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2026:GUJHC:18364-DB

Reserved On : 18/02/2026
Pronounced On : 12/03/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO.640 of 2022
With
R/TAX APPEAL NO.113 of 2023

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR. JUSTICE A.S. SUPEHIA Sd/-

and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI Sd/-

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Approved for Reporting	Yes	No
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AMBALAL SARABHAI ENTERPRISES LIMITED
Versus
THE DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE 1, VADODARA

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Appearance:
MR SAURABH SOPARKAR, SENIOR ADVOCATE, with MR B.S. SOPARKAR, ADVOCATE (6851) for the Appellant
MR MAUNIL G. YAJNIK for the Opponent

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CORAM: **HONOURABLE MR. JUSTICE A.S. SUPEHIA**
and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI

COMMON CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. The captioned cross appeals filed under section 260A of the Income Tax Act, 1961(for short "the Act") emanates from the judgement and order dated 25.05.2022 passed by the Income Tax Appellate Tribunal (ITAT), Ahmedabad in ITA No.1771/AHD/2015 for Assessment Year (AY) 2001-2002, and ITA No.1762/AHD/2015 for AY 2001-02, wherein the Tribunal has partly allowed the

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cross-appeals filed by the assessee and the Revenue. Both the assessee and the revenue had challenged the orders passed by Commissioner of Income Tax (Appeals) (for short "the CIT(A)"), in which the ITAT partly allowed the Appeals.

2. In Tax Appeal No.640 of 2022 the following substantial questions of law were formulated vide order dated 22.01.2024:

> (a) Whether in the facts and circumstances of the case, was the Income Tax Appellate Tribunal right in confirming dis-allowance of Rs.5,49,22,119/- in relation to the payment for gratuity and leave encashment?
>
> (b) Whether in the facts and circumstances of the case, was the Income Tax Appellate Tribunal right in law in holding that Receipt of Rs.25 crores on account of transfer of trademarks were not capital receipt in nature?
>
> (c) Whether in the facts and circumstances of the case, was the Income Tax Appellate Tribunal right in law in holding that Receipt of Rs.20 crores on account of transfer of marketing rights were not capital receipt in nature?
>
> (d) Whether in the facts and circumstances of the case, was the Income Tax Appellate Tribunal right in law in holding that Receipt of Rs.2 crores on account of transfer of marketing rights were not capital receipt in nature?

3. In Tax Appeal No.113 of 2023, this Court framed the following substantial question of law was formulated vide order dated 20.06.2023:

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> "Whether in the facts and circumstances of the case and in law , the learned ITAT has erred in treating Rs.18 crore out of Rs.25 crore shown by the assessee company as consideration received for the so called trademark agreement, as capital gains and deleting Rs.7 crores as capital receipt instead of the treating of entire sum of Rs.25 crore as revenue receipt chargeable to tax as business income?

BRIEF FACTS

4. The appellants - assessee - Ambalal Sarabhai Enterprise Ltd. and M/s.Cadila Health Care formed 50:50 Joint Venture Company (for short "JV Company") called *'Sarabhai Zydus Animal Health Ltd.'* vide Deed of Assignment dated 29.01.2000, by selling / transferring 46 veterinary trademarks/ brand names *'along with goodwill of the business'* for the consideration of Rs.73 crores, out of which Rs.25 crores were paid for the assignment of trademarks and were claimed as capital receipt, Rs.20 corers for the assignment marketing rights, the same are also claimed as capital receipt, Rs.28 crores for the transfer of know-how, which is offered as revenue receipt and Rs.2 corers for five years for marketing rights of ABIC, Bomac and Bristol Myers Squibb which is also claimed as capital receipt. Thus, the assessee had transferred its veterinary/ animal health business to the JV Company.

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5. The Assessing Officer (for short the "AO") passed an order dated 31.03.2004 treating Rs.47 crores as revenue receipts mainly on the ground that the trademarks were not registered, trademarks are same as know-how, and by transferring the marketing rights, income apparatus is not given up.

6. The aforesaid order culminated into appeal before the CIT(A), which was partly allowed vide order dated 12.03.2015.

7. Being aggrieved, the assessee and the revenue filed appeals before the ITAT. The ITAT confirmed the order passed by CIT(A) vide judgement and order dated 25.05.2022 giving rise to the present appeals.

SUBMISSIONS ON BEHALF OF THE ASSESSEE

Following ***submissions are made apropos question No.(a)*** by learned Advocate Mr.Soparkar:

a) That during the year, certain employees of the assessee were relieved from employment under the Voluntary Retirement Scheme (VRS), and they were paid a total amount of Rs.6,86,52,649/-, and out of such payment, Rs.1,77,62,048/- was of Gratuity

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under the payment of Gratuity Act, and Rs.30,93,624/- was paid as Leave Encashment and Rs.4,77,96,977/- at the time of Voluntary Retirement. Thus, it is contended that the assessee claimed 1/5th of Rs.4,77,96,977/- as claim under Section 35DDA of the Act and claimed full amounts of Rs.1,77,62,048 and Rs.30,93,624/- as expenses wholly and exclusively expended for the purpose of business. That the AO held that 1/5th of the entire amount of Rs.6,86,52,649/- is eligible for deduction under Section 35DDA of the Act and amounts of Rs.1,77,62,048/- and Rs.30,93,624/- are not allowable as they are business expenses done separately, which is erroneous as the assessee has given clear bifurcation based upon the nature of expenses and, therefore, payment of Gratuity and Leave Encashment, although paid at the time of end of the service, they are not part of VRS as such.

b) That the reliance placed by CIT(A) and the ITAT on the provision of Section 43B(f) of the Act since Section 43B of the Act states that certain expenses are allowable on payment basis as opposed to accrual. The insertion of Section 43B(f) of the Act provides for additional condition for allowability of expenses which was

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otherwise allowable without the additional condition, and that merely because Section 43B(f) of the Act is inserted subsequently, it does not mean that the expenditure is allowable thereafter only, and it means that earlier the expenditure was allowable without any condition as to the payment and subsequent to the insertion of section 43B(f) of the Act, it is allowable with additional condition of actual payment. It is contended that one more reason for confirming dis-allowance of the expenditure by the CIT(A) is non-supply of the employment contracts, but the AO never asked for them in the first place. The CIT(A) in 2015 could not expect the assessee to produce for the first time, the employment contracts of employees retired in the year 2000. It is therefore urged that the claim of the assessee is correct in fact and in law, and hence the question may be answered in favour of the assessee and against the revenue.

Submissions apro pos question No.(b):

c) It is submitted that the assigned Trademarks are not purchased, but are self-generated over years. Out of 46 trademarks transferred, 06 are registered and 40 are pending registration

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(application is made). With transfer of 46 trademarks, it was submitted that the Assessee is prohibited from manufacturing and marketing of these products on its own, and the same is a capital asset and its transfer is a capital receipt.

d) That, when the agreements of assignment of trademark, marketing rights and know-how are distinct and separate, AO cannot modify the same to hold that a part of the agreement is for assignment of trademark and a part of it for goodwill. The deed of assignment is unequivocally clear as to what is assigned and what are the trademarks.

e) That, considering Section 37 of the Trade and Merchandise Marks Act, 1958, assignment of trademark can happen “with the goodwill of the business” or “without the goodwill of the business”. It was submitted that under Trademarks Act “goodwill of the business” term has wholly different meaning compared to the term “goodwill” under Section 55(2)(a) of the Act, and that the assessee could not have sold only goodwill of the business without selling its running business. Admittedly, the assessee has continued to run its

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business even after assignment of trademark. Therefore, it is inconceivable that the assessee could only sell the goodwill without actually selling the running business.

f)That the observations of the ITAT to the extent that the assignment of Trademark is Revenue Receipt (Business Income) is *ex-facie* wrong in view of the ITAT decision in the case of Cadila Healthcare Ltd. - ITA No.642/AHD/2005. The same reasoning holds true for the present assessee (being the second party to the same arrangement) as well. Further, the amendment brought in Section 55(2)(a) of the Act from AY 2002-03 conclusively shows that the said transaction does not give rise to the Revenue Receipt, but Capital gain which too is taxable only from AY 2002-03.

g)It was submitted that the argument of the Revenue that know-how is same as trademark is fundamentally erroneous, since assignment of Trademark is recognised under Trade and Merchandise Marks Act, 1958. That the assessee has entered into two separate agreements, one for the transfer of trademarks and one for the transfer of know-how, and by transferring know-how the assessee only shares knowledge which it

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could have shared without assignment of trademark. Therefore, it is completely wrong to argue that once the Appellant has assigned know-how as well as trademark, they are one and the same.

h) While referring to the findings of the ITAT, recording the non-submissions of books of account, it is submitted that the reason for the non-submission of the books of accounts of the JV for the year 2000-01 by the appellant to the CIT(A) is that the AO never asked for the same, since the Appellant had also sold the 50% share in the JV to the other party to the JV way back in 2007. It was submitted that therefore it was not possible for the assessee to produce the same before the CIT(A). Moreover, the treatment of the purchase of the trademarks or marketing rights by the purchaser in its books of accounts would have no effect so far its non-taxability is concerned in relation to the assignor-appellant.

***Submissions apro pos question Nos.(c) and (d)*:**

i) Learned Senior Advocate Mr.Soparkar on the point of marketing rights submitted that the assessee had exclusive rights to market the products of ABIC, Bomac and Bristol Myers Squibb

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which allowed the assessee to market their products in specific regions. That the marketing rights are given to the assessee without any cost. It was also submitted that the marketing rights are capital asset and source of income and not stock in trade. After the transfer of the marketing rights, the assessee cannot market these products. It is also submitted that subsequent to the transfer, the revenue of the assessee is severely impacted, since when the income earning apparatus is transferred the quantum of the income forgone is not the determining factor, and the nature of the loss of apparatus is crucial. In the facts of the case when the appellant is completely denuded of the stream of the revenue that may be generated out of ownership of the exclusive marketing rights, it is nothing but extinguishment of income earning apparatus and therefore the compensation against the same is capital receipt. It was submitted that compensation received by the assessee for Transfer of marketing rights are therefore is a capital receipt and not revenue receipt. Reliance is placed on the judgement of Madras High Court in the case of *Commissioner of*

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Income Tax vs, Ambadi Enterprise Ltd., (2004) 139 taxmann 96 (Madras).

SUBMISSIONS ON BEHALF OF THE REVENUE :

8. Learned Senior Standing Counsel appearing for the Revenue has made the following submissions:

(I) Regarding the substantial question of law relating to taxability of consideration of Rs.25 crores for assignment trademarks along with the goodwill of business received by the assessee for transfer of Trademark along with goodwill of business to its JV company is taxable as 'income from the business and profession' under section 28(iv) and/or under section 41(1) of the Act; and alternatively, the said consideration is taxable as capital gain since the benefit accruing from business activities carried out by it over the years, is converted into money and therefore, the same is taxable as benefit accruing/arising from business under section 28(iv) of the Act. Therefore, the benefit which accrued to the assessee on transfer of said Trademark / brand name is also liable to be taxed under section 41(1) of the Act.

(II) It is further submitted that in the present case, over and above, the agreement to transfer

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trademark to the JV, assessee has also entered into an agreement with the JV for transfer of "know-how" for transfer of "know-how" qua the very same 46 trademarks and the same is already shown as revenue receipt by the assessee and hence, it is submitted that the transfer of "know-how" qua the very same 46 trademarks and consideration received thereof amounting to Rs.28 crores is treated as revenue receipt, then the transfer of those 46 trademarks whereas, only 6 are registered and 40 are unregistered. Hence, the said transfer has to be treated as revenue receipt only.

(III) Regarding taxability of the said consideration of Rs.25 crores as capital gain, it was submitted that as stated hereinabove the assessee had received Rs.25 cores towards the transfer of Trademark along with goodwill of business and, it is pertinent to note that assessee has already received remuneration amounting to Rs.28 crores by an agreement of transfer of "know-how" for the very same 46 trademarks along with goodwill of businesss. As assessee has already received Rs.28 crores for transferring "know-how" of the very said 46 trademarks and during the argument assessee had

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candidly admitted that trademark is “know-how” and it is also not the case of the assessee that only “know-how” was transferred and not the trademark. It was therefore submitted that the entire amount of Rs.25 crores received by the assessee is essentially towards the transfer of goodwill of business only.

(IV) That in absence of any specific valuation assigned to trademark, it is not open for the assessee to contend that the entire amount of Rs.25 crores is received for the transfer of trademark only since the assessee has not bifurcated value of each trademark as out of 46 trademarks only 6 are registered and 40 are unregistered, and in the absence of any specific bifurcation for each trademark, it is difficult to believe that entire consideration was only for transfer of trademark and not goodwill.

(V) It is contended that though requested to furnish copy of audited balance-sheet and other relevant books of account of the JV so that it could be cross verified that JV has shown 46 trademarks in the balance-sheet as assets and also, it has claimed depreciation on 46 trademarks only and not on the goodwill, and since the assessee did not produce the same and

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hence, it cannot be said that only trademarks were transferred and not the goodwill.

(VI) To consider present transaction as capital receipt, it was incumbent upon the assessee to show and to provide adequate documentary evidence showing that the capital assets (i.e. trademark) has gone from the balance of the assessee and has found its place in the balance sheet of the assignee i.e. (JV). In absence of any documentary evidence, the CIT(A) and Tribunal has rightly held the said transaction as capital gain.

(VII) It is also relevant to submit that subsequent to the decision of the Supreme Court in the case of *CIT vs. B.C. Srinivasa Setty*, [1981] 128 ITR 294 (SC), there is an amendment in Section 55(2) of the Act by the Finance Act, 1987, and it is not in dispute that by virtue of the said amendment, the transfer of self-generated goodwill is now taxable as capital gain by taking cost of acquisition of such self-generated asset as Nil. It is submitted that the said amendment is clarificatory / declaratory nature and by virtue of the said amendment in Section 55(2) of the Act by the Finance Act, 2001, the legislature has merely clarified / declared that the cost of acquisition in relation

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to self-generated trademark is Nil. It is therefore submitted that applying the said amendment retrospectively, even if the entire amount of consideration of Rs.25 crore is treated as received towards the transfer of Trademarks only and the same is taxable as capital gain. Reliance is placed on the following two decisions of the Apex Court in the cases of *CIT Vs. Podar Cement Pvt. Ltd*., (1997) 226 ITR 625 (SC), and *ITO vs. Vikram Sujitkumar Bhatiya*, (2023) 453 ITR 417 (SC).

(VIII) Further, regarding the reliance of the assessee on the decision of the Karnataka High Court in the case *CIT, Bangalore vs. of Associated Electronics & Electrical Industries (Bangalore) Pvt. Ltd*., (2016) 65 taxmann.com 253 (Karnataka), it is submitted that the said decision is distinguishable on facts and in law since in the said case, by way of a legal battle, a settlement had arrived between the parties and the mark “SHARP” on 14 goods were transferred in favour of SHARP corporation and the assessee in that case, retained to use mark “SHARP” qua 6 items and hence, it was concluded that since assessee still retained to use mark “SHARP” qua 6 items, it cannot be said that the entire business

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has been transferred and goodwill has also been transferred.

9. By making the foregoing submissions, it is thus urged that the impugned order of the ITAT is erroneous and unsustainable in law to the extent it is against the revenue.

ANALYSIS AND OPINION :
Answer to Question No.(a):

10. The question No.(a) refers to the dis-allowance of Rs.5.49 crores in relation to payment of gratuity and leave encashment to the employees of the assessee at the time of voluntary retirement scheme. The assessee claimed 1/5th of the amount of Rs.4,77,96,977/- as claim under Section 35DDA of the Act and claimed full amounts of Rs.1,77,62,048 and Rs.30,93,624/- as expenses wholly and exclusively expended for the purpose of business. The CIT(A) and the ITAT has allowed the deduction of Rs.1,37,30,530/- under Section 35DDA of the Act, by holding that the payment of Gratuity and Leave Encashment, is part of VRS. Section 35DDA of the Act, allows businesses to claim a tax deduction for expenditures incurred on VRS, which is spread over five years. In order to satisfy us, we had

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called for the VRS dated 12.02.2000. The recitals of VRS reveals that the employees are paid compensation for remaining period of services. Apart from other benefits, which are paid under the Scheme, the employees are paid the amount of gratuity as per payment of gratuity act, and leave encashment. Thus, albeit it can be said that the employees are paid the amount of gratuity and leave encashment, however, such benefits are ancillary, which are paid on voluntary retirement/retirement. The intent of section 35DDA of the Act, is that the payment of expenditure to an employee should have been made in connection with his voluntary retirement under a scheme of such retirement. On fulfilment of these conditions, one-fifth of the expenditure would fall for allowance in the year of payment and the balance will be allowed in four equal annual instalments. In the instant case, there are two components of the VRS. One is the payment of compensation to the employees who opt for VRS, whereas the second is the payment of gratuity and leave encashment towards the service rendered by the employees, which an employee is otherwise entitled on retirement, whether voluntary or in retirement in due course on reaching the age of

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superannuation. Thus, the benefit of gratuity and leave encashment are the post-retirement benefits accruing from the actual service rendered by an employee. These benefits are governed by respective rules/clauses of the employment. The assessee has offered bifurcation of the amount under VRS and the amount of leave encashment and gratuity however, the AO has restricted the claim to 1/5th of the amount paid under the VRS, and the remaining claim is disallowed. This approach is erroneous in view of the VRS, which has separate benefit of compensation and as held by us, the amount of leave encashment and gratuity are paid on the voluntary retirement, and cannot be said to be part of the VRS. The assessee had categorically offered the compensation payable under the VRS under section 35DDA of the Act minus the terminal benefits to be amortized by granting 1/5th. The CIT(A) has rejected the contention of the assessee on the ground that the assessee had not produced any agreement or contract which had taken place between the assessee and its employees. It is not in dispute that the assessee was never called upon to produce the same by the AO hence, the CIT(A) and the ITAT have fell in error confirming

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the assessment order of the AO in making additional dis-allowance, and treating the amount of gratuity and leave encashment inclusive of VRS. The additional ground which has weighed upon the CIT(A) is that the provision of section 43B(f) of the Act, which states about *"any sum payable the employer/assessee in lieu of any leave at the credit of his employee"*, has been introduced w.e.f. 01.04.2002 vide Finance Act, 2001, and hence, the same will be applicable from such date. We find the view expressed by CIT(A) as erroneous for the reason that the sum payable towards gratuity was falling part of the deduction under section 43B(b) of the Act, which is paid for the welfare of the employees. Similarly, the amount of leave encashment is paid as a welfare/benefit to the employees on their retirement or cessation of service. Thus, merely because the sum payable on leave encashment has been introduced w.e.f 01.04.2002, the expenditure incurred by an assessee prior to the said date becomes allowable prior to said date only. The same becomes allowable only after its actual payment after 01.02.2002, and it was allowable without any condition of actual payment prior to such date.

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11. Thus, both CIT(A) and ITAT have taken an erroneous view, hence the substantial question of law (a) is answered in favour of the assessee, and against the revenue.

Answer to Question No.(b) and question No.A of Tax Appeal No.113 of 2023:

Whether Receipt of Rs.25 crores on account of transfer of trademarks were not capital receipt in nature?

12. The appellants – assessee - Ambalal Sarabhai Enterprise Ltd. and M/s Cadila Health Care formed 50:50 Joint Venture Company called *'Sarabhai Zydus Animal Health Ltd.'* vide Deed of Assignment dated 29.01.2000, by selling/ transferring 46 veterinary trademarks/ brand names *'along with goodwill of the business'* for the consideration of Rs.73 crores, out of which 25 crores are paid for assignment of trademarks and were claimed as capital receipt. However, the same has been treated as revenue receipt. The Revenue has considered that the factum of non-registration of 40 trademark out of 46 trademark and not offering the value of trademarks depending on their scope and commercial value;

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13. Before, we answer the foregoing question, we may mention similar issue was examined by the ITAT in case of same parties i.e M/s Cadila Health Care along with Ambalal Sarabhai Enterprise Ltd., which had formed 50:50 Joint Venture Company called *'Sarabhai Zydus Animal Health Ltd.'* vide Deed of Assignment dated 15.06.2000, by selling/ transferring 22 veterinary trademarks/ brand names *'along with goodwill of the business'* for the consideration of Rs.29.10 crores. By the judgement and order dated 20.10.2006 passed by the Income Tax Appellate Tribunal, Ahmedabad in ITA No.642/AHD/2005 for Assessment Year(AY), 2001-2002, and ITA No.1302/AHD/2005 for AY 2001-02 the Tribunal has held in favour of the assessee. The Tribunal has held thus:

> *"14. … … …*
> *(b) We have no hesitation in holding that the trade marks/brand names under consideration are required to be treated as "capital assets". The Assessee is right in contending that section 2(14) which defines a "capital asset", covers within its scope "property of any kind held by an assessee whether or not connected with business or profession" In fact, even the Hon'ble Supreme Court has rightly held in the case of CIT v/s Express Newspapers Ltd. 53 ITR 250 (SC), "the fact that capital gains are connected with the capital assets of the business will not make that profits of business" Under the circumstances, the conclusion sought to be drawn by the Assessing*

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Officer in the assessment order that the sale consideration of Rs.29.10 crores for assignment of trade marks/ brand names should be treated as business income is required to be rejected in toto.

(c) Once it is held that the trade marks/brand names assigned by the appellant are capital assets under section 2(14) of the Income tax Act, the only logical conclusion that can follow is that the resultant gains from the transfer or assignment of the same are in the nature of capital gains. However, as held by the Hon'ble Supreme Court in the case ***of CIT v/s B.C. Srinivasa Setty, 128 ITR 294(SC),*** *"none of the provisions pertaining to the head "capital gains" suggest that they include an asset in the acquisition of which no cost at all can be conceived. "If the asset under consideration is a self generated asset, it does not fall within the purview of section 45 r.w.s. 48 of the Income tax Act. The issue for consideration, therefore, is whether the trade marks/brand names under consideration can be classified as "self generated assets" it has not been disputed even by the Assessing Officer that the trade marks/brand names were in any manner purchased or acquired by the appellant for any consideration. The Assessee has rightly contended that in respect of the trade marks/brand names of its Veterinary Division, which came to be assigned to Sarabhai Zydus Animal Health Ltd., no cost of acquisition was incurred by it and they were generated or evolved in the business over the years. The Assessing Officer has tried to take the view that for building brand name, systematic efforts in terms of man, maternal and money are needed and, therefore, in his view, it was not proper to say that for generating trade marks/brand names, no cost has been incurred. However, the finer aspect of the evaluation of the intangible assets such as trade marks has been lucidly explained in the land mark judgement of the Apex Court in B.C. Srinivasa Setty(Supra). The following ratio of the said judgment in*

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regard to the evaluation of "Goodwill" would squarely apply in the case of the evaluation of intangible assets such as trade mark/brand name:

"In a progressing business goodwill tends to show progressive increase and in a failing business it may begin to wane. Its value may fluctuate from one moment to another depending on changes in the reputation of the business. It is affected by everything relating to the business, the personality and business rectitude of the owners, the nature and character of the business, its name and reputation, its location, its impact on the contemporary market, the prevailing socio-economic ecology, introduction to old customers and agreed absence of competition. There can be no account in value of the factors producing it. It is also impossible to predict the moment of its birth. It comes silently into the world unheralded and unproclaimed and its impact may not be visibly felt for an undefined period. Imperceptible at birth it exists enwrapped in a concept, growing or fluctuating with the numerous imponderables pouring into, and affecting the business"

In our view, therefore, the trade marks/brand names in the case of the Assessee are clearly required to be held as "self generated".

14. Thus, on a similar issue, the ITAT by placing reliance on the judgement of the Apex Court in the case of ***B.Srinivasa Setty (supra)*** has previously held in favour of the assessee. The cross-Tax Appeal Nos.1234 of 2007 and 642/AHD/2005 were admitted by formulating an identical substantial question of law. The same is decided by separate judgement and order.

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15. We may at this stage, refer to the legal precedent governing the issue. The Supreme Court in the case of ***B.C.Srinivasa Shetty (Supra)***, while dealing with the sections 45, 48 and section 55(2) of the Act in context of capital gain arising from the sale of goodwill has held thus:

> *"**9**. The point to consider then is whether if the expression "asset" in section 45 in construed as including the goodwill of a new business, it is possible to apply the computation sections for quantifying the profits and gains on its transfer.*
>
> ***10** The mode of computation and deductions set forth in Section 48 provides the principal basis for quantifying the income chargeable under the head "Capital gains". The section provides that the income chargeable under that head shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset :*
>
> *"(ii) the cost of acquisition of the capital asset ... "*
>
> ***11** What is contemplated is an asset in the acquisition of which it is possible to envisage a cost. The intent goes to the nature and character of the asset, that it is an asset which possesses the inherent quality of being available on the expenditure of money to a person seeking to acquire it. It is immaterial that although the asset belongs to such a class it may, on the facts of a certain case, be acquired without the payment of money. That kind of case is covered by Section 49 and its cost, for the purpose of Section 48 is determined in accordance with those provisions. There are other provisions which indicate that Section 48 is concerned with an asset capable of acquisition at a cost. sec. 50 is one*

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such provision. So also is sub-sec. (2) of Section 55. None of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the acquisition of which no cost at all can be conceived. Yet there are assets which are acquired by way of production in which no cost element can be identified or envisaged. From what has gone before, it is apparent that the goodwill generated in a new business has been so regarded. The elements which create it have already been detailed. In such a case, when the asset is sold and the consideration is brought to tax, what is charged is the capital value of the asset and not any profit or gain.

12 *In the case of goodwill generated in a new business there is the further circumstance that it is not possible to determine the date when it comes into existence. The date of acquisition of the asset is a material factor in applying the computation provisions pertaining to capital gains. It is possible to say that the "cost of acquisition" mentioned in sec. 48 implies a date of acquisition, and that inference is strengthened by the provisions of Ss. 49 and 50 as well as sub-sec. (2) of Section 55.*

13 *It may also be noted that if goodwill generated in a new business in regarded as acquired at a cost and subsequently passes to an assessee in any of the modes specified in sub-sec. (1) of Section 49, it will become necessary to determine the cost of acquisition to the previous owner. Having regard to the nature of the asset, it will be impossible to determine such cost of acquisition. Nor can sub-sec. (3) of sec. 55 be invoked, because the date of acquisition by the previous owner will remain unknown.*

14 *We are of opinion that the goodwill generated in a newly commenced business cannot be described as an "asset" within the terms of sec. 45 and therefore its transfer is not subject to income-tax under the head "capital gains".”*

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16. The aforesaid judgement has been followed by the High Court of Bombay in the case of ***Fernhill Laboratieries and Industrial Establishment (supra)***. The Bombay High Court has also considered the amendment to section 55(2)(a) of the Act introduced w.e.f. 01.04.2002, and it is held that the same applies prospectively. It has held thus:

> *"**8.** We have considered the rival submissions. Section 45 of the Act is a charging section for the purpose of levying capital gains. However to impose the charge, parliament has enacted provision to compute profits or gains under that head. Section 48 of the said Act provides the manner in which the income chargeable under the head capital gains is to be computed i.e. by deducting costs of acquisition of the capital asset from the full consideration received on the transfer of the capital asset. The Supreme Court in the matter of B. C. Srinivasa Shetty (supra) was dealing with the issue whether the transfer of the goodwill by partnership firm can give rise to a capital gain tax under Section 45 of the said Act. The Apex Court held that where the cost of acquisition of the capital asset is nil then the computation provision fails and the transfer of goodwill not give rise to capital gains tax. Prior to the amendment made to Section 55(2) by the Finance Act, 2001 effective from 1/4/2002 by adding the words "trade mark or brand name associated with the business" self generated assets such as trademark did not have any cost of acquisition. Therefore, for the period under consideration the computation provision under Section 48 of the said Act fails resulting in such transfer of trade marks not being chargeable to capital gains tax. Consequent to amendment made to Section 55(2) with effect from 1/4/2002 by which the words trade mark or brand name*

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associated with the business was introduced into it, the computation provision becomes workable and the consideration received for the sale of trade mark would be subject to capital gains tax. However, for the period prior to 1/4/2002 the sale of self generated trademark is not liable to capital gains tax. In fact, when the amendment was made to Section 55 by Finance Act, 2001 the Central Board of Excise and Customs had issued a circular bearing No.14/2001 explaining the provision of the Finance Act, 2011 relating to direct taxes provided as under:

> *"42- Providing for cost of acquisition of certain intangible capital asserts under section 55*
>
> *42.1 Under the existing provisions of sub-section (2) of section 55 of the Income tax Act, the cost of acquisition of an intangible capital asset, being goodwill of a business or a right to manufacture, produce or process any article or thing, tenancy rights, stage carriage permits or loom hours, is the purchase price in case the asset is purchased by the assessee from a previous owner, and nil in any other case. It was pointed out that certain similar self generated intangible assets like brand name or a trademark may not be considered to form part of the goodwill of a business and consequently it may not be possible to compute capital gains arising from the transfer of such assets.*
> *42.2- The Act has therefore amended clause*
>
> *(a) of sub-section (2) to provide that the cost of acquisition in relation to trademark or brand name associated with a business shall also be taken to be the purchase price in case the asset is purchased from a previous owner and nil in any other case.*
>
> *42.3- This amendment will take effect from 1st April, 2002, and will , accordingly, apply in*

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relation to the assessment year 2002-2003 and subsequent years."

(9) *From the above circular, it would be clear that the amendment bringing self generated intangible assets such as trademark to capital gains tax only with effect from Assessments Year 2002-03 onwards. In this case, we are concerned with Assessment Year 1999-2000 and therefore, the amendment would not have any effect. Further as held by the Supreme Court in the matter of Dy. CIT v/s. Core Health Care ltd. reported in 298 ITR 194 that a provision introduced with effect from a particular date would not have retrospective effect unless it is expressly stated to be so. Consequently, the sale of self generated trade marks during the Assessment year 1999-2000 are not chargeable to capital gains tax. So far as the sale of self generated designs (i.e. not acquired) the same is also not chargeable to capital gains tax not only for the reasons applicable to trade marks but for the fact that even till this date, no amendment has been made to Section 55(2) of the said Act defining cost of acquisition of design as in the case of trademark goodwill etc."*

17. Similarly, the Karnataka High Court in the case of ***Associated Electronics & Electrical Industries (Banglore) (P) Ltd. (supra)***, wherein the High Court while considering the Deed of Assignment assigning the trademarks along with the goodwill of the Assignor's business in context of the aforesaid provisions has held thus:

*"**14.** A reading of these provisions would make it clear that any profits or gains arising from the transfer of a capital asset effected in the*

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previous year shall be chargeable to income tax under the head 'capital gains'. The income chargeable under the head 'capital gains' shall be computed as per the provisions of Section 48 of the Act. In the present case, the said computation shall be, deducting the cost of acquisition of the asset from the full value of consideration. The cost of acquisition in relation to a 'capital asset' in case of goodwill of a business, shall be taken to be 'Nil', as the question involved is relating to the transfer of goodwill of a business.

15. *Section 55(2) of the Act is amended by Finance Act, 2001 inserting the words 'or a trademark or brand name associated with a business'. Thus, it is clear that the cost of acquisition in relation to a trademark or brand name associated with the business comes within the tax net subsequent to 1.4.2002. Admittedly, the said amendment is not applicable to the present case. Hence, the assessment to capital gains can be sustained only if the capital asset transferred was the 'goodwill of the business' of the company.*

16. *The expression 'goodwill' has been considered and explained by the Apex Court in 'S.C. Cambatta & Co. (P.) Ltd.'s case (supra), wherein their Lordships having considered the Judgments of various Courts, have held as under:*

"6. It will thus be seen that the goodwill of a business depends upon a variety of circumstances or a combination of them. The location, the service, the standing of the business, the honesty of those who run it, and the lack of competition and many other factors go individually or together to make up the goodwill, though many other factors go individually or together to make up the goodwill, though locality always plays a considerable part. Shift the locality, and the goodwill may be lost. At the same time, locality is not everything. The power

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to attract custom depends on one or more of the other factors as well. In the case of a theatre or restaurant, what is catered, how the service is run and what the competition is, contribute also to the goodwill."

17. *The Hon'ble Apex Court in Guzdar Kajora Coal Mines Ltd.'s case (supra), was dealing with the case of the purchases made by the Assessee therein by Deed of Conveyance executed by the liquidators of Guzdar Kajora Colliery Co., Ltd., all the colliery lands, hereditaments and premises, mines, minerals, powers and privileges and all other hereditaments together with the machinery thereon belonging to the latter company. It is held that even if it is not expressly mentioned that goodwill has been sold, it can be shown and ascertained by evidence whether the same has been purchased or not by the Assessee.*

18. *In the case of R.C. Cooper v. Union Of India (AIR 1970 SC 564), the Apex Court has held that goodwill of a business is an intangible asset representing the whole advantage of reputation and connection formed with the customers together with the circumstances making the connection durable.*

19. *In Corpus Juris Secondum, it has been observed that "goodwill" has no existence except in connection with the continuing business.*

20. *In the case in IRC v Muller & Co.'S Margarine Ltd. 1901 AC 217 Lord Machnaghten has observed thus:*

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start….. if there is one attribute common

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to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again".

***21.** Section 37 of the Trade and Merchandise Marks Act, 1958 provides for assignability and transmissibility of registered trademarks which is as under:*

"Notwithstanding anything in any other law to the contrary, a registered trade mark shall subject to the provisions of this chapter, be assignable and transmissible, whether with or without the goodwill of the business concerned and in respect either of all the goods in respect of which the trade mark is registered or of only some of those goods".

***22.** The meaning of the expression "goodwill" as explained in these judgments referred to above vis-à-vis the provision of Trade and Merchandise Marks Act, 1958 makes it clear that the 'trade mark' and 'goodwill' are two distinct separate concepts. Section 55(2)(b) of the Act prior to the amendment provided for the levy of tax on capital gains in relation to a capital asset, being goodwill of a business. Insertion of the words, "registered trademarks or brand name associated with the business" by the Finance Act, 2001 depicts the intention of the Legislature to levy tax in relation to capital asset, being a trade mark or brand name associated with the business, which was not exigible to tax during the relevant assessment year.*

xxxxxx

***27.** We have perused the relevant clauses of the settlement deed entered into between the parties extracted supra, which clearly indicates, the assignment made by the assessee company to M/s Sharp Corporation, is only transfer of trademarks and the goodwill associated with the trade marks.*

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> *It cannot be misconstrued to that of goodwill of a business. It is observed in the judgment of the ITAT, "it is common ground before us that the assessee did not sell its entire business undertaking to Sharp Corporation". This admitted fact itself proves that the assessee has transferred only the trademarks and not the goodwill of a business. Even assuming the goodwill related to the trade mark is transferred, it cannot be construed as the goodwill of a business. If the arguments of the revenue that the transfer of trade mark itself is goodwill of a business is accepted, then there was no necessity for the Legislature to amend Section 55(2)(a) of the Act inserting the words "trade mark" or "brand name" associated with the business by Finance Act, 2001."*

18. A holistic reading of the foregoing observations dealing with the assignment of trademark along with goodwill of business prior to amendment in section 55(2)(a) of the Act w.e.f. 01.04.2002 read with sections 45 and 48 of the Act, establishes that the consideration received on "transfer of trademark along with goodwill", is not chargeable to tax and will not be an "asset" to attract the charging provision of section 45(1) of the Act, and its assignment/ transfer is not subject to income tax under the head of "capital gains". In the instant case, we disagree with the findings of the Tribunal that in fact, the assessee has transferred the trademark, but not the good will. From the

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assignment deed, it is evident that what is transferred is 46 self-generated trade marks for Rs.25 crores, as appearing at Schedule to the Deed of "Assignment of Trademarks" dated 15.06.2000. The assessee is a manufacturing pharmaceutical company and the 46 trademarks are transferred along with goodwill of the business concerned in the goods for which these trademarks were transferred. The pharmaceutical business of the assessee is not entirely transferred, and it retains substantial business with it. It is settled legal precedent that goodwill has no independent existence, and it cannot subsist by itself, and is attached to a business, and if the business is destroyed the goodwill also perishes with it, though some elements remain which may perhaps be gathered up and be revived again.

19. Section 2(47) of the Act classifies transfer in relation to categories of capital gains. Section 2(24)(vi) of the Act mentions that income includes any capital gains chargeable under section 45 of the Act. Section 45 of the Act stipulates that any profits and gains arising from the transfer of capital assets shall be chargeable to income tax under the head of capital gain. Capital asset has been defined

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under section 2(14) of the Act. Thus, there has to be transfer of capital asset for satisfied capital gains. Section 48 of the Act provides the Mode of Computation on the income chargeable under the head "Capital gains" by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset on i) expenditure incurred wholly and exclusively in connection with such transfer; and, ii) the cost of acquisition of the asset and the cost of any improvement thereto. Section 2(22)(B) of the Act defines fair market value in relation to an of the asset which means the price that the capital asset would ordinarily fetch on sale in open market, and ii) where the price referred is not ascertainable, such price as may be determinable as per rules made under the Act. At this stage in order to answer the situation arising from the interpretation and applicability of the statute on the consideration received on a capital asset liable to tax, the law declared by the Supreme Court in the case of ***B.C.Srinivasa Shetty (supra)*** comes into play. The Supreme Court has observed the nature of the acquisition of asset of which it is possible to envisage cost under section 48 of the Act and that there are

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other provisions which indicate that Section 48 of the Act is concerned with an asset capable of acquisition at a cost and Section 50 of the Act is one such provision. So also is sub-section (2) of Section 55 of the Act, which stipulates the Meaning of 'adjusted', 'cost of improvement' and 'cost of acquisition. The case of the respective parties hinges on the provision of Section 55(2)(a) of the Act, which reads thus:

> *"Section 55:*
>
> *(2) For the purposes of sections 48 and 49, "cost of acquisition" —*
>
> *(a) in relation to a capital asset, being goodwill of a business [or a trade mark or brand name associated with a business or a right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours,-*
>
> *(i) in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price; and*
>
> *(ii) in any other case [not being a case falling under sub-clauses(i) to (iv) of sub-section(1) of section 49, shall be taken to be nil;"*

20. Thus, none of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the acquisition of which no cost at all can be conceived. Section 55(2) of

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the Act is amended by Finance Act, 2001 inserting the words 'or a trademark or brand name associated with a business' having prospective effect. Thus, it is apparent that that the cost of acquisition in relation to a trademark or brand name associated with the business comes within the purview of taxability subsequent to 01.04.2002. In the instant case, the amendment is not applicable since the entire transaction is prior to the cut-off date.

21. On the facts and in the circumstances of the assessee's case, the AO was not justified in taxing the consideration of Rs.25 crores received for assignment of Trade Marks as business income of the assessee. For justifying his reasoning for taxing the said receipt as business income, the Revenue has relied upon the provisions of Sections 28(iv) and 41(1) of the Act. In our view, none of the provisions under either of these sections can be applied on the facts of the instant case, since Section 28(iv) of the Act provides that "the value of any benefit or perquisite, whether convertible into money or not, arising from the exercise of a business or a profession" shall be chargeable to Income tax under the head "profits and gains of business or

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profession. The sale consideration for assignment of trade marks as a benefit or perquisite arising from the exercise of a business cannot be treated as the value of any benefit or perquisite arising from the business or a profession, more particularly, when the same are self-generated and cost of acquisition cannot be ascertained.

22. Section 41(1) of the Act provides that "where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure on trading liability incurred by the assessee and subsequently during any previous year, the person has obtained any amount or benefit, whether in cash or in any other manner whatsoever, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits or gains of business or profession. In in this regard, we may remark that the AO has not attempted to carve out any case for the revenue for taxing the sale consideration of trademarks as profit chargeable to tax under section 41(1) of the Act. It appears that such contention is raised before us in the present tax appeal.

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23. The Revenue has considered that the factum of non-registration of 40 trademark out of 46 trademark and not offering the value of trademarks depending on their scope and commercial value, and the assessee has not furnished the audited balance sheet for cross verification that JV has shown the trademarks in their balance sheet as capital asset. It appears that the revenue is oblivious of the fact that JV is a separate entity, and assessee is not supposed to furnish the audited balance sheet of JV. Section 39 of the Trademarks Act, 1999 stipulates that an unregistered trade mark may be assigned or transmitted with or without the goodwill of the business concerned. Merely, because the transfer is of an unregistered trademark, the same will not *ipso facto* make such transfer chargeable to capital gains. The nature of non-registered trademark will remain as an intangible asset. The consideration received on transfer of non-registered trademark prior to the amendment made to Section 55(2) of the Act w.e.f. 01.04.2002 would not be subject to capital gains tax.

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24. Thus, on an overall analysis of recital of assignment deed, the statutory provisions and legal precedent, we are of the opinion that both the CIT(A) and ITAT have taken an erroneous view in treating the receipt of Rs.25 crores on account of transfer of trademarks as revenue receipts and not capital receipt. Hence the substantial question of law (b) and substantial question of law (a) in Tax Appeal No.113 of 2023 is answered in favour of the assessee, and against the revenue.

Answer to Substantial Question of Law (c & d)

25. The assessee has claimed Rs.20 cores and Rs.2 crores for assignment of marketing rights as capital receipt, whereas the revenue has held in converse. The assessee had offered that the acquisition in respect of the market rights were Nil, and the assessee had an exclusive right to market the products of ABIC, Bomac and Bristol Myers Squibb which allowed the assessee to market their products in specific regions, and the marketing rights are given to the assessee without any cost. The assessee before the revenue had contended that that the marketing rights are capital asset and source of income and not stock

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in trade, and after the transfer of the marketing rights, the assessee cannot market these products, and by such transfer, the assessee has given away its earning apparatus to JV. The CIT(A) has simply rejected the claim of the assessee that by transfer of know-how, assignment of trademarks and marketing rights, the assessee has converted its business into JV, wherein the appellant also continues to get the same profit without any loss risk. The CIT(A) has also rejected the contention of the assessee relating to the loss suffered after the transfer of trademarks and marketing rights by holding the loss as superficial.

26. We do not agree with the proposition of revenue on this issue. It is not in dispute that marketing is an income earning apparatus, and on its transfer, the assessee has been stripped of from its revenue generated through marketing rights, thus the compensation which is received by the assessee is a capital receipt and not revenue receipt. Subsequent to the transfer, the revenue of the assessee is severely impacted, which is substantiated from the following, however the CIT(A) has considered the

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compensation as revenue receipt by holding the loss as superficial.

	AY 2000-01	**AY 2001-02**
Turnover	Rs.230.99 crores	Rs.199.45 crores
Profit	Rs.3.45 crores	Loss of Rs.1.93 crores

The quantum of loss cannot be a determinative factor of treating the compensation as revenue receipt. The Revenue has botched up two distinct transactions i.e, transfer of trademark and marketing rights. The ITAT has failed to consider that on transfer of trademarks and marketing rights, the assessee will not be able to earn from such products, and at the most, it would earn dividends declared if any by the JV. The CIT(A) has also erred in holding that the assessee has not relinquished the right of manufacturing. In this context, it may be mentioned that the assessee has entered into two separate agreements for transferring of trademarks and know-how. The Revenue has erroneously held the know-how equivalent to trademark. By transferring these assets, there is cessation of income. Like the trademarks, the know-how is a self-generated asset, and will not fall within the scope of section 55(2)(a) of the Act. The Madras High Court in the case of ***Ambadi***

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Enterprise Ltd.(supra) has held that in case the ties with profit earning apparatus are snapped, the amount received, whether as consideration or compensation would be capital receipt. In the instant case, after the transfer of trademark, know-how and the marketing rights, the assessee is prohibited from manufacturing the products relating to 46 trademarks, and thereby precluded from exploiting the source of income. Hence, on transfer of such capital asset it would be taxable as capital receipt and not revenue receipt. Thus, the compensation received by the assessee on the assignment of marketing rights and know-how will not be assessable to tax.Both the CIT(A) and ITAT have taken an erroneous view and hence, the substantial question of law (c & d) is answered in favour of the assessee, and against the Revenue.

27. Thus, the substantial questions of law, 'a to d' formulated in Tax Appeal No.640 of 2022 is answered in favour of assessee and against the revenue. Consequently, the question No.A formulated in Tax Appeal No.113 of 2023, accordingly stands answered against the revenue.

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28. Thus, the Tax Appeal No.640 of 2022 is ***allowed***. The impugned order passed by the ITAR is quashed and set aside. Tax Appeal No.113 of 2023 is ***dismissed***. Registry to place a copy of this judgment in the connected Tax Appeal.

Sd/- .
(A. S. SUPEHIA, J)

Sd/- .
(PRANAV TRIVEDI,J)

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*Bhavesh-[PPS]**