N THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "I", NEW DELHI

BEFORE SHRI R.P. TOLANI, JUDICIAL MEMBER

AND

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER

I.T.A. No. 3823/Del/2009

A.Y. : 2003-04

Asstt. Commissioner of Income Tax, Circle, Noida, G-Block Commercial Complex, Sector-20, Noida	vs.	M/s LG Electronics India Pvt. Ltd., Plot NO. 51, Udyog Vihar, Surajpur- Kasna Road, Greater Noida – 201 306 (UP) (PAN/GIR NO. : AAACL 1745Q)

AND

I.T.A. NO. 3729/DEL/2009

A.Y. 2003-04

M/s LG Electronics India Pvt. Ltd., Plot NO. 51, Udyog Vihar, Surajpur- Kasna Road, Greater Noida – 201 306 (UP) (PAN/GIR NO. : AAACL 1745Q) **(Appellant)**	Asstt. Commissioner of Income Tax, Circle, Noida, G-Block Commercial Complex, Sector-20, Noida **(Respondent)**

Assessee by :- **S/Sh. Ajay Vohra, Adv., Neeraj Jain,Adv. Sh. Ramit Katyal, CA**

Revenue by :- **Sh. Peeyush Jain, Ld. C.I.T.(D.R.)(TP)**

ORDER

PER SHAMIM YAHYA: AM

These cross appeals by the Revenue and Assessee emanate out of orders of the Ld. Commissioner of Income Tax (A) dated 29.6.2009 and pertain to assessment year 2003-04.

REVENUE'S APPEAL

2. The grounds raised read as under:-

"1. That the Ld. Commissioner of Income Tax (A) has erred in law and on the facts by allowing relief of Rs. 13,58,98,217/- by holding that the Transfer Pricing Officer's (TPO) action of apportionment of Global Cricket Council contribution in the ratio of 5.40:94.60 between LG Electronics India Pvt. Ltd. and L.G. Electronics Korea is incorrect without appreciating the facts mentioned by the TPO.

2. That the Ld. Commissioner of Income Tax (A) has erred in law and on the facts by allowing relief of Rs. 6,57,19,516/- being provision of warranty expenses without appreciating the facts mentioned by the Assessing Officer that the expenses were mere estimations and had not matured and it was a contingent liability rather than a ascertained liability.

3. Hence order of the Ld. Commissioner of Income Tax (A) may be set aside and the order of the Assessing Officer be restored.

3. Apropos ground no. 1 :- Transfer Pricing Issue :-

3.1 LG Electronics India Pvt. Ltd. (LGEIL) is a 100% subsidiary of LG Electronics Korea (LGEK). Its major international transactions undertaken by the assessee are as under:-

S.No.	International Transaction	Method	Value (in Rs.)
1.	Import of raw material and components	TNMM	55,45,42,940

2	Import of service spares	TNMM	4,79,80,282
3	Export of raw materials and components	Cost Plus	22,49,801
4	Import of finished goods	TPM/TNMM	1,96,01,67,598
5	Export of manufactured goods	CUP	31,11,29,843
6	Import of production equipment	Cost Plus	53,67,67,978
7	Royalty	CUP	15,33,91,187
8	Expenses towards overseas market development	CUP	12,03,750
9	Interest paid for the usance period availed	CUP	80,02,500
10	Reimbursement of expenses	-	14,80,95,057
11	Other transactions (Material-in-transit, Goods-in-transit, capital work-in-progress)	TNMM	1,06,47,18,813
12	Design and Development fee	TNMM	22,03,47,432
13	Communications Link Charges	CUP	28,64,553
14	IT Software and training charges	-	5,49,568
15	Contribution towards global sponsorship of ICC World Cup Cricket tournament	Cost Contribution	16,29,59,302
16	Purchase of business of LG Systems Ltd.	CUP	47,92,730

3.2 An economic analysis was undertaken by the assessee, in accordance with the Act and Rules for the determination of arms' length price of the international transactions and based on the economic analysis so conducted by the assessee, it was concluded that

the pricing in respect of the above transactions are at arms length, as per section 92(1) of the Act.

3.3 A reference was made by the Assessing Officer u/s. 92CA(1) of the Act to the TPO for computation of arms' length price of above mentioned international transaction. The TPO agreed with the ALP (Arms Length Price) determined by the assessee for all of its transactions except for the ALP of contribution towards global sponsorship of ICC World Cup Tournament.

3.4 As per the Transfer Pricing Report the LGEIL alongwith LGEK and LD AD Inc. Korea entered into an agreement with Global Cricket Corporation PTE Limited, Singapore (GCC) and World Sport Nimbus PTE Ltd. Singapore on 28.6.2002 to sponsor Cricket World Cup 2003 and 2007 and ICC Championship Trophy 2004, 2005 and 2006 to promote sale of LG product. The cost of sponsorship was shared between the assessee LGEIL and its parent company LGEK in the ratio of 40:60. The breakup of the contribution for the present assessment year i.e. 2003-04 is as follows:-

Total contribution	LG Korea's Share (60%)	LG India's share (40%)
40,73,98,255/-	24,44,38,953/-	16,29,59,302/-

Hence, the value of international transactions, i.e. the contribution made by LGEIL during the year was Rs. 16,29,59,302/-.

This sharing ratio, as explained in the TP report for the relevant years, was arrived at by the LG group, keeping in mind the following factors:

a) Sales Growth: Cricket is a very important game for India and has a lot of promotional value attached to it. Every International Cricket tournament where India is participating gives a boost to the Sales of all Consumer durables, more particularly Colour Televisions. Therefore, LGEIL expected that during Cricket World Cup 2003, the sales of LG products would grow due to greater visibility achieved by sponsoring the Cricket World Cup 2003.

b) Brand Awareness growth :- LGEIL anticipated that the media coverage of the event would lead to greater brand awareness in India (expected to grow from 17.50% to 35.00%.

c) Viewership :- There are 14 nations playing in 2003 World Cup of which three nations are new. The population table of these Countries is as given below:-

S.No.	Country	Population (in crores)	%
1	India	103.41	65%
2	Australia	1.97	35%
3	New Zealand	0.39	
4	England	6.00	
5	South Africa	4.27	
6	Srilanka	1.97	
7	Bangladesh	13.56	
8	Pakistan	14.76	
9	Kenya	3.16	
10	Zimbabwe	1.25	
11	Canada	3.22	
12	West Indies	2.97	

13	Namibia	0.19	
14	Holland	1.61	
	Total	158.73	100%
World Population		**636.36**	

Based on LGEIL's assessment, the level of enthusiasm regarding the game is definitely much higher in the South Asian sub-continent than in most other parts of the world and the larger market for televisions and other appliance and media devises is in India, amongst all cricket playing (and watching) countries. Hence, the percentage of the population watching cricket is much higher than the other thirteen countries where sports such as soccer, golf, motor racing etc. are more popular. Based on the above data, LGEIL perceived that at least 65% of viewers of the Cricket World Cup telecast belong to India.

Considering the co-relation between population and sales, atleast 65% of the cost should have been allocated to LGEIL, as the higher viewership ratio results in a potentially larger market size for consumer durable products and a higher sale. However, in view of the fact that LGEIL was already receiving support form LGEK for its advertising efforts, it requested LGEK to pick up a higher percentage than its share. Taking into consideration the above facts, LGEIL and LGEK decided that LGEIL should contribute of 40% towards the total sponsorship.

3.5 However, the TPO did not agree with the above cost contribution ratio. He observed that LGEK and LGEIL have to demonstrate respective benefits in proportion of their share in cost contribution. Both these parties would be at arm's length price if they are able to

demonstrate that they receive benefit in the ratio of 60:40 from this cost contributory agreement.

3.6 The TPO rejected the analysis adopted by the appellant and held that cricket is not the only dominant game in India. He has also stated that in England, Soccer is most popular game whereas Australia has proved its supremacy in Hockey as well along with Cricket. In Western Countries Tennis has a high popularity which is evident from Wimbledon matches and Australian open matches. Even in Asian subcontinent, cricket is not the only game but Hockey and Athletics is equally popular.

3.7 The TPO held that it has been assumed by the appellant that there is a higher level of enthusiasm about cricket in South Asian subcontinent and thus it will get translated in higher sale benefit for appellant. However, in reality, level of enthusiasm is not the only factor for buying consumer which drives his first decision to buy or not to buy a consumer product. The appellant company has not considered that purchasing power of South Asian Sub-continent is comparatively very poor as compared to Western Continents. In fact media appliances and other consumer durables are considered as luxurious items in this part of the world whereas in developed nations these items have greater penetration. It is also demonstrated from the fact that consumer companies keep on adding new models and versions of products in more advanced countries to begin with having better per capita income and then these versions are brought to Asian Continent market. Therefore, while arriving at a conclusion that impact of level of enthusiasm only will bear fruits for appellant is not a correct assumption.

3.8 The TPO further commented that that cricketing events involving Indian team would benefit LGEIL also but if there is an additional sale of Rs. 100 of LG product in India it will add a profit of Rs. 5.85 to LGEIL (since as per transfer pricing documentation submitted by the appellant operating margin of LGEIL over sale is 5.85%.) However at the same time it will mean additional profit of Rs. 3 for LGEK on account of Royalty payment @ 3% on domestic sale and also a profit on account of technical know how, design fee and profit element in sale of raw material or finished goods which LGEIL has to buy from parent company for effecting additional sale. It means LGEK is also rewarded with almost equal to LGEIL for any additional sale in India. Apart from direct benefits, it further strengthens Brand awareness of LG in India providing more bargain power to Korea company worldwide.

3.9 The TPO also observed that there are large number of subsidiaries of LGEK all over the globe. The Cricket game involving other nations would similarly benefit on above basis to LGE Korea only for which no benefit would pass to Indian entity (the appellant). There is a strong distributor network in entire world owned by LGEK serving for direct sales of its products and in these niche territories exclusive benefit of cricket matches would pass only to LGEK.

3.10 The TPO therefore considered the basis of percentage of profit between LGEK and LGEIL as the most appropriate base to allocate the cost between the appellant and its AE.

3.11 The financials of LGEK were downloaded by the TPO from one-source database. Based on the same, he determined that ratio of gross profit earned by LGEK (global) and LGEIL works to 5.40:94.60.

Accordingly, the TPO determined that LGEIL should have born 5.40% of the total contribution paid to GCC and not 40%. Based on the same, an adjustment of Rs. 13,58,98,217 was made to the taxable income of the appellant.

4. Upon assessee's appeal Ld. Commissioner of Income Tax (A) noted the assessee's submissions as under:-

> *"..... Vide submission dated 27th October' 2008 the appellant submitted that it is a known fact that cricket icons are cult figure in India. It is an undisputed fact that the enthusiasm for cricket is unmatched and undoubtedly for India, we can say that its population represents the viewer ship of cricket match. It is true that besides cricket different games are popular in different countries, but in India, Cricket is a match which cannot be missed by any person even if he is keeping interest in Soccer, Hockey or any other game. When any one talks about the main stream game in any country, the population of that country plays an important role and therefore fair basis of allocation of expenses could be nothing but the population viewer ship.*
>
> *The appellant contended that as per TPO's own order, in England, Soccer is most popular game whereas Australia has proved its supremacy in Hockey as well as along with Cricket. In Western Countries Tennis has a high popularity which is evident from Wimbledon matches and Australian open matches. Therefore, a lower proportion of population in these countries would be interested in watching cricket vis-a-vis India. Hence, LGEIL would have benefitted significantly out of the sponsorship ..... "*

"....Vide its submission dated 11th December' 2008, the appellant further submitted extracts of an article which highlights the importance of cricket advertising in India, "Global Cricket Corporation (GCC), the Newscorp company, is said to have paid $550 million to buy the rights for two World Cup tournaments and then sold them to Sony TV. About 70 per cent of the advertising revenue is expected to come from India." [Source http:/www.domain-b.com/industry/entertainment/20021221 cricket. html

The appellant therefore submitted that since 70% of advertisement revenue was expected to be from India, it cannot be reasonably constructed that purchase power of South Asian subcontinent is low ..... "

LGEIL had derived significant benefit from contribution to GCC

Vide submission dated 23rd April' 2009, the appellant substantiated the above stated fact by highlighting that the comparables have registered a decrease of 15.49% in their sales in Financial Year 2002-03 whereas the appellant's sale has increased by a staggering 35.04% during the same period. The detailed working of the same is as follows:

S.No.	*Company*	*Sales (for a period of 12 months)*		*% increase in sales*
		F.Y. 2001-02	*F.Y. 2002-03*	
1	*Videocon appliances Ltd.*	*9,35,47,67,773*	*9,54,80,65,335*	*2.07%*
2	*Videocon Communications Ltd.*	*5,38,40,05,415*	*6,43,37,53,460*	*19.50%*

3	*Video International Ltd.*	*31,02,82,43,093*	*33,60,03,62,011*	*8.29%*
4	*BS Refrigerators*	*78,68,55,420*	*60,43,09,913*	*-23.20%*
5	*Symphony Comfort Systems Ltd.*	*28,17,62,969*	*20,42,91,997*	*-27.50%*
6	*Hitachi Home and Life Solutions (India) Ltd.*	*1,98,24,54,000*	*1,75,02,84,667*	*-11.71%*
7	*Godrej Appliances Ltd.*	*4,58,01,67,000*	*6,63,87,000*	*-98.55%*
8	*Carrier Aircon Ltd.*	*3,18,42,85,000*	*3,30,11,78,667*	*3.67%*
9	*Whirlpool of India Ltd.*	*9,86,74,97,000*	*8,76,76,83,200*	*-11.15%*
	Average increase in sales of the comparables.			*-15.40%*
Tested party	*LG Electronics India*	*20,03,99,94,000*	*27,06,16,51,552*	*35.04%*

Study undertaken by the appellant through external advertisement agency 'LINTAS'

The appellant vide its submission dated 27th October' 2008, further submitted a copy of an empirical, study by ad agency 'LINTAS', which had shown that the air time during which 'LG' logo was on display during the telecast of various matches had an opportunity cost of approximately Rs. 95.20 crores in the first year itself which is roughly 73% of the total agreement value, which is spread over a 5 years period. The study clearly indicates that the agreement has led to a significant cost saving for LGEIL.

Additional CUP Analysis regarding similar contract entered by Hero Honda

The appellant vide its submission dated 23th April 2009, has contended that Hero Honda, an Indian Company has also entered into a similar agreement with GCC. No benefits are accruing to any foreign entity in this case still Hero Honda has allocated Rs. 120 crores for cricket sponsorship during the same period. [Source http://www.domain-b.com/industrv/entertainment/20021221 cricket.html]. On the other hand, the appellant's share amounted to Rs. 16.29 crores, which is 40% to the total global sponsorship contract for the year.

On examining the above mentioned contentions, an inference can be drawn that an Indian entity, is incurring much higher expenses as is being jointly incurred by LGEK and LGEIL. Hence, Hero Honda must have anticipated much higher benefit than its 'expenditure out of advertising for the world cup. Since the appellant has contributed a mere 40% of such an expense, it cannot be regarded as excessive in the case.

Allocation key adopted by the TPO is incorrect

The allocation of cost on the basis of allocation key (percentage of profit/ sales between LGEK and LGEIL and its AEs) used by the TPO is not correct since:-

It doesn't adhere to the mechanism of cost allocation as prescribed by the OECD guidelines.

In this regard, the appellant has contended that OECD states that each participant's interest in the results of the Cost Contribution Arrangement(CCA) activity should be established from the outset. OECD also states that the goal is to estimate the shares of benefits

expected to be obtained by each participant and to allocate contributions in same proportions.

Hence, sales/ gross margin, which is a post event measure and which does not co-incide with the 'expected' benefit is not the right allocation key because:

a) It is a post match event which could not be determined at the time of signing of agreement.

b) Moreover, the sales/profit figures are bound to vary from year to year and region to region, whereas the base chosen by the assessee company i.e population is expected to remain reasonably constant over the period of agreement and therefore, it is the only logical base/ method based upon which cost can be apportioned.

The sales/profit of LGEK includes figures of those countries also where cricket is not played at all. In this regard, the Appellant vide its submission dated 23rd April' 2009 submitted the following break-up of LG Group's global sales which is taken by the TPO to determine the gross profit ratio of LG Korea.

Consolidated sales of LG Group for 2002
Financial Data by Geographic Area

(Millions of Won)

Region	***External Sales***	***Percentage Share***	***Cricket Playing Regions***
Korea	*51,80,389*	*23%*	*No*
North America	*45,54,537*	*20%*	*No*
South	*7,86,889*	*4%*	*No*

America			
Central Asia	*9,44,098*	*4%*	*No*
China	*24,82,193*	*11%*	*No*
Europe	*29,80,838*	*13%*	*Yes (Partly)*
Asia	*43,81,869*	*20%*	*Yes (Partly)*
Others	*10,07,279*	*5%*	*Yes (Partly)*
Total	***2,23,18,902***	***100%***	

Out of the total global sales of LG group, only 38% (Approx.) pertains to LG entities located in cricket playing continents (namely Europe, Asia, other than central Asia, and Others). Even in these continents, various countries in Europe like Germany" Italy, Spain, France and Poland and various countries in Asia (other than Central Asia) are also non-cricket playing nations.

From the above, it evident that the TPO had used an incorrect measure to determine LGEIL's share in the GCC contribution as 62% of the global sales comprised of countries, which do not play/watch cricket.

Further the appellant separately collated data pertaining to sales made by major cricket playing nations. The same is tabulated below:

Name of Country	***2002***
Australia	*$ 307,661,748*
England	*$ 451,684,982*
South Africa	*$ 130,097,693*

Canada	*Not available*
New Zealand	*No subsidiary in this country In F.Y. 2002-03*
Srilanka	*-do-*
Banladesh	*-do-*
Pakistan	*-do-*
Kenya	*-do-*
Zimbabwe	*-do-*
West Indies	*-do-*
Namibia	*-do-*
Holland	*-do-*
Total Sales in Major Cricket Playing Nations Other than India (in $)	*$ 889,444,423*
Exchange rate	*48.40*
Total sales in Major Cricket Playing Nations Other than India (In Rs.)	*INR 43,044,662,852*
Total sales of LGEIL (in Rs.)	*INR 30,317,261,932*
Proportionate sales of LGEIL	*41.33%*

It is evident from above that out of the total sales of these cricket playing nations, the sales of. LGEIL constitutes 41.33%. Hence, the 40% share of the total global sponsorship expense as borne by the Appellant should be considered to be at arm's length.

Further, chances of incremental sales are very dim in Western Countries. For example, in United Kingdom for every 100 households the number of Color Televisions is 98.6 as compared to India where for every 100 households only 31.1 Color Televisions are available.

Thus appellant contended that this leaves, no alternative, but the population as the only logical base to share cost in the case cost sharing agreement. Thus, the ratio of contribution, which is based on "percentage of profit" is skewed and is contrary to the reality existing with regard to the love of cricket in India. Whereas most countries to which LGEK is selling its goods, including the major ones such as South Korea, China etc are indifferent to cricket.

LGEK should not compensate LGEIL as it derives only indirect benefits of the advertising spend and comparable vendors are not making contributions for similar benefit received by them.

The TPO in his order has contended that LGEK subsidiaries worldwide are also benefited due to the increased brand awareness in India. In response to this the appellant vide its submission dated 23rd April' 2009, submitted that out of the total materials and finished products consumed by the appellant, only 31.16% is procured from its AE's and the balance is purchased from local independent vendors. Hence, an increase in LGEIL's sale would not only benefit the AE's but it would also benefit third party vendors. Infact, the benefit accruing to third party vendors would be higher than the AEs. Hence, all local independent vendors, whose sales were also increasing due to LGEIL's efforts, should have remunerated LGEIL. Applying arm's length principle, LGEIL's other vendors did not contribute towards its ad spend and hence, LGEK should not be liable for any such contribution.

Further, the appellant has placed reliance on the judgment of ITAT in the case of Star India (P) Ltd. vs Addl. CIT. It states that -

> *".... The only relevant factor is whether incurring of expenditure was for the purpose of assessee's business. The assessee was carrying on its business activity exclusively for Star TV and, therefore, survival of its business depends on the success of programmes transmitted by Star TV Assessee was required to solicit the advertisements for Star TV channel. No person would give advertisement unless he is sure of large viewership of programmes on Star TV Therefore, if assessee incurs expenditure on advertisement with a view to increase the viewership of Star TV, in our opinion, such expenditure would be in the interest of assessee's business though it may also benefit its principal ... "*

Further, reliance has been placed on the judgment of Delhi ITAT in the case of Nestle India wherein the facts were similar to that of the Appellant. The Tribunal held that the expenditure has been incurred to promote business in India. Therefore, these expenses were incurred wholly and exclusively for the purpose of business of the assessee. Further, payments for these expenses have been made to third parties in India, who are not in any way related to the parent entity of Nestle. Therefore, there is no justification on the part of the assessing officer to invoke the provisions of Section 92 of the Act.

In light of the above mentioned facts, it may be unreasonable to conclude that indirect benefits accrue to AEs as in an uncontrolled scenario as well, no vendor remunerates an entity for its advertisement efforts. Hence, an adjustment on the basis of such long stretched indirect benefits to AEs cannot be sustained.

Benefits of LGEK's advertisement expenses accrue to LGEIL as well

The appellant in its submission has submitted that LGEK for AY 2003-04, has incurred in Indian Rupees an expenses of approx Rs. 3441 crores on all kinds of sponsorship including motor sports, soccer, golf and other sports and similar events, and that expense should also be considered for allocation rather than global sponsorship of ICC World Cup Cricket tournament only since over 77% of its global falls are in non cricket playing countries and such sports, which are more popular in countries outside the Indian sub-continent, would have played a bigger role in contributing to the revenues of LGEK (LG Group) than the cricket world cup. It is further submitted that LGEIL makes no contribution for the expenses incurred in sponsoring such sports played outside India, which enjoy significant viewership in India as well. Drawing analogy from the TPO's contention, LGEIL should also make payment to other group entities towards their advertisement expenses/ sponsorship expenses.

The appellant has further submitted that-

> *"Hence, it can be concluded from the above that sales of LG Group as a whole have increased due to spending on all major sports such as Motor Sports and Soccer. Hence, the gross profit earned by LGEK would be courtesy all these sports and events and not merely ICC Cricket World Cup.*
>
> *Your Honour would also appreciate the fact that such sports are more popular in. countries outside the Indian sub-continent and would have played a more significant role in contributing to the revenues of LGEK (LG Group).*

Further, India has a substantial population that also watches these sports and the benefit of such advertising would accrue to India. Hence, without prejudice to the Appellant's contentions, the total spending on advertising by LGEK and LGEIL in relation to all sports should be aggregated and such expenditure should then be apportioned in the ratio of gross profits of LGEK and LGEIL to determine arm's length price of the GCC contribution."

The allocation methodology has to be reasonable and there cannot be just a one sided allocation of the benefits. Moreover, it will also be unreasonable to conclude that all the profits earned by LGEK and the promotion of the LG brand worldwide is consequent to the ICC Cricket Sponsorship only. If a both sided allocation is made, even using the flawed method adopted by the TPO, the contribution attributable to LGEIL would be far greater than what it is currently liable to pay.

Guidance on similar issue by the Australian Tax Office ("ATO")

The appellant has submitted that the ATO in its guidance for marketing intangibles has laid down an identical example wherein the marketer/distributor bears the costs and risks of its marketing activities and has a royalty-free contractual arrangement (with exclusive right) with the owner of the brand.

Under this example, the distributor (B) receives no reimbursement from brand owner (A) in respect of any expenditure it incurs or any other indirect or implied compensation from A and expects to earn its reward solely from the sales of branded watches to

third party customers in the Australian market. The ATO agrees that if A was compensating B for its marketing activities, it would've charged higher for products sold to B and consequentially, the profit earned by B would have been lower than comparables who undertake their own marketing. Since in the example, the profits earned by B were same as that of comparable companies, it was concluded that benefits obtained by B result in profits similar to those made by independent marketers and distributors from similar marketing arid distribution agreements. Hence, the arrangement was held to be at arm's length.

On analysing the above mentioned facts, it can be seen that in the Appellant'-s case, the Appellant is responsible for its own marketing efforts and any benefits/losses out of such marketing activities accrue to the Appellant. Hence, the Appellant is compensated for its marketing efforts by way of sales. The same is evident from the fact that the company earns profits at the same level as the comparable companies.

To conclude, the Appellant's case is identical to the example cited by the ATO, wherein the ATO has held such an arrangement to be at arm's length."

5. Considering the aforesaid, Ld. Commissioner of Income Tax (A) referred to the following break-up of Global sales of LG Group:-

Region	External Sales	Percentage Share	Cricket Playing Regions
Korea	51,80,389	23%	No
North America	45,54,537	20%	No
South	7,86,889	4%	No

America			
Central Asia	9,44,098	4%	No
China	24,82,193	11%	No
Europe	29,80,838	13%	Yes (Partly)
Asia	43,81,869	20%	Yes (Partly)
Others	10,07,279	5%	Yes (Partly)
Total	**2,23,18,902**	**100%**	

6. From the above Ld. Commissioner of Income Tax (A) opined that it was evident that out of LG group's global sales, mere 38% pertains to cricket playing continents. The benefits of advertisement in the Cricket World Cup would accrue only to those entities of LG that have their presence in the cricket playing nations or those countries where cricket is having a substantial audience viz. middle east countries. Hence, Ld. Commissioner of Income Tax (A) observed that considering the sales of the entire LG group is not the appropriate basis to apportion the benefits accruing from the sponsorship of the world cup and other events, to the entities of LG Group.

7. Ld. Commissioner of Income Tax (A) further referred to the following sales data submitted by the assessee:

Name of Country	**2002**
Australia	$ 307,661,748
England	$ 451,684,982
South Africa	$ 130,097,693

Canada	Not available
New Zealand	No subsidiary in this country In F.Y. 2002-03
Srilanka	-do-
Banladesh	-do-
Pakistan	-do-
Kenya	-do-
Zimbabwe	-do-
West Indies	-do-
Namibia	-do-
Holland	-do-
Total Sales in Major Cricket Playing Nations Other than India (in $)	$ 889,444,423
Exchange rate	48.40
Total sales in Major Cricket Playing Nations Other than India (In Rs.)	INR 43,044,662,852
Total sales of LGEIL (in Rs.)	INR 30,317,261,932
Proportionate sales of LGEIL	41.33%

8. From the above, Ld. Commissioner of Income Tax (A) observed that sale of LGEIL constitute 41.33% of such sales. Ld. Commissioner of Income Tax (A) further observed that LGEK and its subsidiaries incur all kinds of sponsorship including motor sports, soccer, gold and other sports and similar events. That expenses of such sponsorship would have also contributed significantly to sales of these entities. Hence, Ld.

Commissioner of Income Tax (A) drew a conclusion that LGEIL shares seem to be reasonable considering the sales data of 14 cricket playing nations. That LGEIL has not made any contribution towards the expenses of approximately Rs. 3441 crores incurred by LG Korea and other group companies in sponsoring and advertising in other sports events viz. motor sports, soccer, gold which are popular and played outside India but they enjoy significant viewership in India as well.

9. Ld. Commissioner of Income Tax (A) referred to the TPO's contention that it is the buying capacity (purchase power) of the customers which drives his first decision to buy or not to buy a consumer product and that purchasing power of South Asian Subcontinent is comparatively very poor as compared to Western Continents. However, Ld. Commissioner of Income Tax (A) noted that in this regard it was important to consider the penetration level of sales in advanced countries for example in UK for every 100 household the number of Color Television is 98.6 as compared to India where for every 100 households only 31.1 Color Television are available. Hence, Ld. Commissioner of Income Tax (A) inferred that the benefits in terms of increase in sales would be much higher in case of LGEIL as compared to the advanced countries where standard of living is high. In this regard, Ld. Commissioner of Income Tax (A) noted that as per the data submitted by the assessee's sales increased by 35.04% during Financial Year 2002-03 which shows that India has tremendous growth potential.

10. In this regard, Ld. Commissioner of Income Tax (A) observed that TPO has failed to make the adjustment for the above mentioned differences. Therefore, he opined that in the absence of such

adjustments the allocation key used by the TPO was flawed. But Ld. Commissioner of Income Tax (A) accepted that there was no doubt in agreeing to the fact that spending on the Cricket World Cup has also benefitted LGEK and its subsidiaries. Hence to examine the 40% apportionment in the hands of LGEIL, one can measure whether the contribution made by the LGEIL results in commensurate 'costs saved'.

11. Ld. Commissioner of Income Tax (A) further referred to the article submitted by the assessee "Cashing in on Cricket". The said article stated the following:-

> "Global Cricket Corporation (GCC), the Newscorp Company, is said to have paid $550 million to buy the rights for two World Cup tournaments and then sold them to Sony TV. About 70 percent of the advertising revenue is expected to come from India.
>
> And not without reason – for cricket to India is what football is to Brazil. It is almost a religion and hence companies here look forward to the event with glee since it means assured eyeballs for nearly every match with even channel surfing down to a minimum as people fear missing even a single delivery....."

From this Ld. Commissioner of Income Tax (A) opined that this demonstrates that LGEIL shares may have closed to 70% according to market estimates.

12. Ld. Commissioner of Income Tax (A) further referred to the empirical study by ad agency 'LINTAS' which shows that the air time during the LG logo was on display during the telecast of various matches had an opportunity cost of approximately Rs. 95.20 crores in the first year itself which is roughly 73% of the total agreement value,

which is spread over a 5 years period. Hence, Ld. Commissioner of Income Tax (A) observed that this Study clearly indicates that the agreement has led to a significant cost saving for the appellant,, which is much higher than the expenditure incurred by the appellant.

13. Ld. Commissioner of Income Tax (A) further referred to the following table which showed that assessee's sales had increased by 35.04% during the financial year 2002-03 whereas the sales of comparables companies reduced by 15.49%. That this clearly implies that the assessee derived significant benefit due to its advertisement expenses during the World Cup.

S.No.	Company	Sales (for a period of 12 months)		% increase in sales
		F.Y. 2001-02	F.Y. 2002-03	
1	Videocon appliances Ltd.	9,35,47,67,773	9,54,80,65,335	2.07%
2	Videocon Communications Ltd.	5,38,40,05,415	6,43,37,53,460	19.50%
3	Video International Ltd.	31,02,82,43,093	33,60,03,62,011	8.29%
4	BS Refrigerators	78,68,55,420	60,43,09,913	-23.20%
5	Symphony Comfort Systems Ltd.	28,17,62,969	20,42,91,997	-27.50%
6	Hitachi Home and Life Solutions (India) Ltd.	1,98,24,54,000	1,75,02,84,667	-11.71%
7	Godrej Appliances Ltd.	4,58,01,67,000	6,63,87,000	-98.55%
8	Carrier Aircon Ltd.	3,18,42,85,000	3,30,11,78,667	3.67%
9	Whirlpool of	9,86,74,97,000	8,76,76,83,200	-11.15%

	India Ltd.			
	Average increase in sales of the comparables.			-15.40%
Tested party	LG Electronics India	20,03,99,94,000	27,06,16,51,552	35.04%

From the above discussion, Ld. Commissioner of Income Tax (A) concluded LGEIL derives commensurate benefit for the GCC contribution and the same was not excessive in view of the benefits derives by LGEIL.

14. Ld. Commissioner of Income Tax (A) further considered the TPO's contention that the benefit of LGEIL sales would accrue to its AEs, since they are earning from LGEIL by way of imports, royalty etc. Hence, they should also contribute to LGEIL's ad spend. In this regard, Ld. Commissioner of Income Tax (A) referred to financial information obtained from the assessee which showed that only 31.16% was procured from its associated enterprises and the balance was purchased from local Indian Vendors. Hence, Ld. Commissioner of Income Tax (A) opined that in case of LGEIL's sale benefit both the AEs and third party vendors and applying TPO's rationale, even LGEIL's third party vendors should contribute towards its ad spend. Since under arm's length circumstances, no such payment was made by third parties, LGEK (and its subsidiaries) should also not be liable for any such contribution. Furthermore, Ld. Commissioner of Income Tax (A) referred to the decision of the ITAT in the case of Nestle India and Star India Pvt. Ltd.. He observed that in both the cases it has been regarded it is immaterial that third party is being benefited by the advt. expenses of the assessee, if an expense has been incurred by a

Company for its own benefit, the same should be allowed to the company as bonafide expenses.

15. In view of the aforesaid discussion, Ld. Commissioner of Income Tax (A) held that the TPO's action of apportionment of GCC contribution in the rate of 5.40:94.60 between LGEIL and LGEK is not correct. He held that LGEIL has received commensurate benefit for its 40% share of the contribution. Hence, the adjustment made by the Assessing Officer /TPO on this account was deleted.

16. Against the above order Revenue is in appeal before us.

17. We have heard the rival contentions in light of the material produced and precedent relied upon.

18. We find that LGEIL alongwith LGEK has entered into an agreement to sponsor World Cup Cricket. The total cost in this regard for the Asstt. Year 2003-04 was Rs. 40,73,98,255/-. This cost of sponsorship was shared between the assessee LGEIL and its parent company LGEK in the ratio of 40:60. In arriving at the above said ratio of contribution assessee has considered sales growth potential. Cricket is a very important game for India and has a lot of promotional value attached to it. Every International Cricket tournament where India is participating gives a boost to the Sales of all Consumer durables, more particularly Colour Televisions. Therefore, assessee expected that during Cricket World Cup 2003, the sales of LG products would grow due to greater visibility achieved by sponsoring tournament. The assessee further anticipated that media coverage of the event would lead to greater brand awareness in India. This was expected to grow from 17.50% to 35.00%. Assessee further considered the population of these countries where Cricket is played.

Out of the total population in these 14 nations 60% population is in India. Hence, it was assessed that level of enthusiasm regarding the game was much higher in the South Asian sub-continent. It was further considered that larger market for televisions and other appliance and media devises was in India, amongst all cricket playing and watching countries. Hence, the percentage of the population watching cricket is much higher than the other thirteen countries. In these circumstances, it was decided that assessee contribute 40% towards the total sponsorship.

19. However, TPO did not agree with the above cost contribution ratio. He held that Cricket is not the only dominating game in India. TPO further observed that it has been assumed that there is a higher level of enthusiasm about cricket in South Asian subcontinent and thus it will get translated in higher sale benefit for assessee. He opined in reality, level of enthusiasm is not the only factor for buying consumer durables. The assessee company has not considered that purchasing power of South Asian Sub-continent is comparatively very poor as compared to Western Continents. TPO further observed that Cricket events involving India would benefit LGEIL also but at the same time, he observed that this will also result in additional profit to LGEK. Apart from direct benefits, it further strengthens Brand awareness of LG in India providing more bargain power to Korea company worldwide. The TPO further observed that there are large number of subsidiaries of LGEK all over the globe. That the Cricket game involving other nations would similarly benefit on above basis to LGE Korea only for which no benefit would pass to Indian entity. TPO held that percentage of profit between LGEK and LGEIL as the most appropriate base to allocate the cost between the appellant and its AE.

19.1 We agree with the Ld. Commissioner of Income Tax (A) that considering the sales of the entire LG group is not an appropriate basis to apportion the benefits emerging from sponsorship of the World Cup and other events to the entities of the LG Group. In this regard, following break-up of Global sales of the LG Group may be considered:-

Region	External Sales	Percentage Share	Cricket Playing Regions
Korea	51,80,389	23%	No
North America	45,54,537	20%	No
South America	7,86,889	4%	No
Central Asia	9,44,098	4%	No
China	24,82,193	11%	No
Europe	29,80,838	13%	Yes (Partly)
Asia	43,81,869	20%	Yes (Partly)
Others	10,07,279	5%	Yes (Partly)
Total	**2,23,18,902**	**100%**	

20. From the above, it is evident that out of LG group's global sales, only 38% pertains to cricket playing continents. The benefits of advertisement in the Cricket World Cup would accrue only to those entities of LG that have their presence in the cricket playing nations or those countries where cricket is having a substantial audience. Hence, we find that considering the sales of the entire LG group is not an appropriate basis to apportion the cost.

We can also refer to the following sales data:-

Name of Country	2002
Australia	$ 307,661,748
England	$ 451,684,982
South Africa	$ 130,097,693
Canada	Not available
New Zealand	No subsidiary in this country In F.Y. 2002-03
Srilanka	-do-
Banladesh	-do-
Pakistan	-do-
Kenya	-do-
Zimbabwe	-do-
West Indies	-do-
Namibia	-do-
Holland	-do-
Total Sales in Major Cricket Playing Nations Other than India (in $)	$ 889,444,423
Exchange rate	48.40
Total sales in Major Cricket Playing Nations Other than India (In Rs.)	INR 43,044,662,852
Total sales of LGEIL (in Rs.)	INR 30,317,261,932

Proportionate sales of LGEIL 41.33%

21. From the above, we find that sale of LGEIL constitute 41.33% of total sales. LGEK and its subsidiaries incur all kinds of sponsorship expense. The expenses of such sponsorship also contribute significantly to the sales by these entities. Hence, we agree with the Ld. Commissioner of Income Tax (A) that considering the sale data of 14 of the Cricket Playing nations LGEIL contribution is reasonable.

Further, LGEIL has not made any contribution towards the expenses of approximately Rs. 3441 crores incurred by LG Korea and other group companies in sponsoring and advertising in other sports events viz. motor sports, soccer, golf which are popular and played outside India but they enjoy significant viewership in India as well.

22. While considering the cost contribution, it is also necessary to bear in mind the penetration level of sales in advanced countries. For example in UK for every 100 household the number of Color Television is 98.6 as compared to India where for every 100 households only 31.1 Color Television are available. As per details submitted by the assessee the sales increased by 35.04% during the financial year 2002-03. This shows that benefits in terms of increase in sales would be much higher in the case of LGEIL, as compared to the advanced countries.

23. We further find that assessee has referred to an Article in the media "Cashing in on Cricket". This article mentions that Global Cricket Corporation (GCC), the Newscorp Company, is said to have paid $ 550 million to buy the rights for two World Cup tournaments and then sold them to Sony TV. About 70 percent of the advertising

revenue is expected to come from India. This shows that the LGEIL stood to gain substantially by the above sponsorship expenditure.

24. We further refer to the submission to the empirical study by ad agency 'LINTAS' which shows that the air time during which the LG logo was on display during the telecast of various matches had an opportunity cost of approximately Rs. 95.20 crores in the first year itself which is roughly 73% of the total advertisement value, which is spread over a 5 years period. This study clearly indicates that the agreement has led to significant cost saving to the assessee, which is much higher than the expense incurred.

25. We may further refer to the following table reflecting the increase in sales in comparable companies:-

S.No.	Company	Sales (for a period of 12 months)		% increase in sales
		F.Y. 2001-02	F.Y. 2002-03	
1	Videocon appliances Ltd.	9,35,47,67,773	9,54,80,65,335	2.07%
2	Videocon Communications Ltd.	5,38,40,05,415	6,43,37,53,460	19.50%
3	Video International Ltd.	31,02,82,43,093	33,60,03,62,011	8.29%
4	BS Refrigerators	78,68,55,420	60,43,09,913	-23.20%
5	Symphony Comfort Systems Ltd.	28,17,62,969	20,42,91,997	-27.50%
6	Hitachi Home and Life Solutions (India) Ltd.	1,98,24,54,000	1,75,02,84,667	-11.71%
7	Godrej	4,58,01,67,000	6,63,87,000	-98.55%

	Appliances Ltd.			
8	Carrier Aircon Ltd.	3,18,42,85,000	3,30,11,78,667	3.67%
9	Whirlpool of India Ltd.	9,86,74,97,000	8,76,76,83,200	-11.15%
	Average increase in sales of the comparables.			-15.40%
Tested party	LG Electronics India	20,03,99,94,000	27,06,16,51,552	35.04%

From the above table, it is seen that assessee's sales had increased by 35.04% during the financial year 2002-03 pursuant to the sponsorship of cricket event whereas the sales of comparables companies got reduced by 15.49%. The above indicates that assessee derived significant benefit due to its advertisement expenses.

26. We further refer to the TPO's contention that the benefit of LGEIL sales would accrue to the associated enterprises since they are earning from LGEIL by way of imports, royalty etc. Hence, they should also contribute to LGEIL's ad spend. In this regard, Ld. Commissioner of Income Tax (A) has referred to the financial information obtained from the assessee which showed that only 31.16% was procured from its associated enterprises and the balance was purchased from local Indian Vendors. Hence, Ld. Commissioner of Income Tax (A) opined that in case of LGEIL's sale benefit both the AEs and third party vendors and applying TPO's rationale, even LGEIL's third party vendors should contribute towards its ad spend. Since under arm's length circumstances, no such payment was made by third parties, LGEK and its subsidiaries should also not be liable for any such contribution.

27. We may further refer to the assessee's submission that Hero Honda India Company has also entered into a similar agreement with GCC, and no benefits are accruing to any foreign entity. In this case still Hero Honda has allocated Rs. 120 crores for cricket sponsorship during the same period. This compares very favourable with the assessee's share which amounts to Rs. 16.29 crores which is 40% to the total global sponsorship contract for the year. It is evident that the Indian entity is incurring much higher expenses as is being jointly incurred by LGEK and LGEIL. Hence, in this view of the matter assessee's contribution of 40% of the expenditure cannot be regarded as excessive.

28. In this regard, we also refer to the mechanism of cost allocation as prescribed by the OECD guidelines. In this regard, OECD states that each participant's interest in the results of the Cost Contribution Arrangement (CCA) activity should be established from the outset. The OECD also states that the goal is to estimate the shares of benefits expected to be obtained by each participant and to allocate contributions in same proportions. Hence, the sales / gross margin which is a post event measure and which does not coincide with the expected benefit is not the right allocation key because :

a) It is a post match event which could not be determined at the time of signing of agreement.

b) Moreover, the sales/profit figures are bound to vary from year to year and region to region, whereas the base chosen by the assessee company i.e population is expected to remain reasonably constant over the period of agreement.

29. In this regard, we also refer to the following expositions of ITAT in Star India Pvt. Ltd. vs. Addl. C.I.T.

> *"…. The only relevant factor is whether incurring of expenditure was for the purpose of assessee's business. The assessee was carrying on its business activity exclusively for Star TV and, therefore, survival of its business depends on the success of programmes transmitted by Star TV Assessee was required to solicit the advertisements for Star TV channel. No person would give advertisement unless he is sure of large viewership of programmes on Star TV Therefore, if assessee incurs expenditure on advertisement with a view to increase the viewership of Star TV, in our opinion, such expenditure would be in the interest of assessee's business though it may also benefit its principal … "*

30. Hence, we find that the above also justifies the portion of cost contribution allocated to the assessee.

31. In the background of the aforesaid discussion, we are in agreement with the Ld. Commissioner of Income Tax (A) that the TPO's action of apportionment of GCC contribution in the ratio of 5.40 : 94.60 between LGEIL and LGEK is not correct. We affirm the Ld. Commissioner of Income Tax (A)'s view that LGEIL has received commensurate befits of its 40% share contribution. Hence, we hold that the adjustments made by the Assessing Officer /TPO on this account has rightly been deleted by the Ld. Commissioner of Income Tax (A).

32. Apropos ground no. 2 :- Provision for warranty expenses. On this issue Assessing Officer observed that the assessee has made a

provision of Rs. 6,57,19,516/- for service of warranty. Assessing Officer observed that the same was a provision and was not allowable.

33. Upon assessee's Appeal Ld. Commissioner of Income Tax (A) considered the Ld. Commissioner of Income Tax (A)'s order as well as ITAT order in assessee's own case for assessment year 2002-03. He noted that while adjudicating this issue reliance has been placed on Hon'ble Apex Court decision in the case Bharat Earth Movers vs. C.I.T. 245 ITR 428 and Delhi High Court decision in the case of C.I.T. vs. Vinitech Corporation Pvt. Ltd. 278 ITR 377 and accordingly, assessee's appeal has been allowed. Considering the above, Ld. Commissioner of Income Tax (A) allowed the assesseee's appeal in this regard.

34. Against the above order the Revenue is in appeal before us.

35. We have heard the rival contentions in light of the material produced and precedent relied upon. Both the counsel fairly agreed that the issue is covered in favour of the assessee. For assessment year 2002-03, the Ld. Commissioner of Income Tax (A) has considered the matter as under:-

> *"After considering the rival submissions I find that the issue involved in the appeal is covered by the decision of jurisdictional Delhi High Court in the case of CIT vs. Vinitec Corporation Pvt. Ltd. (2005)-278 ITR 337 dated 5th May, 2005 wherein it was held*

that the warranty clause was part of the sale document and imposed a liability upon the assessee to discharge its obligation under that clause for the period of warranty. It was a liability which was capable of being construed in definite terms, which had arisen in the accounting year, although its actual quantification and discharge might be deferred to a future date. Once the assessee is maintain his accounts on the mercantile system, a liability accrued, though to be discharge at a future date, would be a proper deduction while working out the profits and gains of his business. Regard being had to the accepted principles of commercial practice and accountancy. To substantiate its claim for the relevant assessment year the assessee had given the figures of last five years of warranty liability provided. vis-a-vis the expenditure incurred. These figures clearly exhibited that the assessee had incurred expenditure resulting from the warranty clause to the extent of more than 2% of its total sales in the previous year. There was nothing on the record which could suggest that the change in the accountancy was motivated or was improper or that the provision made in the accounting year and deduction claimed as business expenditure was unduly excessive and was intended to evade taxation. Following the ratio laid down by the jurisdictional Delhi High Court the claim of the assessee company has been examined. It has been noticed that the assessee company had made the warranty provisions right from the first year of the commencement of the business i.e assessment year 1998-99. These provisions were made after working out the factor based on the actual expenses divided by the average sales of the earlier

years. The factor value so worked out was applied as a multiplying factor on the sale of the year resulting into expenses including provisions. The difference in the expenses including provisions and actual expenses was considered for providing the additional provisions. This method was followed by the assessee company uniformly right from the first year of the commencement of the production. Although the claim of the provisions as a revenue expense was made first time in the year under consideration based on the decision of Hon'ble Supreme Court in the case of Bharat Earth Movers Ltd., Vs. CIT (2000)245 ITR 428 and many other courts' citations submitted by the appellant company in its submission in the course of assessment proceedings and also in the course of appellate proceedings but I find that its time claim in the year under consideration is allowable as per the ratio laid down by the jurisdictional Delhi High Court in the case of CIT Vs. Vinitec Corporation Pvt. Ltd. (2005)278 ITR 337 (Delhi). The Observation made by the Assessing Officer that since these provisions have not been incurred wholly and exclusively for the purpose of business, they stand disallowed under section 37(1) of the Income Tax Act, 1961 and also they are based on the sales which are totally unpredictable to be determined have become irrelevant after the decision of the jurisdictional Delhi High Court in the case of Vinitec Corporation Pvt. Ltd .. Appellant's appeal on this ground stand allowed."

36. Further, ITAT has affirmed the above order of the Ld. Commissioner of Income Tax (A) and concluded as under:-

"In the case before us, we are concerned with regard to the assessee's claim of deduction towards warranty liability under a condition or stipulation made in the sale document imposing a liability upon the assessee to discharge its obligation under warranty clause for the period of warranty, and thus, in the light of the discussion made above, the liability so accrued, though to be discharged as a future date, would be a proper deduction while working out the profits and gains of assessee's business from sale of the commodity in question. The assessee had made the provision of warranty liability having regard to the past factor of actual expenses incurred by the assessee towards warranty liability.

37. In the background of the aforesaid discussions and precedents, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (A). Accordingly, we uphold the same.

ASSESSEE'S APPEAL

38. The grounds raised read as under:-

"1. That on facts and in law the order's passed by the Commissioner of Income Tax (Appeals) is bad in laws in as much as he failed to appreciate the facts in issue and the law thereon.

2. That on facts and in law the Ld. Commissioner of Income Tax (A) erred in para 13.4 of the impugned order, by upholding the decision of the Assessing Officer that the

amount received towards sales tax subsidy, in accordance with the UP State Industrial Policy, is revenue in nature.

2.1 That on facts and in law the Ld. Commissioner of Income Tax (A) erred by failing to appreciate that the sales tax subsidy is in the nature of capital subsidy granted by the UP State Government for promoting capital investment in specified areas.

2.2 That on the facts and in law the Ld. Commissioner of Income Tax (A) erred in coming to the conclusion that the appellant had not set up the industry in view of the incentives given by UP Industrial Policy. He should have rather evaluated the object of the government behind granting the subsidy.

2.3 That on facts in law Ld. Commissioner of Income Tax (A) erred in relying on the fact that industrial policy was not formulated with the sole objective of encouraging the capital investment in NOIDA area, but various other objectives as well. He should have instead evaluated the purpose and the object of the subsidy or exemption scheme to determine the nature of the receipt in accordance with the principles laid down by Supreme Court in the case of Sahney Steel (228 ITR 253).

2.4 That on facts and in law Ld. Commissioner of Income Tax (A) erred in coming to the conclusion that sales tax subsidy is given subsequent to the commencement of business and hence has to be considered as an assistance for carrying out the business.

3. That on facts and in law the Ld. Commissioner of Income Tax (A) erred in para 16.3 of the impugned order by upholding the inclusion of profit of I&C division while calculating the appellant's claim under section 80HHC.

4. That on facts and in law the Ld. Commissioner of Income Tax (A) erred by upholding the levy of interest under section 234D.

The appellant prays for leave to add, alter, amend and / or modify any of the grounds of appeal at or before the hearing of the appeal."

39. Apropos ground relating to treatment of amount received towards sales tax subsidy :-

On this issue Assessing Officer observed that assessee has received sales tax exemption amounting to Rs. 33,32,95,517/-. Assessing Officer was of the opinion that the sales tax exemption should be treated as revenue receipt as against the claim of the assessee that the same was capital receipt. Assessing Officer has summarized his observation as under:-

"(i) The sales tax exemption was given after the assessee had already set up its business and commenced production.

(ii) The subsidy was given not to set up the business but to carry out existing and an ongoing business..

(iii) This issue has already been dealt with in detail in the case of Sahney Steel 228 ITR 253.

(iv) The citation given by the assessee does not apply in the case of the assessee as it has already collected the sales tax which it was not supposed to have collected. Once the amount has been collected and the liability to return the same to the State Govt. does not exist, such receipts can only be treated as income in the hands of the assessee."

40. Upon assessee's appeal Ld. Commissioner of Income Tax (A) considered the submissions of the assessee. He observed that this issue was decided against the assessee by the Ld. Commissioner of Income Tax (A) in his order in A.Y. 2002-03. He noted that there is no change in the facts and circumstances of the case. Hence, he agreed that the decision of his predecessor. Following the said decision, Ld. Commissioner of Income Tax (A) upheld the addition made by the Assessing Officer where the sale tax exemption have been treated as revenue receipt.

41. Against the above order the Assessee is in appeal before us.

42. We have heard the rival contentions in light of the material produced and precedents relied upon. We find that the issue is squarely covered in favour of the Revenue by the decision of the ITAT in assessee's own case for the assessment year 2002-03. In this case the ITAT has held as under:-

"9. We have heard both the parties and gone through the material available on record. In this case the assessee had collected sales tax as a part of dealers' price. At the year end the sales tax portion, which formed the part of dealers' price had been bifurcated and has been claimed as

capital subsidy. We have also gone through the Notification No. 1179 dated 31.03.1995 issued by the State Government of Uttar Pradesh. The State Govt. has provided sales tax exemption with an objective to promote the development of certain industries which have been set up or undertaken modernisation, diversification, backward integration by way of fixed capital investment of Rs.50 crores or more. The exemption of from sales tax or benefit of reduced rate of tax is available to those units which have started production or have carried out expansion or modernisation or backward integration etc. between 1.12.1994 and 31.03.2000. Para 2 of the notification specifies that the exemption or reduction in the rate of sales tax including the additional tax would not be more than 5 per cent of sale of goods. In case where tax rate was more than 5 per cent including additional tax, the balance was to be paid by the unit. Para7 (2) of the notification provides for the exemption of sales tax to the extent of exemption or reduction in tax. Item (2) of the Schedule includes Greater Noida Industrial Development Area wherein exemption from sales tax to the extent of 200 per cent of capital investment has been provided. None of the clauses of the Notification authorises the assessee to collect the sales tax and retain the same with it. The exemption of sales tax was available from the date of first sale or the date within the period of six months from the date of production, whichever is earlier. The said notification also provided that the eligibility certificate to the assessee will be issued by the

joint/additional director of concerned Development Authority and the same will be produced before the concerned assessing officer. The Addl. Director Industries, Greater Noida Industrial Development Authority, vide letter No. 1344 dated 23/06/1999 issued eligibility certificate to the assessee. As per this certificate fixed capital investment is of Rs.51,57,95,446/-. The date of commencement of production is 9/03/1998 and the first sale was affected on 27th March, 1998. The assessee applied for exemption from trade tax [sales tax] vide application dated 10/09/1998. The exemption from trade tax [sales tax] was provided from 27th March, 1998 to 26th March, 2013 for a period of 15 years or till the time the exemption of sales tax was availed of to the extent of 200 per cent of fixed capital investment i.e. Rs.1,02,75,90,892/- whichever was earlier. This certificate also provided the items i.e. Colour TV, Washing machine and Air-conditioners on which exemption from sales tax was provided. Another certificate was issued on 27th September, 2000 vide letter No. 1519 in respect of printed circuit voice for CTV number 8,12,000 and Micro-wave Oven 1,00,000. In this certificate, the sales tax exemption in first three years has been provided to the extent of 100 per cent, next three years 75 per cent, next two years 50 per cent and next two years 25 per cent. In all exemption from sales tax was provided for 10 years.

10. Neither the certificates issued by Greater Noida Industrial Development Authority nor the Notification issued

by the State Govt. authorises the assessee to collect sales tax from its customers. The assessee has been exempted from collecting the sales tax from customers on the sales made with effect from 27th March, 1998. In fact, the ld. counsel for the assessee made a statement at the bar, during the course of hearing, that neither the Notification has authorized the assessee to collect sales tax nor the assessee had collected the sales tax as such. The assessee had included the element of sales tax in the dealers' price as a sale price of the product. In the States other than Uttar Pradesh, the sales tax so collected as a part of dealers' price has been paid to respective State Governments, whereas in the case of the assessee, since the assessee was not liable to pay sales tax, as exemption has been provided to the extent of 200 per cent of fixed capital investment, the sales tax element which is embedded in the sale price have been retained by the assessee as excess sales consideration. At the year-end the assessee has allocated the sales tax element from dealer's price and has claimed the same as capital subsidy. Therefore, the collection of dealers' price has been made in the ordinary course of trading activities. When the assessee is not permitted to collect the sales tax under the notification issued by the State Govt. the collection of sales tax as a part of dealers' price is nothing but constitutes a trading receipt.

11. Our view that the sales tax collected by the assessee as a part of dealer's price would constitute trading receipt is supported by the decision of Hon'ble Supreme court in the

case of Sinclair Murray and Co. P. Ltd. Vs. CIT (1974) 97 ITR 615 (SC). In this case during the accounting period relevant to the assessment year 1953-54, the assessee company, with its head office in Calcutta, sold jute in Orissa to certain mills for being used in Andhra Pradesh and charged sales tax under a separate head in the bill as "Sales tax : Buyer's account..... to be paid to the Orissa Government". The sales tax was not paid to the Orissa Government on the ground that the sales were inter-State sales. The Appellate Tribunal held that where a dealer collected sales tax under section 9-B(3) of the Orissa Sales Tax Act, 1947, as it then stood, the amount of the tax did not form part of the sale price and the dealer did not acquire any beneficial interest therein and that the sum of Rs.7,14,398/- collected by the appellant did not form part of its total income. On a reference, the High Court held that the sales tax collected was part of the trading receipt and was to be included in the appellant's total income since the money realised from the purchaser was employed by the appellant for the purpose of making profit and the appellant did not earmark the amount realised as sales tax and did not put it in a different account or deposit it with the Government in terms of section 9-B(3).

On further appeal the Hon'ble Supreme Court held as under :-

Held, affirming the decision of the High Court,

(i) that, assuming that section 9-B(3) of the Orissa Sales Tax Act, 1947, was valid, the fact that the dealer was compelled to deposit the amount of sales tax in the State exchequer did not prevent the applicability of the principle laid down by the Supreme Court in Chowringhee Sales Bureau P. Ltd. Vs. CIT (1973) 87 ITR 542;

(ii) that the amount collected by the appellant as sales tax constituted its trading receipt and had to be included in its total income;

(iii) that if and when the appellant paid the amount collected to the

State Government or refunded any part thereof to the purchaser, the appellant would be entitled to claim deduction of the sum so paid or refunded."

From the Notification issued by State Government, as discussed above, it is clear that exemption from Sales tax / trade tax or reduction in sales tax / trade tax has been provided to the industrial units, which have been set up or carried out expansion, modernisation or backward integration. The sales tax exemption is available from the date of first sale of eligible units. In the case of the assessee the production of expended unit started from 9th

March, 1998 and the first sale was effected on 27th March, 1998. The assessee had made application for the purpose of exemption on 19/09/1998. It is a undisputed fact that none of the clause of the Notification issued under section

4-A of Trade Tax Act, 1948 had authorised the assessee to collect sales tax / trade tax. It is also a fact that the collection of sales tax / trade tax has been made after the eligible industrial unit started production. Nowhere in the Notification has it been stated that exemption from sales tax / trade tax was provided for the setting up of the eligible unit. Therefore, the exemption from sales tax was granted in the course of carrying out of the business of the assessee. Hence, the grant of exemption from sales tax cannot be treated for the purpose of setting up of the industry. In other words, the industry was to be first set up and after it went into production and made the first sale, the assessee became eligible for exemption of sales tax / trade tax. The eligibility certificate was to be produced before the sales tax authorities in order to enable the assessee to claim exemption from sales tax. Since the assessee has collected the sales tax as part of dealer's price, the sales tax element will be trading receipt in the hands of the assessee. Our view is supported by the decision of Hon'ble Allahabad High Court in the case of CIT Vs. K. M. Sugar Mills Ltd. 164 Taxman 562 (All.) as discussed below.

12.1 In the case of CIT Vs. K. M. Sugar Mills Ltd. (supra) the assessee had paid purchase tax of Rs.20,12,046/- against which it had received a subsidy of Rs.20,11,000/-. The claim of the assessee was that the amount received on account of subsidy was a capital receipt and not liable to tax. This was negative by the assessing officer. In appeal,

the ld. CIT (Appeals) observed that the nature of subsidy received by the assessee was different from the subsidy which was held to be a capital receipt by the Madhya Pradesh High Court in the case of CIT Vs. Dusadh Industries (1986) 162 ITR 784 because it was neither for encouragement of industries in the backward areas nor for setting up of industries. After referring to the relevant Notification and the fact that the purchase tax, when paid, was claimed as deduction, the ld. CIT (A) held that the refund of the same purchase tax received by the assessee as subsidy was taxable as a trading receipt. On further appeal the Tribunal upheld the findings of the ld. CIT (A) that the subsidy received by the assessee against the payment of purchase tax was a trading receipt in its hands and, therefore, liable to tax.

12.2 At the instance of the assessee the following question was referred to Their Lordships of Hon'ble Allahabad High Court for consideration:

" Whether on a true and correct interpretation of the scheme under which the subsidy was granted by the Govt. of Uttar Pradesh, read with the provisions of section 28 of the Income-tax Act, the Tribunal was legally correct in holding that the sum of Rs.20,11,000/- receivable from the State Govt. was taxable as revenue receipt? "

Hon'ble Allahabad High Court held as under :-

" 15. So far as the question referred at the instance of the assessee is concerned, we find that under the Govt. order

dated 24/08/1984 issued by the State Govt. providing aid was to be given to the extent of the purchase tax paid by the sugar mill on purchase of sugar cane in order to facilitate payment of cane price. It may be mentioned here that the cane price paid by the assessee is a revenue expenditure and, therefore, any amount provided as aid for making revenue expenditure, would partake the nature of revenue receipt."

12.3 Similar view has been taken by Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Abhishek Industries Ltd. (supra). The facts of this case were that the assessee initially while filing the return of income treated the sales tax subsidy as a revenue receipt.

Even though a revised return was filed by the assessee on 12/08/1994, still no claim was made for treating the sales tax subsidy as capital receipt as against the revenue receipt.

However, it was only at the time of framing the assessment the assessee changed its stand where vide letter dated 29/2/1996, a plea was sought to be raised that the sales tax subsidy was inadvertently treated as revenue receipt. The claim of the assessee was that the sales tax subsidy was in the form of sales tax exemption granted by the State of Punjab under the 1991 Rules, as amended by Notification dated 29th September, 1992. The relevant Rule as was sought to be relied upon by the counsel for the assessee is extracted below:-

" 4. A (1) Notwithstanding anything contained in any provisions of these Rules and subject to provisions of sub rule (2),

(i) Group of industries which are set up in A category area on or after the 1st day of October, 1992 and the goods produced by them shall be exempt from the payment of sales tax for a period of 10 years commencing from the date of production for the first time in the State of Punjab, subject to condition that total sales tax exemption shall not exceed 300 per cent of their fixed capital investment;

(ii) Group of industries which are set up in B category area on or after the 1st day of October, 1992 shall be exempt from the payment of sales tax for a period of 7 years from the date of production for the first time in the State of Punjab, subject to the condition that the total sales tax exemption shall not exceed 150 per cent of their fixed capital investment. "

12.4 Hon'ble Punjab & Haryana High Court after examining the contention of the assessee and also various decisions at page 25 observed as under :-

" ..... In the present case, all that is claimed and is put on record by the assessee is that the sales tax subsidy is being received by it from the State.

It is not disputed that the same is being received on recurring basis after the unit came into production. There is no document or material placed on record by the assessee

to substantiate its plea that subsidy of the kind under consideration was to enable it to acquire new plant and machinery or as an aid to set up the industry. Rather, it is quite evident that subsidy in the present case is in the form of an operational subsidy provided by the State after the industry had been set up and commenced commercial production.

The subsidy is not in the form of a financial assistance granted to the assessee for setting up of the industry. The endeavour of the State was to provide the newly set up industries, a helping hand for specified period to enable them to be viable and competitive vis-a-vis the industries were already set up and were in production since long. The assessee has failed to establish on record that the kind of subsidy involved in the present case was in the form of a subsidy to enable it to carry out capital investment. In the absence thereof, it cannot possibly be presumed by the authorities that such a subsidy would be in the nature of capital subsidy. The onus to provide the same strongly lay on the assessee, which it had failed to discharge. "

12.5 Likewise in the case of Mudit Refrigeration P. Ltd. Vs. ACIT (2003) 84 I.T.D. 289 (All.) according to scheme notified by State Govt. the assessee company, a cinema owner was entitled to grants-in-aid or subsidy by way of adjustment of Entertainment Tax, which was treated as paid by way of adjustment and retained by the assessee. The assessee claimed it as a capital receipt, on plea that subsidy was paid

to carry on trade and that its quantification on the basis of entertainment tax was only a measure to determine it and that it was not a fact that entertainment tax was not payable by the assessee to the Govt. The assessing officer treated it as revenue receipt. The question before the Bench was whether if grants in aid were given by way of assistance to the assessee in carrying on of his trade or business and for purpose of making cinema business more profitable in backward areas, and not to acquire any asset or against capital outlay it had to be treated as a trading receipt and the source of funds was quite immaterial. It was also held that grant in aid received by way of adjustment of Entertainment Tax, which was treated as paid by way of adjustment and retained by the assessee could not be regarded anything, but a revenue receipt. If the facts of the case are examined in the light of decision of the ITAT, Allahabad Bench in Mudit Refrigeration P. Ltd. Vs. ACIT (supra) the collection of sales tax as part of dealer's price would be a trading receipt in the hands of the assessee even if it is assumed that the assessee was authorised to collect and retain with it the sales tax as part of dealer's price. Moreover, there is nothing on record to suggest that sales tax exemption was granted for acquiring of capital assets. Similar view has been taken in the case of U. P. State Handloom Corporation Vs. DCIT 42 I.T.D. 436 (All). In this case the assessee received subsidy amount from Govt. under a specified scheme called "Janta Cloth Scheme" in the capacity of trader and it was compensation for loss of

profit or for loss on cost of production. It was held that subsidy received by trader under "Janta Cloth Scheme" to compensate trader for loss on cost of production was a revenue receipt.

13.1 In the case of Sahney Steel & Press Works Ltd. & Others (supra) a notification was issued by the Andhra Pradesh Government that certain facilities and incentives were to be given to all the new industrial undertakings, which commenced production on or after 1st January, 1969 with investment capital (excluding working capital) not exceeding Rs.5 crores. The incentives were to be allowed for a period of five years from the date of commencement of production. Concession was also available for subsequent expansion of 50 per cent and above of the existing capacity provided in each case, the expansion was located in a city or town or panchayat area other than that in which existing unit was located. The salient features of the scheme formulated by the Andhra Pradesh Govt. were that the incentives were not available unless and until the production had commenced; the availability of incentive would be limited to a period of five years from the date of commencement of production; the incentives were to be given by way of refund of sales tax and also by way of subsidy on power consumed for production to the extent stated in the notification; the exemptions were given from payment of water drawn from Govt. sources. The assessee-company, S, set up a factory at P which went into production in the year 1973. The assessee maintained its

accounts according to the calendar year. It was, therefore, entitled to the benefits of the said Government order in the calendar year 1973, which meant the assessment year 1974-75. In the said accounting year, the assessee obtained refund totalling Rs.14,665.70 being refund of sales tax on purchase of machines, purchase of raw materials and sale of finished goods. The Income-tax Officer, while making the assessment for the year 1974-75, included the said amount in the assessable income of the assessee which was confirmed on appeal by the Commissioner of Income-tax (Appeals). On further appeal, however, the Tribunal upheld the assessee's contention and held that the amount of Rs.14,665.70 refunded to the assessee in terms of the said Government order "did not represent refund of sales tax" but was a development subsidy in the nature of a capital receipt. The High Court held that the amount was assessable. On appeal to the Supreme Court by the assessee : " Held, dismissing the appeal, that, under the notification in question the payments were made to assist the new industries at the commencement of business to carry on their business. The payments were nothing but supplementary trade receipts. It was true that the assessee could not use this money for distribution as dividend to its share-holders. But the assessee was free to use the money in its business entirely as it liked and was not obliged to spend the money for a particular purpose. The subsidies had not been granted for production of, or bringing into existence any new asset. The subsidies were granted year

after year, only after the setting up of the new industry and commencement of production. Such a subsidy could only be treated as assistance given for the purpose of carrying on of the business of the assessee.

The subsidies were of revenue nature and would have to be taxed accordingly."

13.2 The principle laid down in the case of Sahney Steel and Press Works (supra) is that if the purpose of subsidy is to help the assessee to set up its business or complete a project, the moneys must be treated as having been received for capital purposes. But if moneys are given to the assessee for assessing him in carrying out the business operations and the moneys are given only after and conditional upon commencement of production, such subsidies must be treated as assistance for the purpose of the trade. The facts of the case before us are similar to the facts of Sahney Steel and Press Works (supra). The purpose of notification issued by Uttar Pradesh Government was to provide sales tax exemption to all new industrial undertakings or the industrial undertakings which have been expanded or modernised or went in backward integration between 1/12/1994 to 31st March, 2000. The assessee had collected the amount of sales tax equal to exemption granted in the course of carrying out business. The assessee was not obliged to spend the sales tax collected for any particular purpose. The notification as stated above has neither authorised the assessee to collect

the sales tax nor has the assessee collected sales tax as such. The sales tax element is embedded in dealer's price and has been collected as part of dealer's price. Even if it is assumed that the assessee was authorised to collect sales tax and retain with it, the same will be chargeable to tax as trading receipt in view of decision of Hon'ble Supreme Court in the case of Sahney Steel and Press Works (supra).

14. The contention of the assessee that the issue is covered in favour of the assessee by the decision of Special Bench of the Tribunal in the case of Reliance Industries (supra), in our view, is not correct in view of the decision of Hon'ble Punjab & Haryana High Court in the case of Abhishek Industries P. Ltd. (supra); the decision of jurisdictional High Court in the case of CIT Vs. K. M. Sugar Mills Ltd. (supra) and the decision of Sahney Steel and Press Works (supra). Moreover, the decision of Special Bench of the Tribunal was rendered before the decision in the case of Abhishek Industries P. Ltd. (supra). The assessee had not been able to produce any evidence that the assessee was authorised to collect sales tax as authorised by the State Government or collection of sales tax was required for investment in setting up of the industry or expansion of the industrial unit. Hence, in view of the decision of Punjab & Haryana High Court in the case of Abhishek Industries P. Ltd. (supra); and the decision of jurisdictional High Court K.M. Sugars as well as Hon'ble Supreme Court in the case of Sahney Steel and Press Works

(supra) the sales collected by the assessee as dealers price and retained with it has to be taxed as revenue receipt.

15.1 The alternative contention of the assessee that if the State Govt. has permitted the assessee to collect sales tax and had refunded the same in the form of subsidy, the things would have been different and the refund of sales tax in the form of subsidy would have been capital receipt in the hands of the assessee, this, in our view, is not correct. We have already discussed that that even the refund of sales tax will be chargeable tax as the same was collected in the course of carrying out the business by the assessee. Hence the alternate submission of assessee deserves to be rejected.

15.2 In view of the above discussion, in our considered opinion, the ld. CIT (Appeals) was justified in treating the sales tax collected by the assessee as trading receipt and hence no interference is called for."

43. In view of the above, Ld. Departmental Representative claimed that the issue is squarely covered in favour of the Revenue. However, ld. Counsel of the assessee submitted that the Tribunal has not considered the matter properly. He submitted that the appeal against the tribunal order is pending in the Hon'ble High Court of Delhi. However, upon careful consideration, we find that there is no proper justification to deviate from the decision of the ITAT in assessee's own case. The appeal against the Tribunal order is still pending in Hon'ble High Court. Under the circumstances, the judicial propriety mandates that we adhere to the decision of the Tribunal in assessee's own case.

Accordingly, respectfully following the precedent as above, we uphold the order of the Ld. Commissioner of Income Tax (A).

44. Apropos issue of inclusion of profit of I&C Division while calculating the assessee's claim u/s. 80HHC.

On this issue Assessing Officer had clubbed the profits of I&C Division of the assessee for the purpose of calculating the deduction u/s. 80HHC.

45. Assessee appealed before the Ld. Commissioner of Income Tax (A) that the said action of the Assessing Officer was not justified as assessee was maintaining the separate sets of books of accounts for each of the Division. Assessee further placed reliance upon the several case laws. Considering the above, Ld. Commissioner of Income Tax (A) has held as under:-

> *"I have gone through the above submissions of the appellant. On this issue though the appellant claims that the IPCA's judgement is not applicable, but this fact is totally wrong. The issue before the Hon'ble Supreme Court in IPCA's case was "whether the appellant are entitled to deduction of 80HHC ignoring the loss" and Hon'ble Supreme Court, held in clear term that while calculating the deduction under section 80HHC, the provision of Section 80B(5) and Section 80AB cannot be overlooked and the income has to be computed in accordance with the provisions of this Act, then not only profits but losses have to be taken into consideration.*

Thus the legal proposition is very clear that Section 80HHC is governed by Section 80AB and Section 80AB has been given an overriding effect over all other sections in Chapter VIA. Section 80HHC does'nt provide that their provisions are to prevail over Section 80AB or over any provision of the Act. Supreme Court has clearly held that Section 80HHC would be governed by Section 80AB.

Further, even under section 80HHC(3)(C)(i), the profit to be taken up has to be "adjusted profit of the business", therefore, if there are losses, they cannot be ignored.

Hence, in view of the above. I hold that Assessing Officer was right in including the profit of I&C Division while calculating the appellant's claim under section 80HHC."

46. Against the above order the Assessee is in appeal before us.

47. We have heard the rival contentions in light of the material produced and precedent relied upon. Ld. Counsel of the assessee pleaded that Ld. Ld. Commissioner of Income Tax (A)'s reliance on Apex Courts' ruling in IPCA is not applicable on the facts of this case. Ld. Counsel of the assessee in this regard further submitted that there are case laws both in favour of the assessee as well as against the assessee on this issue. He referred to case laws as under:-

(i) 254 ITR 656 (C.I.T. vs. Rathore Brothers)

In this case it was held that the assessee was maintaining separate trading receipts and profit and loss account for exports sales and domestic sales, clause (b) of sub-section (3) of Section 80HHC

could not be invoked & the assessee was entitled to relief u/s. 80HHC in respect of the entire export net profits.

(ii) 257 ITR 60 (C.I.T. vs. Madras Motors).

In this case it was held that the total turnover in section 80HHC(3) (b) refers to total turnover of the exportable goods and does not include turnover from the business of sale of goods, which are not at all exported by the assessee.

(iii) The Hon'ble Delhi High Court in I.T.A. No. 1265 vide order dated 14.9.2011 has followed the view as expounded in the above case laws. However, ld. Counsel of the assessee further conceded that there are decisions against the assessee also on this subject. In this regard, ld. Counsel of the assessee has contended that where two views are possible one in favour of the assessee and one against the assessee, the view in favour of the assessee should be adopted as expounded by the Hon'ble Apex Court in the case of Vegetable Products 88 ITR 192. In this regard, Ld. Counsel of the assessee further referred to the decision of the Hon'ble Apex Court in the case of Bajaj Tempo Ltd. vs. C.I.T. 196 ITR 188 for the proposition that deduction provisions should be liberally construed.

48. Ld. Departmental Representative on the other hand relied upon the order of the authorities below.

49. We have carefully considered the submissions and perused the records. We find that the Ld. Commissioner of Income Tax (A)'s reliance on the decision of the Hon'ble Apex Court is not applicable on the facts of the present case. Further, as discussed above, there are decisions in favour of the assessee as well as against the assessee on

this issue. In this view of the matter we rely upon the decision of the Hon'ble Apex Court in the case of Vegetable Products (Supra), that if two views are possible, one in favour of the assessee and one against the assessee, the view in favour of the assessee should be adopted. Hence, respectfully following the decision from the case laws of Madras Motors (Supra) and Rathore Brothers (Supra), this issue is decided in favour of the assessee. Accordingly, we set aside the order of the authorities below and hold that Assessing Officer was not correct in including the profit of I&C Division while calculating the assessee's claim under section 80HHC.

50. Another issue raised in this appeal that Ld. Commissioner of Income Tax (A) erred in upholding the levy of interest under section 234D.

51. Ld. Counsel of the assessee submitted that he will not be pressing this ground. Accordingly, this ground is dismissed as not pressed.

52. In the result, the appeal filed by the Revenue stands dismissed and appeal filed by the Assessee stands partly allowed.

Order pronounced in the Open Court on 17/5/2013.

Sd/-	Sd/-
[R.P. TOLANI]	[SHAMIM YAHYA]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Date 17/5/2013
"SRBHATNAGAR"

Copy forwarded to: -

1. Appellant 2.Respondent 3. CIT 4.CIT (A) 5. DR, ITAT

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By Order,

Assistant Registrar,
ITAT, Delhi Benches