
2013 SCC OnLine ITAT 8074

In the Income Tax Appellate Tribunal "J" Bench, Mumbai
(BEFORE B. RAMAKOTAIAH, A.M. AND AMIT SHUKLA, J.M.)

I.T.A. No. 5072/Mum./2001 (Assessment Year: 1998-99)

Parle Soft Drinks Pvt. Ltd. Western Express Highway Andheri (East), Mumbai 400099 … Appellant;

Versus

Jt. Commissioner of Income Tax Special Range-6, Aayakar Bhavan 101, M.K. Road, Mumbai 400020 … Respondent;

PAN AAACP4620J

I.T.A. No. 5284/Mum./2001 m(Assessment Year: 1998-99)

Dy. Commissioner of Income Tax Special Range-6, Aayakar Bhavan 101, M.K. Road, Mumbai 400020 … Appellant;

Versus

Parle Soft Drinks Pvt. Ltd. Western Express Highway Andheri (East), Mumbai 400099 … Respondent;

PAN AAACP4620J

C.O. No. 136/Mum./2002 (5284/Mum./2002) (Arising out of I.T.A. no. 5284/Mum./2002 Assessment Year: 1998-99)

Parle Soft Drinks Pvt. Ltd. Western Express Highway Andheri (East), Mumbai 400099 … Cross Objector;

Versus

Dy. Commissioner of Income Tax Special Range-6, Aayakar Bhavan 101, M.K. Road, Mumbai 400020 … Respondent;

PAN AAACP4620J

I.T.A. No. 877/Mum./2003 (Assessment Year: 1998-99)

Asstt. Commissioner of Income Tax Central Circle-25, Old CGO Building 101, M.K. Road, Mumbai 400020 … Appellant;

Versus

Parle Bottling Ltd. (Now Parle International Ltd.) Western Express Highway Andheri (East), Mumbai 400099 … Respondent;

PAN AAACP8417H

I.T.A. No. 825/Mum./2003 (Assessment Year: 1998-99)

Parle Bottling Ltd. (Now known as Parle International Ltd.) Western Express Highway Andheri (East, Mumbai 400099 … Appellant;

Versus

Dy. Commissioner of Income Tax Central Circle-25, Old CGO Building 101, M.K. Road, Mumbai 400020 … Respondent.

PAN AAACP8417H

Assessee by: Mr. S.E. Dastur a/w Mr. Sanjeev Shah and Mr. Rajan Vora
Revenue by: Dr. P. Daniel, Special Counsel

I.T.A. No. 744/Mum./2002 (Assessment Year: 1998-99)

Dy. Commissioner of Income Tax Central Circle-25, Old CGO

Building 101, M.K. Road, Mumbai 400020 … Appellant;

Versus

Aqua Bisleri Ltd. Western Express Highway Andheri (East), Mumbai 400099 … Respondent;

PAN AABCA2056N

C.O. No. 35/Mum./2003 F. 744/Mum./2003) (Arising out of I.T.A. no. 744/Mum./2003 (Assessment Year: 1998-99)

Parle Bisleri Ltd. (Formerly known as Aqua Bisleri Ltd.) Western Express Highway Andheri (East), Mumbai 400099 … Cross Objector;

Versus

Dy. Commissioner of Income Tax Central Circle-25, Old CGO Building 101, M.K. Road, Mumbai 400020 … Respondent.

PAN AABCA2056N

I.T.A. No. 5072/Mum./2001 (Assessment Year: 1998-99), I.T.A. No. 5284/Mum./2001 m(Assessment Year: 1998-99), C.O. No. 136/Mum./2002 (5284/Mum./2002) (Arising out of I.T.A. No. 5284/Mum./2002 Assessment Year: 1998-99), I.T.A. No. 877/Mum./2003 (Assessment Year: 1998-99), I.T.A. No. 825/Mum./2003 (Assessment Year: 1998-99), I.T.A. No. 744/Mum./2002 (Assessment Year: 1998-99), C.O. No. 35/Mum./2003 F. 744/Mum./2003) (Arising out of I.T.A. No. 744/Mum./2003 (Assessment Year: 1998-99)

Decided on September 20, 2013, [Date of Hearing: - 25.06.2013]

Assessee by: Mr. Firoze Andhyarajina

Revenue by: Dr. P. Daniel, Special Counsel

ORDER

AMIT SHUKLA, J.M.:— The aforesaid appeals and cross appeals are directed against the impugned separate orders passed by different Commissioner (Appeals). Since one of the main grounds raised in all the appeals are common and inter-connected, therefore, as a matter of convenience, they were heard together and are being disposed off by way of this consolidated order.

2. One of the main issues involved in these appeals are with regard to the treatment of amount of Rs. 16,05,82,500, received by Parle Soft Drinks Pvt. Ltd. and Parle Bottling Co. Ltd., each, towards compensation received from The Coca Cola Co., is a capital receipt or revenue receipt or capital gain or casual income and in whose hands it should be taxed

3. The facts relating to this issue is permeating through in all the appeals, on which the various authorities have taken different views and different stands with regard to the taxability of the receipt of the same compensation amount. For the sake of convenience, we first take up appeals in ITA no. 5072/Mum./2001, ITA no. 5284/Mum./2001 and C.O. no. 136/Mum./2002, which were argued by the learned Sr. Counsel, Mr. S.E. Dastur. The grounds raised by the Revenue in ITA no. 5284/Mum./2001, are as under:—

1. *"On the facts and in the circumstances of the case, the learned CIT(A) erred in law in directing the Assessing Officer to treat the amount of Rs. 16,05,82,500/- being the compensation received from Coca Cola Co. as long term capital gains whereas the Assessing Officer had treated the same as income from other sources of alternately as short term capital gains for the reasons discussed by him in the asstt. orders."*
2. *"On the facts and in the circumstances of the case, the learned CTT(A) erred in law in holding that ROFR passed to the assessee company on its inception take*

over by the Chauhan Group automatically without 'express written consent of The Coca Cola Co. (TCCC)" in terms of last para of Exhibit J' to the Master Agreement."

3. *"On the facts and in the circumstances of the case, the learned CIT(A) erred in law in allowing the claim of the assessee amounting to Rs. 10,00,000/- being professional fees paid to Mr. R.N. Mungale - the Director of the assessee company which was rightly disallowed by the Assessing Officer u/s. 37(1) of the I.T. Act."*
4. *"Without prejudice to Gr. No. 3, the learned CIT(A) erred in holding that provisions u/s. 40A(2) is not attracted in the disallowance of Rs. 10,00,000/- whereas the issue is clearly covered under the provisions of Section 40A(2)(b)(ii) of I.T. Act since Mr. R.N. Mungale was Director of the assessee company at the relevant time."*
5. *"On the facts and in the circumstances of the case, the learned CIT(A) erred in law by holding that net compensation of Rs. 15,95,82,500/- received from Coca Cola Co. is long term capital gain and hence it does not constitute book profits as provided in Section-il 5JA ignoring the detailed reasons given by the Assessing Officer for the aforesaid addition for computing book profit u/s. 115JA of I.T. Act and thus the decision of CIT(A) is in contravention of Hon'ble Bombay High Court's decision in the case of* Veekaylal Investment Co. Pvt. Ltd and Hotel Hiramani Pvt. Ltd. *(249 ITR 597)."*
6. *"On the facts and in the circumstances of the case, the learned CIT(A) erred in directing the Assessing Officer to recompute interest u/s. 234B on the returned income instead on the assessed income as levied by the Assessing Officer ignoring the fact that Section-234B had been amended w.e.f. 1.4.1989 for levy of interest on assessed income.*

In ITA no. 5072/Mum./2001, the assessee has raised following grounds:—

"1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in in concluding that the sum of Rs. 16.05 crores received by the appellant from Coca Cola Co. USA, constituted taxable capital gains income inasmuch as the transaction attracted charge to tax under section 45 of the Act the impugned capital sum was not chargeable to tax inasmuch as the right of ROFR in respect of which amount has been received did neither constitute chargeable capital asset within the meaning of section 22(2)(a) of the Act nor did the transaction involve any transfer of any chargeable asset within the meaning of section 2(47) of the Act.

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in not admitting claim of the appellant for depreciation @ higher rate of 40% in respect of vehicles used in the business of hire."

4. The relevant facts, apropos the issue of treatment of amount of Rs. 16,05,82,500, which are culled out from the records and submissions made by either party are that, all the aforesaid assessee's (who are in appeal) are part of Parle Group owned by Mr. Prakash Chauhan and Mr. Ramesh Chauhan. The Parle Group of companies were engaged in the business of manufacturing, bottling and distribution of soft drinks and beverages under several popular brands viz., Thumbs Up, Limca, Gold Spot, Maaza, Citra, etc., and other popular brands. The Parle Group of companies entered into a "master agreement" with The Coca Cola Co. of U.S.A. (for short "TCCC") on September 1993, for transfer of intellectual property rights in the nature of trade marks, knowhow, franchisee rights, etc., in respect of various brands of beverages/soft drinks owned by Parle Group. The parties to the said master agreement were as under: —

(i) Limca Flavours and Fragrances Ltd. (for short "LFFL")

(ii) Parle Exports Ltd.

(iii) Parle International Ltd.

(iv) Golden Agro Products Pvt. Ltd. and

(v) Aqua Minerals Pvt. Ltd.

The aforesaid parties along with Mr. Ramesh Chauhan and Mr. Prakash Chauhan, have been referred to as "seller" in the master agreement and TCCC is the buyer along with Coca Cola South Asia Holding Inc., as a confirming party. After the transfer of trade-mark, etc., as per the master agreement, bottling of soft drink was continued by Mr. Ramesh Chauhan and Mr. Prakash Chauhan, through Parle Bottling Co. Ltd., having bottling rights in the territory of Pune while LFFL now known as "Aqua Bislery" having bottling rights in the territory of Bangalore respectively. The master agreement was in the nature of memorandum of understanding which provided the drafts and understanding of individual agreements for transfer of various trade marks, franchisee rights, non-compete covenants, letter of arrangement, etc. which was to be executed by the respective parties. In the said agreement, there was an Article-7.01(d) which contemplated execution of ROFR (right of first refusal) agreement for bottling rights in the territories of Bangalore and Pune. The said clause reads as follows:—

"The Buyer shall have issued to LFFL the ROFR Agreement relating to the territories for Poona and Ban galore or such parts thereof as may be determined by the Buyer. The parties shall use good faith efforts to draw the boundaries of the territories referred to in the preceding sentence to create efficient bottling territories based as closely as possible on the appropriate governmental units (or parts thereof) existing at the time of execution of the relevant Bottler's Agreement and will be based upon the areas for those cities served by the Existing Bottlers as of July 2, 1993 for those cities under the Parle Bottling Agreements, as then understood by the Buyer, and to be based on operating (manufacturing, sales, distribution and marketing) arrangements and practices relating to the areas served."

The ROFR agreement was defined in the master agreement as under:—

"ROFR Agreement" shall mean a right of first refusal agreement in the form set forth as Exhibit J hereto, granting LFFL a right of first refusal for the bottling rights for the products "Coca-Cola", "Fanta" and "Sprite" in certain bottling territories containing the cities of Poona and Ban galore, provided that certain standards customarily used by the Buyer for qualification are met, including quality standards and capitalization requirements."

5. The draft of ROFR agreement was elaborated in Exhibit-J of the master agreement. For bottling rights in the territory of Bangalore, LFFL was assigned to become licensed bottler of TCCC in the city of Bangalore. It was also agreed upon by the parties in the master agreement itself, that a new company i.e., a Bangalore subsidiary was to be established for carrying out bottling operations in Bangalore. The Article-1 of the master agreement contained the definition of Bangalore subsidiary which, inter-alia, means that the company to be formed for the production, distribution and sale of products of TCCC for the city or nearby territories of the city of Bangalore. For this purpose, Exhibit-L of the master agreement provided the manner and the guideline on which this Bangalore subsidiary was to be established, which would be initially owned by Parle Group entities and the TCCC would later on invest up to 30% in the equity shares of Bangalore subsidiary under the terms of BIC shareholder agreement. The definition of Bangalore investment agreement and BIC shareholder agreement was also mentioned in the definition clause of Article-1. Prior to the agreement with the TCCC, the Bangalore territory was served by an independent third party bottler, M/s. Brindavan Beverages Pvt. Ltd., (for short "BBPL") under franchisee agreement dated 13th November 1988, with Parle Export Ltd., which

was to run for a period of 10 years up to the year 1998. The said company BBPL was bottling, soft drinks and beverages of the brands owned by Parle group. This franchisee agreement was later on terminated. The assessee company i.e., Parle Soft Drinks Pvt. Ltd. had come into the existence, solely for the purpose of bottling rights in the territory of Bangalore in terms of ROFR agreement and the terms given in Exhibit-L. The history of coming into the existence of this company is that, one of the companies of the Parle Group was having possession of land at Bangalore, which was incorporated on 18th October 1991, as *"General Knitwear Exports Pvt. Ltd."* through Parle International Ltd. and Golden Agro Products Pvt. Ltd. On 3rd July 1993, 100% shares of General Knitwear Exports Pvt. Ltd. was transferred to Parle International Ltd. and Golden Agro Products Pvt. Ltd. Later on, the name of this company was changed to *"Parle Soft Drinks Pvt. Ltd."* w.e.f. 10th October 1994. In terms of Exhibit-J r/w Exhibit-L, the Parle Soft Drinks Pvt. Ltd. i.e., the assessee herein, was to construct the factory and install bottling facilities for doing bottling for the TCCC for the Bangalore territory. In order to prove its credentials that it had necessary resources and qualifications to set-up bottling operations in Bangalore, business plans were submitted to TCCC in May 1994 and was also followed up in June 1994. However, as submitted by the assessee, no positive response was received from TCCC. Later on, in the wake of liberalization environment in India, TCCC took strategic policy decision to set-up its own bottling at Bangalore. This inherently lead to breach of obligation by TCCC in respect of ROFR given to the Parle Group in the master agreement and lead to dispute between the Parle Group and TCCC. This dispute was ultimately settled with TCCC agreeing to pay US$ 4.5 million which in terms of INR was Rs. 16,05,82,500. Such a receipt of compensation which was in breach of ROFR is the subject matter of dispute before us whether it is a capital receipt or revenue receipt or casual income or to be taxed as long term capital gain or short term capital gain and also in whose hands it should be taxed.

6. In case of the present assessee i.e., Parle Soft Drinks Pvt. Ltd., in the return of income filed on 30th November 1998, for the assessment year 1998-99, the amount received from TCCC at Rs. 16,05,82,500, was treated as capital receipt not chargeable to income tax. Along with the return of income, the assessee has annexed the following note:—

> *"During the previous year relevant to A.Y. 1998-99 the company received an amount of Rs. 160582500 as compensation from Coca Col Co. USA. In the accounts for the year ended 31.3.1998, the aforesaid amount received as deducting Rs. 10 lakhs for professional fees paid. In the return of income, the aforesaid amount has been taken to capital reserve after deducting Rs. 10 lakhs for professional fees paid. In the return of income, the aforesaid amount has been treated as capital receipt not liable to tax. Since the said compensation has been received on settlement of dispute relating to bottling rights affecting the profit making business apparatus, inasmuch as the bottling rights by setting up a plant have been lost.*
>
> *Without prejudice to the notes attached to computation, the company has invested Rs. 10,00,17,600 in Units Scheme, 164 under section 54EA of the Act for compensation received from M/s. Coca Cola Co. USA on settlement."*

7. In response to the show cause notice, the assessee narrated the entire background and the facts under which such an amount of compensation was received from The Coca Cola Co. The main submission of the assessee before the Assessing Officer was given by letter dated 7th September 2000 as to how this amount was received which has been incorporated at Page-4 of the assessment order and for the sake of ready reference, the same is also reproduced below:—

> *'The assessee company is owned by members of the Chauhan family. The right of first option for setting up a Bottling Plan for the territory) of Bangalore was available*

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to Pane Group from Coca Cola. It was decided that the bottling rights for Bangalore territory be exploited by Parle Soft Drinks (Bangalore) Ltd. Mr. R.C. Chauhan was Chairman & Director of this company.

In view of the above, a copy of the site plan of land owned by Pane Soft Drinks (Bangalore) Ltd., (at that time shown as General Knitwear it wear Exports Pvt. Ltd.) was submitted to Coca Cola. The business plan for the Bangalore territory was submitted In May, 1994 and a reminder was sent in May, 1994. However, no positive response was received from Coca Cola.

The Bangalore bottling rights dispute was settled based on mutual understanding. The said understanding was confirmed by letter dated 21-07-1997 sent by Coca Cola. Accordingly, an amount US$ 4.5 million was remitted Into the bank a/c of Parle Soft Drinks (Bangalore) Ltd. in respect of Bangalore territory.

The said letter also slated that TCCC intended to proceed wills its own plan to set up bottling business in the city of Bangalore and that neither TCCC nor Coca Cola South Asia Holding inc. shall be responsible or liable to Mr. Ramesh Chauhan or to the companies owned by him, in the event the said companies take any further action on the draft business plans submitted in May/June 1994 or proceed further with setting up of bottling business in Bangalore.

In the certificate of Foreign Inward Remittance (he purpose of remittance has been stated as 'flu and final settlement of certain disputes. In the account for the year ended 31-03-1998, the aforesaid amount was credited directly to capital reserves by Pane Soft Drinks (Bangalore) Ltd. wider the heading "compensation received from Coca Cola Company, USA on settlement."

8. Besides submitting the relevant terms of agreement and Exhibits given in the master agreement, the assessee also explained the reasons as to why such a receipt cannot be taxed in the hands of the assessee. Reliance was placed on the following decisions also:—

i) Kettlewell Bullen & Co. Ltd., [1964] 53 ITR 261 (SC);

ii) Mahindra & Mahindra Ltd., [1973] 91 ITR 130 (Bom.);

iii) Gillanders Arbuthnot & Co. Ltd. [1964] 53 ITR 283 (SC); and

iv) Oberoi Hotels Pvt. Ltd. *v.* CIT, *[1999] 236 ITR 903 (SC).*

9. It was further submitted that the amount received is not taxable under section 10(3) as casual and non-recurring receipt because the said receipt cannot be characterised as income. Besides this, it was also pleaded that the receipt in question cannot be taxed as capital gains, because there was no cost of acquisition for the so called rights in question and, therefore, in view of the decision of the Hon'ble Supreme Court in *CIT* v. *B.C. Srinivasa Setty*, [1981] 128 ITR 294 (SC), the same cannot be taxed.

10. The Assessing Officer, first of all, referred to the definition of "*Income*" as defined in section 2(24) and held that it is an inclusive definition and has a very vide meaning, which would include even those items which may have not been specifically mentioned in the definition but partake the character of income in its natural meaning. In support of this conclusion, he has referred to various decisions of the Hon'ble Supreme Court which have been elaborated at Page-8 to 10 of the assessment order. Thereafter, he has discussed various judgments on the issue of capital and revenue receipts and held that the cases relied upon by the assessee were in the context of compensation received on termination of agency or settlement of disputes, etc., and are distinguishable on facts, inasmuch as, in those cases there was an existing business structure or profit earning apparatus which was completely transferred and/or there was an existing vested right in the hands of the receiver in terms of the agreement. In assessee's case, there was no written agreement between the assessee and the TCCC for granting the rights to the assessee, because the ROFR agreement

was between LFFL and TCCC. Further, there is no evidence that the LFFL has assigned ROFR rights to the assessee. No business activities were carried on by the assessee, except for the land and there was no business asset like building or plant and machinery which was held by the assessee. Thus, the amount paid by the TCCC to the assessee cannot be said to be for any breach of agreement or sacrificing the source of income, since there was no business activity carried on by the assessee company at all. There was no trading or profit making structure and, hence, the amount received cannot be said to be for loss of trading/profit making structure. His conclusion has been summarized by him in Para-2.6/Page-12 of the assessment order. He, thus, held that when the assessee had no business venture, no plant and machinery for the running of business of bottling, the amount received as compensation is not for discontinuance of business or income generating asset. The amount which was received was actually receivable by LFFL but has been received by the assessee company. He also distinguished all the judgments relied upon by the assessee. Lastly, he referred to the decision of Kerala High Court in *Malabar Industrial Co. Ltd.* v. *CIT*, [1992] 198 ITR 611 (Ker.) to hold that the receipt should be assessed under the head *"Income From Other Sources"*. He also made reference that earlier this company was in the name and style of *"General Knightware Exports Pvt. Ltd."* which was neither engaged in the business of bottling nor had any machinery or plant for the purpose of business. Its main objects were also different. Later on, the name of the company was changed to Parle Soft Drinks (Bangalore) Pvt. Ltd. Thus, he held that the amount received by the assessee company is nothing but a revenue receipt chargeable to tax.

Alternate plea of the assessee regarding taxability as capital gain, he concluded that it is a short term capital gain and for arriving to this conclusion, he has given a very detail finding from page-22 to 25 of the assessment order. The sum and substance was that the right, as per the agreement which was available with the assessee was for a period of less than 36 months and, therefore, it has to be taxed only as short term capital gain.

11. The learned Commissioner (Appeals), after discussing the facts stated by the Assessing Officer as well as by the assessee, first of all, clarified to the observations and the conclusion drawn by the Assessing Officer. Finally, regarding the Assessing Officer's allegation that the assessee was never engaged in the business of bottling, he observed that the assessee company has taken over the business of bottling as it had requisite land for the bottling plant; secondly, with regard to the assessee not having any plant and machinery for such business, he observed that the ROFR was for the intended business of setting up of bottling plants and hence, these conditions are not relevant; thirdly, as far as the main object of the assessee company is concerned, he observed that the assessee has shown before him that Article-96 and 146 specifically covers the object of manufacturing and marketing of aerated waters. Thus, these observations were not relevant. Lastly, insofar as the Assessing Officer's observation that only LFFL was entitled to ROFR and the assessee never got the assignment of ROFR, he observed that the agreement itself clearly stipulated that the LFFL shall create a subsidiary for these transactions. This condition was there in the master agreement itself. He further observed that the assessee company was taken over by the two Parle companies with the sole object of setting up of a bottling plant in June 1993. Thus, the very purpose of creation of the subsidiary was only for the purpose of exploiting the ROFR and, therefore, the Assessing Officer's observation regarding absence of written consent of TCCC has become redundant. He agreed with the assessee's contention that the payment made by The Coca Cola Co. was for the relinquishment of ROFR in TCCC's favour and, accordingly, held that the ROFR has rightly been considered in the hands of the assessee company and not LFFL.

12. However, in his ultimate conclusion on this issue, whether it is a capital receipt or revenue receipt, he held that reasoning of the Assessing Officer that the receipt in

question cannot be accepted as capital receipt is correct. This receipt is nothing but has arisen on transfer of asset in the form of right, which has been envisaged in section 55(2) clause (a). He also accepted the assessee's alternate plea that receipt in question has to be treated as capital gain but he disagreed with the assessee's contention that there is no cost of acquisition, because section 55(2) was modified by the Finance Act, 1997, w.e.f. 1st April 1998, to include such kind of right and cost of acquisition has to be taken as *"nil"*. Lastly, whether it is a long term capital gain or short term capital gain, he analysed the sequence of event of these transaction in the following manner and held it to be long term capital gain, after observing and holding as under:—

1. *The agreement by TCCC with LFFL on 11.11.93 granting ROFR to the subsidiary to be treated by LFFL with an inbuilt stake of 30% in the newly created subsidiary.*
2. *The assurance of Ramesh Chauhan and Prakash Chauhan to create the subsidiary before* 31st March 1994.
3. *The taking over of M/s. General Knitwear Exports Pvt. Ltd. changing the name of Parle Soft Drinks and submitting the depreciation of the land to M/s. TCCC for approval in June 1993."*

5.2 These factors indicate that the ROFR has been assigned on the date of creating of the subsidiary since the object of such creation of a new company was to develop the right for profit. With coming into existence of the subsidiary company ie., the appellant, the ROFR has passed to the appellant company. The consent of TCCC is evident from the payment being made to the appellant company instead of to LFFL. Considering all these factors, I hold that the transaction attracks long term capital gain. The Assessing Officer is directed to treat the receipt as long term capital gain."

13. Before stating the arguments placed by both the parties, we would like to discuss the treatment of receipt as given by the Assessing Officer and the learned Commissioner (Appeals) in the case of *"Aqua Bisleri Ltd."* and *"Parle Bottling Ltd."* which are also the subject matter of appeal before us, for the better appreciation of the issue involved in this appeal. As already stated in case of *Parle Soft Drinks Pvt. Ltd.*, the Assessing Officer, first of all, has stated that the ROFR was in the favour of LFFL as per Exhibit-J of the master agreement and not in the favour of Parle Soft Drinks Pvt. Ltd. Despite this, he treated the amount received by Parle Soft Drinks Pvt. Ltd. from The Coca Cola Co. in breach of ROFR agreement as revenue receipt and alternatively short term capital gain as there was transfer of asset in the form of bottling right and has taxed the entire amount. Thus, on one hand, he says the receipt does not belong to the assessee and on the other hand he is taxing the same in the hands of the assessee. In the case of *Aqua Bisleri Ltd.*, i.e., erstwhile LFFL, the Assessing Officer has treated the entire amount received from The Coca Cola Co. amounting to Rs. 32,11,20,000, on account of settlement of dispute arising out of ROFR for the territory of Bangalore and Pune, as long term capital gain in the hands of LFFL and the addition was made on the substantive basis. Thus, the total consideration received by Parle Bottling Pvt. Ltd. and Parle Soft Drinks Pvt. Ltd., was added on substantive basis in the hands of LFFL i.e., Aqua Bisleri Ltd. While doing so, he has taken the cost of acquisition at "nil" in view of the provisions of section 55(2). In the first appeal, the learned Commissioner (Appeals) has deleted the addition on the ground that the assessee Aqua Bisleri Ltd. was never in the bottling business and did not possess the requisite infrastructure. The ROFR was never vested with the LFFL and, therefore, he set aside the entire action of the Assessing Officer in taxing the entire amount of Rs. 32,11,20,000 in the hands of the assessee. Thus, the entire capital gain added on substantive basis, stands deleted from the stage of learned

Commissioner (Appeals) against which the Department has come into appeal before us.

14. In the third case of *Parle Bottling Co. Ltd.*, the Assessing Officer has treated the receipt of Rs. 16,05,60,000, as long term capital gain, however, assessed the same on protective basis, in view of the fact that, already substantive addition on account of capital gain has been taxed in the hands of Aqua Bisleri Ltd. The learned Commissioner (Appeals) in this case has taken all together different stand and after discussing the issue in detail held that it is not a capital gain but it is a non-recurring casual income which is to be taxed under section 10(3) of the Act and, therefore, the action of the Assessing Officer in treating the receipt as long term capital gain and taxing it on protective basis, has no basis. Thus, he held that it is to be taxed as casual and non-recurring receipt.

15. Thus, various authorities in the aforesaid cases of the assessees have taken different views on different reasoning which can be summarised in the following manner:—

A. Aaua Bisleri Ld.

Particulars	*Treatment*
As per return of income	*Capital receipt not taxable*
As per assessment order	*Long term capital gain on entire Rs. 32 crores on substantive basis.*
As per CIT(A)'s order	*Addition deleted*

B. Parle Soft Drinks Pvt. Ltd.

Particulars	*Treatment*
As per return of income	*Capital receipt not taxable*
As per assessment order	*Short term capital gain on Rs. 16 crores on substantive basis and also as income from other sources.*
As per CIT(A)'s order	*Long term capital gain on entire Rs. 16 crores on substantive basis.*

C. Parle Bottling Pvt. Ltd. (Now known as Parle International Pvt. Ltd.)

Particulars	*Treatment*
As per return of income	*Capital receipt not taxable*
As per assessment order	*Long term capital gain on Rs. 16 crores on protective basis.*
As per CIT(A)'s order	*Casual income u/s 10(3) of the Act.*

16. In the wake of the above background, we have heard the learned Senior Counsel, Mr. Soli Dastur, who has represented the case of *Parle Soft Drinks Pvt. Ltd.* and Acqua Bisleri Ltd., and the learned Senior Counsel, Mr. Firoze Andhyarujina has represented the case of *Parle Bottling Pvt. Ltd.*, whereas the learned Special Counsel, Dr. P. Daniel, represented the Revenue in all the three cases. The learned Senior Counsel, Mr. Dastur, after explaining the entire facts which have been incorporated in summarized manner by us above, submitted that in case of *Parle Soft Drinks Pvt. Ltd.*, the Assessing Officer has, first of all, held that in terms of master agreement in Exhibit—J, ROFR was vested with LFFL and there was no specific mention about the assessee company and no evidence has been brought on record that ROFR was in turn assigned by LFFL to the assessee with the consent of The Coca Cola Ltd. In this regard, he submitted that in the master agreement itself, there was a clear cut contemplation of formation of Bangalore subsidiary in the master agreement. Not only this, how the Bangalore subsidiary was to be formed was also mentioned. He referred to the relevant definition clauses as given in Article-1 and also Exhibit-L which laid down the

conditions for assigning the bottling rights only to such Bangalore subsidiary, which was to be initially formed by LFFL or other entities of Parle Group and later on The Coca Cola Co. was to subscribe 30% of the shares. It was this subsidiary company, which was to be assigned the bottling rights for the territory of Bangalore. In support, he also pointed out the relevant terms as given in Exhibit-L. This Bangalore subsidiary company was Parle Soft Drinks (Bangalore) Pvt. Ltd. Only and he further explained as to how this company had come into existence solely for this purpose. He submitted before us a sequence of events to show as to how this company have come into existence and has received the compensation from TCCC, which, for the sake of ready reference, is reproduced below:—

Date	Particulars
18 October 1991	Incorporated as General Knitwear Exports Pvt. Ltd.
24th June 1993	Limca Flavours and Fragrances Ltd. entered into MOU to acquire General Knitwear Exports Pvt. Ltd. (date wrongly mentioned as 1st July 1993 by AO) through Parle International ltd. and Golden Agro Products Ltd. (Now Bisleri Sales Ltd.)
3 July 1993	100% shares of General Knitwear transferred to Pane International Ltd and Golden Agro Products Ltd (Now Bisleri Sales Ltd.) Shri R.N. Mungale and Shri S.K. Motani appointed as directors of Incorporated as General Knitwear Exports P. Ltd.
18 September 1993	Master Agreement ('MA') between Parle Group and The Coca Cola Company ('TCCC') granting Right of First Refusal ('ROFR') to Limca Flavours and Fragrances Limited
11 November 1993	Execution of Exhibit J i.e. Letter for assignment of ROFR to Limca Flavours and Fragrances Limited
May/June 1994	Draft business plan for Bangalore territory submitted by Parle Softdrinks Private Limited to TCCC (Refer letter dated 21 July 1997 from TCCC which mentions the same).
9 May 1994	Resolution passed to rename GKEPL as Parle Softdrinks (Bangalore) Pvt Ltd
10 October 1994	Name of General Knitwear Exports Private Limited changed to Parle Soft Dninks (Bangalore) Pvt Ltd
21 July 1997	Letter from TCCC to settle Bangalore bottling rights dispute at USD 4.5 million
28 July 1997	Certificate of inward remittance of USD 4.5 million i.e. INR 16.05 crores

17. Thereafter, from the record, Mr. Dastur, pointed out as to how a company other than LFFL would be awarded the Bangalore territory for the purpose of ROFR. First of

all, it is evident from the definition clause given in the master agreement, which defines Bangalore investment agreement and Bangalore subsidiary, the Exhibit-E of the master agreement gives the recital of the bottling investment company shareholders agreement and the subscription to the share capital and capitalization. Thereafter, he referred to the Exhibit-L as to how there would be a formation of Bangalore subsidiary. Thus, the view of the Assessing Officer that ROFR was only meant for LFFL is wholly erroneous. Not only this, the TCCC also recognised Parle Soft Drinks Pvt. Ltd. is a rightful entity, which should receive the amount. This aspect has also been accepted by the learned Commissioner (Appeals).

18. Regarding the Assessing Officer's contention on the amount received towards settlement of dispute of ROFR being a revenue receipt, he submitted that as per the terms and conditions of ROFR which has been explained in Exhibit-J, the ROFR constituted a substantial right and foundation upon which the assessee could have built its bottling business. Because it is for the bottling business only that the said company was formed in terms of master agreement as stated above. The bottling rights if granted would have been the source of income and as such profit making apparatus for the Parle Soft Drinks Pvt. Ltd. The very basic right for starting the bottling business was taken away, once The Coca Cola Co. violated the terms of agreement of ROFR. The very foundation on which the company was found was taken away and, therefore, the amount which was received, is nothing but compensation for losses of potential source of income viz. bottling operations in Bangalore territory. In support of his contention, he, first of all, relied upon the judgments of Hon'ble Supreme Court in *CIT* v. *Vazir Sultan*, [1995] 36 ITR 175 (SC) and *Oberoi Hotels Pvt. Ltd.* v. *CIT*, [1999] 236 ITR 903 (SC).

19. Regarding the learned Commissioner (Appeals)'s finding that there was a transfer of a capital asset within the meaning of section 45 and it is a long term capital gain, he submitted that for attracting the provisions of section 45, the very premise of the transfer of capital asset, is lacking completely in the present case. This is a case, where there has been a breach of contract and the amount was received as damages for not carrying out the obligation. It was not for any transfer of capital asset. Thus, here is the case, where there is a breach of contract and any compensation received on such a breach, is a capital receipt and not receipt on account of any transfer of capital asset. He also placed reliance on the decision of the Hon'ble Supreme Court in *CIT* v. *Shantilal*, [1983] 144 ITR 57 (SC) and submitted that this decision of the Hon'ble Supreme Court has been followed by the Bombay High Court also in *CIT* v. *Jaydwar Textiles*, [1993] 202 ITR 569 (Bom.). He further elaborated that the breach of contract is at best, mere right to sue and such a right cannot come within the ambit of capital asset. In support of this contention, he relied upon the decision of Bombay High Court in *CIT* v. *Abhasbhoy A. Dehgamwalla*, [1992] 195 ITR 28 (Bom.).

20. Alternatively, he submitted that if ROFR is treated as a property or any kind of an asset, then such an asset does not have any cost of acquisition which can be ascertained and, therefore, in view of the decision of Hon'ble Supreme Court in *B.C. Srinivasa Setty* (supra), such a transfer cannot be brought to tax. Coming to the learned Commissioner's findings that the cost of acquisition is to be taken as *"nil"* in view of the provisions of section 55(2), he submitted that first of all, ROFR did not represent right to manufacture, produce or process any article or thing. The Coca Cola Co., did not give any right to manufacture to the assessee. The ROFR only provided that the assessee company can establish a bottling unit for the purpose of business with The Coca Cola Co. The ROFR is just a prelude to grant of such right. By the grant of ROFR, the assessee was not automatically granted any right to manufacture. It merely connotes preferential opportunity to prove its worthy of grant of full-fledged manufacturing right. There is no transfer of intangible asset like patent, trademark, knowhow, etc. Thus, ROFR does not represent right to manufacture, produce or

process any article or thing and it is outside the purview of section 55(2) also. As regards the expression used in section 55(2)(a), "right to carry on business" he submitted that it will not be applicable mainly on the ground that such an expression has been brought in the statute w.e.f. 1st April 2003 i.e., from the assessment year 2003-04. In support of his aforesaid contention, the learned Sr. Counsel has heavily relied upon the decision of Hyderabad Special Bench of the Tribunal in *ACIT* v. *Dr. B.V. Raju* (Deceased), [2012] 714 (Trib.) 387 (Hyd.). Thus, even the capital gain cannot be charged on such receipts. Alternatively and without prejudice, he submitted that already the Assessing Officer has taxed the said amount as *"capital gain"* on substantive basis in case of *Aqua Bisleri Ltd.* (LFFL), therefore, the same should be deleted from here as there cannot be double transaction.

21. For the sake of continuity, we are also referring to the arguments placed by learned Senior Counsel, Mr. Firoze Andhyarujina, who has argued the case of *Parle Bottling Pvt. Ltd.*, wherein the Assessing Officer has treated the receipt to be taxed as long term capital gain on protective basis and the learned Commissioner (Appeals) has treated the same receipt to be taxed as casual and non-recurring taxable income under section 10(3) on substitutive basis. The learned Senior Counsel submitted that in this case also, the assessee has received an amount of Rs. 16,05,60,000, as compensation from The Coca Cola Co. for breach of ROFR agreement with regard to bottling rights of Pune territory. The Assessing Officer solely relied upon the observations and the findings given in the assessment order dated 30th March 2001, in case of *Aqua Bisleri Ltd.*, wherein the entire receipt have been taxed on substantive basis under the head *"long term capital gain".*

22. Before the learned Commissioner (Appeals), the entire facts were narrated and they are exactly similar to the case of *Parle Soft Drinks Pvt. Ltd.*, except for the fact that in the present case, the assessee was already in the bottling business for Parle Group of companies. Earlier, the bottling business was done in the name and style of *"Thums Up Beverages Ltd."* which was later on changed to Parle Bottling Ltd. Here also, as per the ROFR, the assessee was to carry on the business of bottling for The Coca Cola Co. For this purpose, the assessee submitted a detail business plan to The Coca Cola Co. for carrying on such business. However, The Coca Cola Co. without any specific reason rejected such business plan. A copy of correspondence between the assessee Parle Bottling Ltd. and The Coca Cola Co., was also shown to us which are forming part of the paper book. After the breach of ROFR, the assessee, after negotiation, received compensation of Rs. 16,05,60,000, which was shown as non-taxable capital receipt.

23. Learned Senior Counsel submitted that by breach of such a ROFR, The Coca Cola Co. has deprived the assessee of potential right. The plans which were submitted to The Coca Cola Co. were not honoured and, hence, the compensation is given. There was a clear cut breach of contracts giving rise to damages for setting-up of or carrying of bottling plant. Thus, the amount received on account of failure to honour the commitment by The Coca Cola Co. is capital in nature. The basic substratum was destroyed in the case of ass by The Coca Cola Co. and the potential source of income has been lost forever. In view of the judgment of Hon'ble Supreme Court in Oberoi Hotels Pvt. Ltd. (SC), such a receipt cannot be taxed as revenue receipt or casual income. It also cannot be taxed as capital gain, because there is no asset in existence, tangle or intangible and, hence, there is no extinguishment of any asset or there is any transfer of capital asset. Therefore, nothing is taxable. On the issue of chargeability of capital gain, he took the same plea as taken by the learned Senior Counsel Mr. Dastur, hence, for the sake of repetition, the same are not stated here. The sum and substance is that there is no cost of acquisition and, hence, cannot be taxed as capital gain.

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24. Coming to the finding of the learned Commissioner (Appeals) that the amount received is in the nature of casual and non recurring receipt, he submitted that such an amount of compensation cannot be equated with the casual receipt within the meaning of section 10(3). To fall within the ambit of section 10(3), first it has to be characterised as income, which here in this case is not. He also referred to CBDT circular no. 158 dated 27th December 1974, and relied upon the judgment of Hon'ble Supreme Court in *Ramanathan Chettiar* v. *CIT*, [1967] 063 ITR 458 (SC). He further submitted that a casual and non recurring receipt can only be taxed, once there is no claim or right in the recipient to expect its recurrence. Merely because the payment has been made one time that would not lead to inference that the amount received by the assessee was casual or nonrecurring. In the present case, there was a violation of ROFR agreement. It was on such a breach that the assessee had a right to be compensated by the violating party. Thus, definitely, it cannot be held as casual or nonrecurring receipt. In support of his argument, he has also relied upon the judgment of Jurisdictional High Court in *Mehboob Productions Pvt. Ltd.* v. *CIT*, [1977] 106 ITR 758 (Bom.). He has also rebutted each and every finding of the learned Commissioner (Appeals) given in this regard before us.

25. Per contra, the learned Special Counsel, Dr. P. Daniel, on behalf of the Revenue, submitted that all the terms and agreement in the master agreement was with LFFL which is evident from various clauses appearing in the master agreement. In this agreement there is no such clause for making a new company and all the other schedules and exhibits which were part of the master agreement have not been executed and, therefore, it has no value. The Bangalore subsidiary is only mentioned in the definition clause, however, Exhibit-E which deals in detail in this regard has not been executed. He read the relevant clauses of the agreement in support of his contention. He submitted that once permission was granted to LFFL and nobody else then such a ROFR was only meant for LFFL only. He referred to various observations made by the Assessing Officer in the assessment order for Parle Soft Drinks Pvt. Ltd. and heavily relied upon them. He also submitted that the learned Commissioner (Appeals) has also not mentioned the facts as discussed by the Assessing Officer. There is no concrete evidence for termination of the agreement, therefore, the amount received is not in violation of agreement but only a casual and non recurring receipt which is nothing else, but revenue receipt, taxable in the hands of these assessees. He also strongly relied upon the finding given by the learned Commissioner (Appeals) as given in case of *Parle Soft Drinks Pvt. Ltd.* and read out various paragraphs and observations made in the appellate order. He has also tried to distinguished various case laws relied upon by the learned Senior Counsel and also referred to the decision of the Hon'ble Supreme Court in *Kettlewell Bullen and Co. Ltd.* v. *CIT*, [1964] 053 ITR 261 (SC). Thus, the amount received by the assessees cannot be taxed either as capital gain or can be treated as capital receipt. His arguments can be summarised in the following manner:—

(i) The master agreement does not refer to third party and ROFR agreement was only to be given to Limca i.e., LFFL;

(ii) There is no mention of right given to any other company;

(iii) Except for transfer of money to the respective assessees viz. Parle soft Drinks Pvt. Ltd. and Parle Bottling Ltd., there is no document that ROFR was given to the other parties; and

(iv) The right given to one limited company cannot be given to other limited company, without any document or transfer and in the present case there is no such document for transfer of assigning of rights by LFFL to these companies;

26. He further submitted that the learned Commissioner (Appeals), in case of *Parle Soft Drinks Pvt. Ltd.* has gone by the fact that the Assessing Officer has not proved the

negative and, therefore, the Assessing Officer's finding is not correct is a wrong conclusion;

27. Lastly, he concluded that the amount received has to be taxed as revenue receipt in the hands of the LFFL or alternatively in the hands of other assessee if it is held that there was no right to LFFL by the ROFR agreement.

28. In the rejoinder, the learned Senior Counsel, Mr. Dastur, submitted that first off all, the Revenue has to take a clear stand as to in which hands, these receipts are to be taxed and under which head. If the argument of the learned Special Counsel is accepted, then the additions made in the hands of Parle Soft Drinks Pvt. Ltd. and Parle Bottling Pvt. Ltd. should be deleted. In case of LFFL, the amount has already been taxed as capital gain on substantive basis, therefore, all these pleas, whether such an amount can be taxed as capital gain or not can be discussed in that case only i.e., Aqua Bisleri Ltd. (LFFL) and not in these cases.

29. Regarding the main arguments taken by the learned Special Counsel, Mr. Dastur, submitted that, firstly, these Exhibits 'E', 'J' and 'L', were part of the agreement itself and they cannot be read as separate from the agreement; Secondly, the definition clause itself provided that there would be Bangalore subsidiary company and Bangalore investment agreement for the purpose of setting-up of a company which has been setforth in Annexure-L and Annexure-E. Once the definition clause itself provides and makes a reference to these Exhibits then, it is a part of master agreement. The agreement has to be understood in the terms understood by the parties which have acted upon it. In the agreement, one has to see as to what was the intention of parties and how they have understood the various terms and conditions. If the Exhibits or any part has not been executed, then what was the need by The Coca Cola Co. to pay such a huge compensation. Coming to the arguments that the ROFR was only meant for LFFL, he submitted that in the agreement as well as in the Exhibit itself, there was clear cut stipulation of forming of a subsidiary company for the purpose of carrying out bottling activities for the Bangalore territory LFFL was never meant to carry on such bottling activity on its own, once the subsidiary was formed for carrying on such activity, hence, the amount received by way of compensation for violation of ROFR agreement was in the nature of capital receipt in the hands of these two companies only i.e., Parle Soft Drinks Pvt. Ltd. and Parle Bottling Ltd. Moreover, the action of The Coca Cola Co. categorically speaks that the payment was made to the assessee for the Bangalore territory. As regards the issue of capital gains, he reiterated that no argument has been placed on behalf of the Revenue, this, inter-alia, means that the issue of capital gain is not being contested by the Revenue. In any case, it is neither the case for taxing the amount under the head *"capital gain"* nor as *"revenue receipt"* or *"casual and non recurring receipt"*.

30. We have carefully considered the rival contentions, perused the relevant findings given by the Assessing Officer and the learned Commissioner (Appeals) on this issue as well as the material placed on record. The main dispute for our adjudication is, whether the sum of Rs. 16,05,82,500, which has been received by the assessee from The Coca Cola Co., on the breach of ROFR agreement, is a capital receipt not chargeable to tax or to be treated as revenue receipt or casual income or long term capital gain or short term capital gain and further in whose hands it should be taxed. As already discussed above, various authorities have discussed and decided this issue in different manner and on different interpretation of the same facts placed before them. Insofar as the facts which have been narrated above, there is no dispute. The dispute is only with regard to the interpretation and the taxability of the receipt and under which head. In the main agreement which has been referred as master agreement entered by the various sellers who are Parle Group of companies with The Coca Cola Co., there was a stipulation for assignment of bottling rights for the Bangalore territory and Pune territory. In order to give priority to the Parle Group of

companies for the bottling rights, ROFR agreement was entered, which flows from Exhibit-J of the master agreement. The ROFR i.e., Right Of First Refusal, is a contractual right that gives its holder an option to enter into a business transaction with the owner of something, before the owner is entitled to enter into a transaction with a third party. In legal parlance, it is a right given to a person to be first allow to purchase a certain object if ever offered for sale. Here, The Coca Cola Co. gave this right to the Parle Group of companies for carrying out the bottling activities in the specified territories. Such a ROFR was reached by The Coca Cola Co. and after the dispute, compensation was settled among the parties which has been paid to these assessees. In the case before us i.e., in case of *Parle Soft Drinks P. Ltd.*, the main controversy as culled out before us in the course of argument are:—

(i) Whether Parle Soft Drinks Pvt. Ltd. is actually entitled for receiving the compensation from The Coca Cola Co;

(ii) Whether Parle Soft Drinks Pvt. Ltd. was party to ROFR agreement with The Coca Cola Co. or LFFL is the rightful entity which is entitled for receiving the compensation;

(iii) Whether the assessee had necessary infrastructure or capability of carrying out bottling activities, as it had neither any plant and machinery nor any business set up and, therefore, there is no loss of trading structure or profit making structure, so the loss was not on account of capital field and the compensation received is not a capital receipt but revenue receipt;

(iv) Whether the amount received is to be taxed as long term capital gain or short term capital gain if it is not a capital receipt; and

(v) Whether the amount can be taxed as casual and nonrecurring receipt.

31. First of all, as per the terms of master agreement in Exhibit-J, ROFR was vested with LFFL to carry out the bottling activities in the territory of the Bangalore. In the master agreement, there was a clear indication that there would be a formation of Bangalore subsidiary and there would be an investment agreement also between the parties for this purpose. The Exhibit-J provided the necessary guidelines as to how this Bangalore subsidiary will be formed. Further, the Exhibit-L also laid down various assignments of the bottling rights, only to such a newly formed company which was to be initially held and formed by Parle Group and later on the Coca Cola Co. will join in after subscribing 30% of the shares. It was to this subsidiary company that the bottling rights were to be given in the territory of the Bangalore. This subsidiary company was formed as *“Parle Soft Drinks Pvt. Ltd.”* i.e., the assessee and the manner and sequence in which this company was formed has already been discussed by us in the forgoing paragraphs. Thus, the assessee company was formed only for carrying out bottling activities in the territory of Bangalore. Hence, there can be no dispute or a question, that the assessee was entitled for receiving the compensation amount on the breach of ROFR from The Coca Cola Co. Thus, even though ROFR agreement was with LFFL but it was always agreed upon by the parties to the agreement that the same should be for a newly formed entity as Bangalore subsidiary company which is the assessee company only. The agreement as well as the ROFR provided that the rights were given to the assessee for carrying out the bottling activities for The Coca Cola Co. for the Bangalore territory. It is for the purpose of this intended business that the assessee company was formed in terms of ROFR as given in Exhibit-J and L. It was not necessary that the assessee should have instaled the entire plant and machinery for carrying out such business. Thus, the ROFR itself constituted a substantial right and foundation on which the assessee could have built its bottling business. If such right would have been assigned to the assessee that would have been the source of assessee's income and profit making apparatus. The assessee had also submitted its business plans and various modes for carrying out the bottling business to The Coca

Cola Co. There is no dispute that The Coca Cola Co. has breached the ROFR by not assigning these rights and it was on account of such a breach of the ROFR agreement, that the compensation amount was settled between the parties. Thus, in the case of the assessee, the very fundamental right for starting the bottling business was taken away as a result of breach of ROFR by The Coca Cola Co. That is the reason why The Coca Cola Co. has paid this amount to the assessee and not to the LFFL.

32. Now, under these circumstances, we have to examine whether this compensation amount of Rs. 16,05,82,500 is capital receipt or revenue receipt that is whether it is non-taxable or taxable receipt. All the receipts in the hand of the an assessee would not necessarily be income or deemed to be income for the purpose of income tax, because it will depend upon the nature of the receipt and the true scope and effect of the relevant taxing provisions. The Hon'ble Supreme Court in *Kettlewel Bullen & Co. Ltd.* (supra) have observed that where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what is substance of his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade the receipt is revenue. However, where by the cancellation of an agency, the trading structure of the assessee itself is impaired or such cancellation results into loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt.

33. This guiding principle of the Hon'ble Supreme Court has been followed time and again not only by the various Courts but also by the Hon'ble Supreme Court itself. In case of *Oberoi Hotels Pvt. Ltd.* (supra), the Hon'ble Supreme Court has reiterated this principle and opined that if the injury was inflicted on the capital asset of the assessee and for giving up the contractual right on the basis of principal agreement which had resulted into loss of source of assessee's income the receipt in the hands of the assessee is a capital receipt.

34. If we apply the said ratio and the law laid down by the Hon'ble Supreme Court in the present case, then, what the assessee has lost, is the very source of his business and loss of a trading structure. If the right given by the ROFR would have continued, the assessee would have the source of income from the bottling business and this would have constituted its profit making apparatus. It is not a case that there was some breach of agreement during the course of carrying on the business or trading activity for which the assessee has received any kind of compensation. Here, even before the assessee's actual business could start, there was a breach by the other party which ended up the said business itself. Thus, clearly this is a case of loss of source of income itself and hence, the compensation which was received by the assessee is on capital field i.e., capital receipt which cannot be taxed under the income laws. This conclusion of ours concludes the entire controversy on this score.

35. Now we shall briefly deal, whether such a receipt could be taxed as casual and non recurring income under section 10(3) as held by the learned Commissioner (Appeals) in Parle Bottling Pvt. Ltd. If any receipt which is to be treated as casual and non recurring nature, first of all, the receipt has to be characterised as income. If it is not within the meaning of the term income, the same cannot be taxed under section 10(33). This has been clearly explained by the CBDT vide circular no. 158 dated 27th December 1974. In this case, the receipt cannot be said to be casual because it has not been incurred by chance or by fortuitous. Here, it is a case of breach of an agreement and the amount has been settled after a dispute among the parties. This receipt cannot be termed as neither casual nor non recurring. In any case, we have already held as above that it is in the nature of capital receipt which cannot be taxed in the hands of the assessee. Hence, this issue becomes purely academic in this case.

36. Such a receipt also cannot be taxed as capital gain, firstly, there was no transfer or extinguishment of any rights. The Coca Cola Co. has never passed on any kind of a right to the assessee for manufacture. The Coca Cola Co. has merely agreed upon, that the bottling business for the territory of Bangalore would be done by the assessee. In case, if The Coca Cola Co. does not fulfill the obligation for allowing the assessee to carry out the bottling business and assigns the same to the third party, then there would be a breach, for which the amount would be payable as compensation. The ROFR only provides the assessee can establish a bottling unit for the purpose of business with The Coca Cola Co. and such a ROFR is merely a prelude to grant such a right. By the grant of ROFR, the assessee does not get automatically the right to manufacture. It merely connotes preferential opportunity to prove its worthy of grant of full-fledged manufacturing right. There is neither any transfer of intangible asset like patent, trademark, knowhow, etc., nor any kind of asset. Thus, it cannot be a case of transfer of an asset and, hence, cannot be subject to taxation under the head capital gain also. As a result of our finding, the ground no. 1, as raised by the assessee is treated as allowed, whereas, ground no. 1 and 2, as raised by the Revenue are treated as dismissed, as the issue of taxability of the amount received by the assessee from The Coca Cola Co. is decided in favour of the assessee that it is not taxable.

37. In ground no. 2, the assessee has challenged disallowance of higher depreciation of 40% in respect of vehicle used in the business of hire.

38. The Assessing Officer noted that the assessee has disclosed hire charges of Rs. 6,18,900. These receipts have been received from the trucks/three wheelers which were leased out by the assessee. These vehicles were purchased during the year and depreciation of 40% was claimed. In response to the show cause notice issued by the Assessing Officer, it was submitted that the assessee was owner of these vehicles and were used for the purpose of its business i.e., for hiring and, therefore, depreciation has to be claimed @ 40%, as prescribed. The Assessing Officer held that the vehicle should be used by the assessee for running them on hire by different persons and it shall necessarily bear the expenditure on running and maintenance, etc. Thus, higher rate on depreciation is not admissible as it is leased out. Hence, he allowed only 20% of the depreciation and admissible depreciation was allowed to the extent of Rs. 5,75,645, in stead of Rs. 11,51,291.

39. Before the learned Commissioner (Appeals), detail submissions were made which have been rejected by him holding that in order to be eligible for 40% depreciation, the vehicle should be used by the assessee for running them on hire and it should necessarily bear the expenditure on running and maintenance, etc. He thus upheld the contention of the Assessing Officer.

40. Before us, it has been submitted that now this issue stands covered by the decision of the Hon'ble Supreme Court in *ICDS Ltd.* v. *CIT*, [2013] 350 ITR 635 (SC), that higher depreciation should be allowed on the vehicle leased out by the assessee because that it is his business. The learned Special Counsel relied upon the order of the learned Commissioner (Appeals).

41. After carefully considering the rival contentions, we are of the opinion that once it is not disputed that the assessee was the owner of the vehicle and its business is for hiring and leasing of vehicles to the third parties, the higher rate of depreciation has to be allowed. Moreover, as pointed out by the learned Counsel before us that this issue has been decided by the Tribunal in Delhi Bottling Co. Ltd. in ITA no. 6332/Mum./2003, order dated 22nd February 2007, wherein, identical issue was decided in favour of the assessee after following the decision of Delhi High Court in *MGF India Ltd.*, 285 ITR 142 (Del.). The Hon'ble Supreme Court in *IDCS Ltd.* (supra), has held that there is no requirement that usage of the asset should be by the

assessee himself. If the vehicle has been purchased by the assessee and leased out to the customer then the assessee is the owner of the vehicle and it is entitled for higher rate of depreciation as applicable under the income tax rules. Thus, this issue is squarely covered by the judgment of Hon'ble Supreme Court and, hence, ground no. 2 is raised by the assessee is treated as allowed.

37. In the result, assessee's appeal ITA no. 5072/Mum./2001. is treated as allowed.

42. We now take up Revenue's appeal in ITA no. 5284/Mum./2001, vide which, ground no. 3 and 4, relate to disallowance of Rs. 10,00,000 being professional fees paid to Mr. R.M. Mungale director the assessee company.

43. The assessee has claimed that a sum of Rs. 10 lakhs was paid to Mr. R.N. Mungale, towards professional fees in connection with negotiation, drafting agreements and finally receiving the compensation from The Coca Cola Co. The Assessing Officer held that the communication was between The Coca Cola Co. and the assessee and moreover Mr. Mungale, is one of the employees of Parle associated group and, therefore, does not justify the payment of professional charges to him.

44. Before us, the assessee submitted a copy of Board resolution approving a payment of Rs. 10 lakhs to Mr. Mungale for the services rendered during the negotiating transactions with The Coca Cola Co. which has resulted in settling the dispute. He is neither related to the assessee nor a shareholder in the Parle group of companies. The learned Commissioner (Appeals) held that on these facts, the provisions of section 40A(2) does not attract and moreover payment of such professional charges has yielded Rs. 16.05 crores to the assessee for carrying out negotiate with The Coca Cola Co. Accordingly, he allowed the same in favour of the assessee.

45. Before us, both the parties relied upon the respective orders.

46. After carefully considering the submissions made by the parties and also the relevant findings given by the Assessing Officer as well as the learned Commissioner (Appeals), it is seen that the Assessing Officer has not given any reason as to why such a professional fees paid to the said person was excessive. Once it has not been disputed that he was a person who was instrumental in carrying out the negotiation with The Coca Cola Co. for settling the dispute and for awarding the compensation, such an expenditure has to be allowed as business expenditure and no disallowance can be made. Accordingly, ground no. 3 and 4, as raised by the Revenue are treated as dismissed.

47. In ground no. 5, the Revenue has challenged that the net compensation of Rs. 15,95,82,500, received from The Coca Cola Co. is a long term capital gain, hence, it does constitute book profit under section 115JA.

48. Since we have already decided the issue in favour of the assessee that the amount received by the assessee is not a capital gain but a capital receipt, which is not taxable and, hence, such a ground becomes purely academic.

49. In ground no. 6, the Revenue has challenged the direction of the learned Commissioner (Appeals) to the Assessing Officer to re-compute the interest under section 234B on the returned income instead of the assessed income.

50. As admitted by both the parties, this issue is consequential and has to be on assessed income.

In the result, Revenue's appeal in ITA no. 5284/Mum./2001, is treated as dismissed.

We now take up assessee's Cross Objection no. 136/Mum./2002.

51. The assessee has challenged that the learned Commissioner (Appeals) ought to have held that the receipt of Rs. 16.95 crores do not form part of the book profit.

52. Since we have already held that the amount in question is not taxable, the provisions under section 115JA will not be applicable to the facts of the present case. Thus, for statistical purposes, the assessee's cross objection is treated as allowed.

53. In the result, assessee's cross objection no. 136/Mum./2002 is treated as allowed for statistical purposes.

We now take up assessee's appeal in ITA no. 825/Mum./2003.

54. Ground no. 1, 2 and 8, relate to issue of taxability of amount of Rs. 16,05,60,000, as received by the assessee from The Coca Cola Co. in lieu of settlement of disputes.

55. In the present case, as already stated above, the learned Commissioner (Appeals) has taken a different view that the amount received by the assessee is casual and non recurring nature, whereas, the Assessing Officer has made protective addition after observing that substantive addition has been made in case of *Aqua Bisleri Ltd.* i.e., LFFL as the same is chargeable to tax as long term capital gain. Since the facts and issue are similar which issue has been discussed by us already in the forgoing paragraphs, the same will apply mutatis mutandis in the present case also, therefore, these grounds are treated as allowed as we have already held that the amount received by the assessee is a capital receipt which is not taxable.

56. In ground no. 9 and 10, the assessee has challenged that both the authorities have not considered the assessee's claim for deduction in respect of deposit on bottles and crates refunded during the year amounting to Rs. 8,30,307.

57. The relevant facts, apropos the aforesaid issue are that, the assessee in the accounts for the year ending 31st March 1988, had shown an amount of Rs. 3,42,84,765, being deposits received in respect of bottles and crates as trade deposits under the head current liabilities. Before the Assessing Officer, the assessee submitted the details of deposits received on bottles and crates along with confirmation received from local retailers/stockiest. It was also submitted that in the assessment year 1996-97 and 1997-98, these deposits which were received in respect of bottles and crates have already been taxed by the Assessing Officer under section 143(3) as unexplained credits. In this year, the assessee has refunded the deposits aggregating to Rs. 8,30,307, the learned Commissioner (Appeals) observed that the Assessing Officer has not made any observation and held as under:—

a. *The appellant did not claim deduction of Rs. 53,82,923 in the return of income filed by it and, therefore, within the meaning of section 246A(1), the appellant cannot be said to be aggrieved by the A.O's order because the A.O. had not done anything in this respect but only accepted the claim of the assessee.*

b. *The appellant cannot be said to be aggrieved in respect of non-allowance of this amount because no such claim was made in the return of income.*

c. *The addition of Rs. 136,28,048 and Rs. 53,82,923 in earlier years is made u/s 68 of the Act. Thus, it is clear that this amount have been treated as unexplained cash credits. In view of this as a result of repayment of this amount no deduction can be claimed by the appellant."*

58. Before us, the learned Senior Counsel, Mr. Firoze Andhyarajina, submitted that these deposits were received and was taxed and now it has been refunded again. This matter can be verified by the Assessing Officer. The learned Special Counsel, Dr. P. Daniel, relied upon the findings of the learned Commissioner (Appeals).

59. After going through the submissions and the findings of the learned Commissioner (Appeals), we are of the opinion that this matter should be restore back to the file of the Assessing Officer to verify, whether these deposits have been taxed and has been refunded again to the customers of the assessee. This ground is thus treated as allowed for statistical purposes.

60. Ground no. 11 and 12, relate to prior period expenses amounting to Rs. 1,63,901.

61. The facts, as noted by the learned Commissioner (Appeals), are that the assessee in the tax audit report filed along with the return of income has shown an amount of Rs. 1,63,901 as net prior period expenses. These expenses were not claimed as deduction in the return of income on the ground that the assessee was making a claim for deduction in respect of the said amount in the assessment year 1997-98. In the assessment year 199798, the Assessing Officer has not allowed the said claim under section 143(3) and, therefore, it should be allowed in this year.

62. The Learned Commissioner (Appeals) has disallowed the assessee's claim on the ground that the same has not been claimed in the return of income for the assessment year 1998-99. and therefore, there should be no grievance. Moreover, this expenditure relates to the assessment year 1997-98 which should have been claimed and allowed in the assessment year 1997-98 only. Accordingly, he disallowed this claim.

63. Before us, the learned Counsel submitted that this claim has been crystallized during the year and, therefore, the same should be allowed in this year because the Assessing Officer has disallowed in assessment year 1997-98 on this ground alone.

64. Under the aforesaid facts, we set aside this issue to the file of the Assessing Officer to examine whether these expenses have been crystallized during the year or not and if that is so the same should be allowed. Thus, ground no. 11 and 12 are treated as allowed for statistical purposes.

65. In ground no. 13 and 14, the assessee has challenged the disallowance of net expenses amounting to Rs. 19,741, which comprise of prior period expenses and prior period income.

66. This amount was not claimed in the return of income in this year and was debited in the accounts of the assessment year 1999-2000.

67. Before us, it has been submitted that the said amount pertains to assessment year 1998-99 and ought to have been allowed in this year when the Assessing Officer in the assessment year 1999-2000 has not allowed this claim in the order passed under section 143(3).

68. In the absence of any details as to how this amount pertains to the assessment year 1998-99, such a claim made by the assessee cannot be sustained and, accordingly, we find no merits in the grounds raised by the assessee and the same are treated as dismissed.

In the result, assessee's appeal is ITA no. 825/Mum./2003, treated as partly allowed for statistical purposes.

We now take up Revenue's appeal in ITA no. 877/Mum./2003, vide which, following grounds have been raised:—

"(i) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 29,72,701/- made on account of excess consumption of raw materials shown by the assessee.

(ii) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the decision of the Ld.CIT(A) and ITAT has not been accepted on this issue in the earlier years and appeal has been filed to the High Court;

(iii) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in holding that disallowance of interest on borrowings of Rs. 3,40,327/- made by the Assessing officer was not justified and consequently erred in deleting the said addition.

(iv) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred

in placing reliance on the appellate order passed by CIT(A) for A.Y. 1996-97 in assessee's own case ignoring the grounds of appeal filed by the Department against the said decision.

(v) On the facts and circumstances of the case and in law, the Ld. CJT(A) has erred in deleting the addition of Rs. 22,22,249/- made on account of unutilised modvat credit failing to appreciate the fact that the decision of Bombay High Court in the case of CIT *v.* Nippon Chemicals Ltd. *[245 ITR 384] has not been accepted by the department and a special leave petition has been filed to the Supreme Court; which is pending.*

(vi) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO to treat the sale consideration of bottles and crates as part of the block of assets;

(vii) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact in earlier years the assessee claimed purchase of bottles and crates as revenue expenditure in the P & L A/c;

(viii) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the bottles purchased during A. Ys. 1993-94, 1994-95 and 1995-96 cannot form part of block of assets since on these bottles, 100% depreciation was claimed by the assessee and the value of such assets was zero. The Ld. CIT(A) failed to observe that the assessee did not discharge his onus of maintaining proper register of stock of bottles and crates purchased in different years and no evidence with regard to the fact that the bottles sold were of current year, was produced before the AO;

(ix) On the Facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition despite the fact that the assessee admitted before the AO that bottles which were worn out over the time were sold, which naturally proves that the assets purchased in the earlier years were sold."

69. Before us, it has been admitted by both the parties that, by and large, most of the issues are covered by the earlier years' order passed by the Tribunal in assessee's own case.

70. In ground no. 1, the Revenue has challenged the deletion of addition of Rs. 29,72,701 on account of excess consumption of raw material.

71. Both the parties agreed before us that this issue has been decided in favour of the assessee by the Tribunal in assessee's own case right from the assessment year 1989-90 to 1995-96. In all these years, the Tribunal has accepted the assessee's contentions and, therefore, as a matter of precedence, we also allow this issue in favour of the assessee. Accordingly, ground no. 1 and 2, raised by the Revenue are treated as dismissed.

72. Ground no. 3, the Revenue has challenged the disallowance of interest on borrowings by the employees of Rs. 3,40,327.

73. Both the parties agreed that this issue has been decided in favour of the assessee by the Tribunal in assessee's own case for the assessment year 1996-97 after detailed discussion.

74. In view of these admitted facts and respectfully following the decision of the Tribunal in ITA no. 3619/Mum./2001, for the assessment year 199697, we decide this issue in favour of the assessee and accordingly the ground no. 3 and 4 are treated as dismissed.

75. In ground no. 5, the Revenue has challenged that the deletion of Rs. 22,22,249, made on account of unutilized MODVAT credit by the learned Commissioner (Appeals) by following the decision of Bombay High Court in *CIT* v. *Indo Nippon Chemicals*, 245 ITR 384 (Bom.). The Revenue's main contention is that this

judgment has not been accepted by the Revenue and SLP has been filed before the Hon'ble Supreme Court.

76. As admitted by both the parties, the Hon'ble Supreme Court has affirmed the decision of Bombay High Court in *CIT* v. *Indo Nippon Chemical*, 261 ITR 275. Accordingly, ground no. 5, is treated as dismissed.

77. In ground no. 6 to 9, the Revenue has challenged the direction of the learned Commissioner (Appeals) to treat the sale of consideration of bottles and crates as part of the block of assets.

78. The Assessing Officer noted that the assessee had shown sale of bottles amounting to Rs. 84,67,666 from the block of assets, comprising bottles on which depreciation @ 50% is admissible. He also noted that up to the assessment year 1995-96, the assessee has claimed depreciation @ 100% on bottles and crates as the cost was less than Rs. 5,000. He required the assessee to furnish details of these bottles on which 100% depreciation has been claimed in the previous year. The assessee replied that no separate registers have been maintained for the bottles and also accepted that bottles on which 100% depreciation has been claimed cannot be distinguished from the bottles on which 50% depreciation is being claimed in the year. In response to the show cause notice, the assessee, vide letter dated 17th March 2001, has given a detail submission which has been incorporated by the Assessing Officer at Page-5 of the assessment order. The Assessing Officer rejected the assessee's submissions on the ground that up to the assessment year 1995-96, the assessee has claimed the expenditure on the purchase of bottles and crates as revenue expenditure being the value less than Rs. 5,000 and in this year, the assessee has failed to prove for such bottles and crates sold this year were purchased after 31st March 1995. Accordingly, he allowed the depreciation from the block of assets comprising of bottles and crates at Rs. 42,38,833 and balance was added.

79. Before the learned Commissioner (Appeals), following submissions were made:—

24. Ground No. 6 of the appeal is against addition of Rs. 84,67,666/- on account of sale of bottles and crates as revenue receipts. In this regard it is seen that at para 8 of page 6 of the assessment order that the A.O. rejected appellant's submission that as the bottles and crates on which 100% depreciation had been claimed did not form part of any block of assets, sales proceeds received in respect thereof do not attract the provisions of section 50 and hence cannot be taxed as deemed short term capital gain. The A.O. further held that the said expenditure had been claimed as revenue expenditure anything received against that would also be revenue receipt and as the assets could not prove that the bottles and crates sold in the current year were purchased after 1st March, 1995, the block of assets comprising bottles and crates would not be reduced by that amount and the assessee would be entitled for additional depreciation of Rs. 42,38,833/- i.e., an addition of Rs. 42,38,833/- was made to the total income. As against addition of Rs. 42,38,833/- the submission of the appellant is as under

“In the statement showing computation of depreciation, the appellant had excluded an amount of Rs. 84,67,666/- in respect of sale of old bottles from the block of assets entitled to depreciation @ 50%.

During the course of assessment proceedings, the appellant was asked to justify as to why the sale of old bottles and crates on which 100% depreciation had been claimed in the earlier assessment years should not be treated as deemed short term capital gains while computing the total income. The appellant vide letter dt 17th March, 2001 furnished detailed submission in respect of the aforesaid issue.

In the assessment order passed u/s. 143(3), the appellants' submissions have been rejected and sale of bottles and crates has been treated as revenue receipt *and part of business income. Further, the block of assets comprising of bottles and crates eligible for depreciation @ 50% has not been reduced by the aforesaid amount and thereby additional depreciation if Rs. 42,38,833/has been granted resulting in a net addition of Rs. 42,38,833/."*

80. Based on these submissions, the learned Commissioner (Appeals) has deleted the additions after observing and holding as under:—

25. Since the bottles and crates on account of sale on which Rs. 84,67,666/- is received could not be segregated between those purchases prior to 1.4.95 and w.e.f. 1.4.95 the entire receipt is reduced from block of assets from the bottles and crates as per submission of the appellant. It is submitted by the appellant that:

(a) The action of the A.O. in treating the same as revenue receipt is wrong because they are sale purchases of capital receipts in form of bottles and crates. It is further submitted that there is no loss to revenue because if assessee's view point is accepted sale proceeds will get taxed over a period of two years because the claim of depreciation will go down by the corresponding amount.

(b) If the A.O's approach is taken to logical conclusion, then what can be taxed is only income under the head 'capital gain' where cost of acquisition is to be reduced from sale proceeds and this course of action shall be detrimental to the interest of revenue because capital gain shall be computed by deducting the cost of acquisition of assets which shall be more than in case of new bottle as compared to sale proceeds of old bottles and crates.

I have carefully considered the submissions of the appellant and perused the material on record. I find merit in submission of appellant that sale proceeds on capital assets cannot be held to be revenue receipts. In view of this and in view of other submissions of the appellant enumerated herein before, it is held that the action of the appellant in reducing the sale proceed from block of assets of bottles and plants in accordance with law and it does not call for any interference. Accordingly, addition of Rs. 42,38,833/- made by the A.O. by treating the proceeds from sale of bottles and crates as revenue receipt is held to be unsustainable and is deleted."

81. Both the parties have relied upon the respective orders.

82. After going through the relevant findings of the Assessing Officer and the learned Commissioner (Appeals), we agree with the conclusion drawn by the learned Commissioner (Appeals) that sale proceeds on a capital asset cannot be held to be revenue receipt and after the sale, the block of assets have been reduced and accordingly, whatever is there in the block of assets, depreciation has to be allowed in accordance with the provisions of law. Accordingly, the finding given by the learned Commissioner (Appeals) is affirmed and the grounds raised by the Revenue are treated as dismissed.

83. In the result, Revenue's appeal in ITA no. 877/Mum./2003 is treated as dismissed.

We now take up Revenue's appeal in ITA no. 744/Mum./2002.

84. In ground no. 1 along with various sub-grounds therein, the Revenue has challenged the deletion of addition of Rs. 32,11,20,000 which represents the amount received from The Coca Cola Co. towards relinquishment of ROFR.

85. In the present case, the Assessing Officer has taxed the amount received from The Coca Cola Co. as long term capital gain on substantive basis in the case of the assessee. As already discussed in detail in the case of *Parle Soft Drinks Pvt. Ltd.* i.e., the Aqua Bisleri Ltd., was not entitled for receiving the compensation amount as the ROFR never vested with this assessee. The finding of the learned Commissioner (Appeals) is to this effect only.

86. Since we have already held that this amount is, firstly, not taxable as it is a capital receipt in the hands of Parle Soft Drinks Pvt. Ltd. and Parle Bottling Pvt. Ltd. and secondly, the present assessee was not entitled for any kind of compensation for the breach of ROFR. Accordingly, the findings of the learned Commissioner (Appeals) in this case are affirmed and the ground no. 1, raised by the Revenue is treated as dismissed.

87. Ground no. 2, the Revenue has challenged the deletion of addition of Rs. 3,94,863 on account of MODVAT credit on the ground that the decision of Bombay High Court in *Nippon Chemicals Co. Pvt. Ltd.* (supra), has not been accepted by the Revenue.

88. As admitted by both the parties, this issue now stands decided by the Hon'ble Supreme Court in the same case which is now reported as 261 ITR 75 (SC). Thus, there is no merit in the ground raised by the Revenue. Accordingly, ground no. 2, raised by the Revenue is treated dismissed.

89. In the result, Revenue's appeal in ITA no. 744/Mum./2002, is treated as dismissed.

We now take up assessee's cross objection (C.O. no. 35/Mum./2003), vide which, the assessee has taken an alternative claim with regard to the receipt of Rs. 32.11 crores.

90. Since we have already given a detail findings on this score holding that the amount aggregating to Rs. 32.11 crores is a capital receipt in the hands of Parle Soft Drinks Pvt. Ltd. and Parle Bottling Pvt. Ltd., which is non taxable and, therefore, the cross objection as raised by the assessee in this case is treated as academic and, accordingly, the cross objection is dismissed.

91. In the result, assessee's cross objection no. 35/Mum./2003, is treated as dismissed.

92. To sum up, assessee's appeal in ITA no. 5072/Mum./2001, is allowed. Revenue's appeal in ITA no. 5284/Mum./2001 is dismissed. Assessee's cross objection no. 136/Mum./2002, is allowed for statistical purposes. Assesee's appeal in ITA no. 825/Mum./2003 is partly allowed for statistical purposes. Revenue's appeal in ITA no. 877/Mum./2003 is dismissed. Revenue's appeal in ITA no. 744/Mum./2002 is dismissed and assessee's cross objection no. 35/Mum./2003 is dismissed.