated above. The facts and circumstances during the year under consideration are same as in the earlier years. Respectfully following the decision of the Tribunal in preceding years, as stated above, we do not find any infirmity in the order of CIT(A) for deleting the disallowance of royalty payment. We order accordingly.

10. The Revenue is also aggrieved by the decision of learned CIT(A) in treating the capital expenditure incurred on Advertisement films as revenue expenditure and accordingly deleting the disallowance made by the AO. The learned CIT(A) held as under:

“3.8.3 I have considered the facts of the case, written submission and oral arguments of the appellant as against the observations/findings of the AO in his order u/s. 143(3) of the Act. The Hon’ble ITAT , while adjudicating the Revenue’s appeal for Assessment Year 2001-02 (ITA no. 3245/Mum/2005) has held that expenditure on advertisement films is revenue expenditure and not capital expenditure . Consistent with this view and the view taken by my predecessors, while deciding the appeal for Assessment Year 2005-06 , 2002-03 and 2004-05, I direct the Assessing officer to allow expenditure on advertisement films.”

Both the parties agree that the issue is covered in favour of the assessee by the decision of the Tribunal in earlier years. The Tribunal in Revenue’s appeal for the assessment year 2005-06 in ITA No. 8359/Mum/2010 vide orders dated 14-11-2014 held as under:-

8. The next grievance of the Revenue relates to expenditure on advertisement films, which has been dealt by the AO at para 13 and by CIT(A) at para 15. The precise observation of the CIT(A) are as under :-

“Ground no. 12 of the appellant is reproduced as under:-

“12. In treating expenditure on advertisement films as capital expenditure Instead of revenue and without prejudice, in not allowing depreciation thereon.

12.1 The Hon’ble ITAT, while adjudicating the Revenue's appeal for Assessment Year 2001-02 (ITA No. 3245/Mum/2005) has held that expenditure on advertisement films is revenue expenditure and not capital expenditure.

12.2 Consistent with this view and the view taken by me while deciding the appeal for Assessment Year 2002-03 and Assessment Year 2004-05, direct the Assessing Officer to allow

expenditure on advertisement films. Accordingly ground no. 12 is allowed.”

8.1 We found that the issue is covered by the order of the Tribunal in assessee’s own case for A.Y.2003-04. The precise observation of the Tribunal for A.Y.2003-04 are as under :-

“41. As regards the issue raised in ground no. 2 relating to the disallowance made on account of advertisement expenses, it is observed that this issue is squarely covered in favour of the assessee by the order of the Tribunal dated 30t July 2009 (supra) for A.Y. 2001-02 wherein order of the Id. CIT(A) deleting the similar disallowance made by the AO on account of advertisement expenses treating the same as capital expenditure was upheld by the Tribunal following its order in assessee's own for A.Y. 1998-99. Respectfully following the said decision of the coordinate bench of this Tribunal in assessee's own case for A.Y. 2000-01, we uphold the impugned order of the Id. CIT(A) deleting the disallowance made by the AO on account of advertisement expenditure and dismiss ground no. 2 of the Revenue's appeal.”

8.2 As the facts and circumstances of the case during the year under consideration are same, respectfully following the decision of Tribunal for A.Y.2003-04, we do not find any infirmity in the order of CIT(A) for deleting the disallowance of expenditure on advertisement films.”

As the facts and circumstances of the case during the year under consideration are same, respectfully following the decision of Tribunal for the assessment year 2005-06, we do not find any infirmity in the order of the learned CIT(A) for deleting the disallowance of expenditure on advertisement films.We order accordingly.

11. In the result, appeal filed by the assessee in ITA No. 195/Mum/2012 for the assessment year 2007-08 and Revenue Appeal in ITA No. 13/Mum/2012 for assessment year 2007-08 are partly allowed as indicated above.

12. Now we will take up the assessee appeal in ITA no. 5671/Mum/2013 for the assessment year 2008-09.
13. The first grievance of the assessee is with respect to the upholding of the disallowance by the learned CIT(A) of the IT charges i.e. COE3 related expenses to the tune of 50% being Rs.73,01,695 out of the total expenses of Rs.1,46,03,390 being disallowed by the AO. We have adjudicated this issue in the preceding para no 3 of this order while adjudicating the assessee's appeal for the assessment year 2007-08. Our above decision / order for the assessment year 2007-08 shall apply mutatis mutandis to the identical issue of disallowance of IT charges i.e. COE3 expenses during this year. We order accordingly.
14. The next grievance of the assessee is with respect to claim of unutilized CENVAT credit u/s 145A of the Act. We have already adjudicated this issue in para 4 of this order while adjudicating the assessee's appeal for the assessment year 2007-08. Our above decision for the assessment year 2007-08 shall apply mutatis mutandis to the identical issue of claim of unutilized CENVAT credit during this year. We order accordingly.
15. The next grievance of the assessee relates to the re-computation of the claim of depreciation on assets located at Silvasa although the assessee had specifically not claimed depreciation in the past. We have already adjudicated this issue in para 5 of this order while adjudicating the assessee's appeal for the assessment year 2007-08. Our above decision for the assessment year 2007-08 shall apply mutatis mutandis to the identical issue of claim of re-computation of the claim of depreciation on assets located at Silvasa during this year. We order accordingly.
16. The assessee has sold fixed assets of Rs. 34,71,820/- . The sold assets are scrap of building. However, the sales considerations were not been

offered for taxation. The assessee was asked by the AO to explain why the depreciation of the building should not be computed by adjusting the sale consideration of Rs.34,71,820/-. It was submitted by the assessee that in depreciation chart , the sales consideration has been adjusted against the addition to building made during the year and a net consideration of Rs.21,58,407/- has been worked out as a capital gain. The AO observed that as per the provision of Section 50 of the Act if the entire block of an asset is sold and the sale consideration exceeds the cost of acquisition (opening w.d.v. plus additions) , the excess amount shall be taxable as short term capital gain. Accordingly, Rs.21,58,407/- was added to the total income as short term capital gains by the AO.

Before the learned CIT(A) , the assessee submitted that during the year, the assessee has sold building for a sum of Rs.34,71,821/- and additions to building were Rs.13,13,413/- , resulting in a net reduction of Rs.21,58,407/- . Since the closing block was reduced to Nil while completing the assessment for assessment year 2007-08 , the same has been taxed as Short Term Capital Gain u/s. 50 of the Act . While adjudicating the appeal for assessment year 2007-08, it was submitted by the assessee before the learned CIT(A) that the learned CIT(A) upheld the calculation of gain by invoking Section 50C of the Act and consistent with the same , the said calculations would be correct. The assessee pleaded that its Block of Assets would be higher due to its option to claim depreciation in earlier years of Silvassa unit and also on the basis of valuation report which may be received from DVO u/s 50C(2) of the Act for the assessment year 2007-08 and hence the assessee pleaded that it reserves the right to claim a resetting of the block based on a determination of fair value and closing WDV of earlier years.

The learned CIT(A) observed that the issue is consequential to the one dealt in assessment year 2007-08 wherein the issue was decided against the assessee as under for the assessment year 2007-08 by learned CIT(A):-

“ In respect of the submissions and facts of the case, it is mentioned here that there is no doubt that the appellant has sold business assets on which the depreciation has been allowed by the department. The claim of the appellant that it had not claimed depreciation but the depreciation was allowed to the appellant by the Department and this issue was agitated by the appellant. This issue has been decided against the appellant by the Hon’ble Bombay High Court. In this set of facts it is clear that what has been sold by the appellant are capital assets forming part of assets in respect of which the depreciation has been allowed under the act and accordingly the provisions of Sec. 50 are squarely applicable in the appellant case. Further, as per provisions of Sec. 50C of the Act where the consideration declared to be received or accruing as a result of transfer of land or building or both is less than the value adopted, assessed or assessable by any authority of State Government (‘Stamp valuation Officer’) for the purpose of payment of Stamp Duty in respect of such transfer, the value so adopted or assessed or assessable shall be deemed to be value of the consideration received or accruing for the purposes of section 48 of the Act. Accordingly the issue raised by the appellant in Sub Ground 8.1 and 8.2 of the appeal are not considered to be acceptable and are accordingly dismissed”.

Thus, the learned CIT(A) decided the substantive issue of taxability of gains u/s 50C of the Act against the assessee. With respect to the resetting of the block based on the outcome of the valuation or the claim of depreciation, it was held that the same would be consequential in nature and as such no separate directions were issued by learned CIT(A).

We have adjudicated this issue in the preceding para 6 of this order w.r.t. assessee’s appeal for the assessment year 2007-08 and our decision in the aforesaid para no 6 of this order shall apply mutatis mutandis to this issue in the assessee’s appeal for this assessment year 2008-09. With respect to the claim of depreciation on Silvassa unit, the said issue was decided against the

assessee vide this order in para 5 for assessment year 2007-08 in assessee's appeal and in para 15 of this order for assessment year 2008-09 in assessee's appeal and our aforesaid decisions shall apply mutatis mutandis to this issue in appeal. We Order accordingly.

17. Now we shall take up Revenue's appeal in ITA no 5846/Mum/2013 for the assessment year 2008-09.

18. The first grievance of the Revenue is with respect to the decision of learned CIT(A) in deleting the disallowance made by the AO with respect to Royalty Payment amounting to Rs.1,20,29,596/- made u/s 92CA of the Act , by the Transfer Pricing Officer/Assessing Officer. We have already adjudicated this issue in para 9 of this order while adjudicating the Revenue's appeal for the assessment year 2007-08. Our above decision for the assessment year 2007-08 shall apply mutatis mutandis to the identical issue of claim of royalty during this year. We order accordingly.

19. The next grievance of the Revenue is with respect to the deleting of the disallowance by the learned CIT(A) of the IT Cost i.e. COE3 related expenses to the tune of 50% being Rs.73,01,695 out of the total expenses of Rs.1,46,03,390 being disallowed by the AO. We have adjudicated this issue in the preceding para no 13 of this order while adjudicating the assessee's appeal for the assessment year 2008-09. Our above decision in assessee's appeal apply mutatis mutandis to the identical issue in Revenue's appeal of deleting of disallowance of IT costs i.e. COE3 expenses by learned CIT(A) during this year. We order accordingly.

20. The Revenue is also aggrieved by the decision of learned CIT(A) in treating the capital expenditure incurred on Advertisement films as revenue expenditure and accordingly deleting the disallowance made by the AO. We have adjudicated this issue in the preceding para no 10 of this

order while adjudicating the Revenue's appeal for the assessment year 2007-08. Our above order in Revenue's appeal for assessment year 2007-08 shall apply mutatis mutandis to the identical issue in Revenue's appeal for the assessment year 2008-09 with respect to allowability of costs of advertisement films as revenue expenditure by learned CIT(A) during this year. We order accordingly.

21. In the result, appeal filed by the assessee in ITA No. 5671/Mum/2013 for the assessment year 2008-09 and Revenue Appeal in ITA No. 5846/Mum/2013 for assessment year 2008-09 are partly allowed as indicated above.

Order pronounced in the open court on 18th October, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 18-10-2016 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 18-10-2016

I

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिलिपि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "E" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई/ ITAT, Mumbai