

आयकर अपीलिय अधिकरण, मुंबई “ए” खंडपीठ में  
Income-tax Appellate Tribunal -“A”Bench Mumbai  
सर्वश्री राजेन्द्र,लेखा सदस्य एवं सी. एन. प्रसाद, न्यायिक सदस्य  
Before S/Sh.Rajendra,Accountant Member and C. N. Prasad,Judicial Member  
आयकर अपील सं./ITA/7825/Mum/2004,निर्धारण वर्ष /Assessment Year:1999-2000  
आयकर अपील सं./ITA/6905/Mum/2006 ,निर्धारण वर्ष /Assessment Year:1999-2000

Aegis Logistics Limited 403, Peninsula Chambers, Morarjee Mills Compound,G.K. Marg, Lower Parel(W) Mumbai-400 013. PAN:AAACA 3302 N	Vs.	ACIT, Circle-1(1) Mumbai.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A./8372/Mum/2004 ,निर्धारण वर्ष /Assessment Year:1999-2000

ACIT, Circle-1(1) Mumbai.	Vs.	Aegis Logistics Limited Mumbai-400013
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

राजस्व की ओर से / **Revenue by:** Shri S.K. Mishra-DR

अपीलार्थी की ओर से / **Assessee by:** Shri Percy Pardiwala/Ms. Vasanti Patel

सुनवाई की तारीख / **Date of Hearing:** 09/02/2017

घोषणा की तारीख / **Date of Pronouncement:**10/03/2017

**लेखा सदस्य, राजेन्द्र के अनुसार/ PER Rajendra A.M.-**

Challenging the order dated 16.6.2004 of the CIT(A)-I,Mumbai the assessee and the Assessing Officer(AO)have filed cross appeals for the year under consideration.The assessee has also filed against the penalty imposed u/s.271(1)(c) for the year under appeal.We will be deciding all the appeals by single common order.Assessee-company,engaged in business of manufacturing of chemicals,filed its return of income,on 31.12.1999,declaring total income of Rs.5.97crores.The AO completed assessment u/s.143(3) of the Act on 28.3.2002 determin-ing its income at Rs.13.93crores.

During the course of hearing before us the Authorised Representative (AR) stated that the assessee was not interested in pursuing Grounds No1.a, 1.c, 1.d and 1.e. Hence,same stand dismissed, as not pressed.

**ITA/7825/Mum/2004:**

**2.**First Ground of appeal(GOA),raised by the assessee,is about levy of capital gain tax on sale of its petrochemical division at Vapi.During the assessment proceedings,the AO found that the assessee had entered into a slump sale agreement, dated 15.04.1998 with Perstorp Aegis Chemiclas Pvt. Ltd. for transferring its entire industrial undertaking at Vapi, including land,building, plant etc. as well as its rights and obligations with Lloyds Finance Ltd. (LFL), as a going concern,for a consideration of Rs.26.10 crores,that the agreement however,

provided that there should be a guaranteed working capital of Rs.2.59 crores as part of purchase consideration, that as per the balance sheet as on 31.08.1998 net working capital was (-) Rs.5.25 crores. Considering the above, the AO held that the then net consideration received by the assessee as on 31.08.1998 was Rs.20.85 crores (Rs.26.10cr- Rs.5.25 crores).

Regarding transfer/sale of industrial undertaking, it was contended before AO that no capital gain was chargeable to tax, that cost of acquisition and improvement of capital assets could not be ascertained. However, without prejudice it furnished the working of Long Term Capital Gain (LTCG) along with the return of income. Considering the detail furnished by the assessee, the AO observed that it had taken the cost of different assets separately, that the value of land and WDV of Plant & Machinery along with the building had been indexed, that there was no force in the argument of the assessee that cost of acquisition /improvement was not ascertainable, that from the details available on record it was clear that the undertaking comprised of assets of tangible nature, that the cost of land, building, Plant & Machinery was ascertainable, that cost of acquisition with regard to right to manufacture and sale of products and to utilise brand name etc. was to be taken at Rs.Nil., tax was exigible to the gains arising on transfer of petrochem unit. However, he adopted the value of land (by indexation) for computing capital gains. With regard to cost of acquisition of plant, machinery and building (by indexing the WDV) he held that same was not acceptable. He adopted WDV without indexation as cost of acquisition of tangible assets except the land. Finally, he computed LTCG at Rs.7.21 crores as against the LTCL of Rs.29.41 crores claimed by the assessee.

**2.1.** Aggrieved by the order of the AO the assessee preferred an appeal before the FAA. Before him, it made elaborate submissions and relied upon several case laws. To verify the facts of the case the FAA called for the case records of the assessee for perusal.

After considering the available material, he held that the assessee had made a note under the head capital gains, that the assessee itself had attributed cost of acquisition to various assets after considering the indexation for the cost of acquisition of land, plant, machinery and building, that for lease hold land, furniture and fixtures, type-writers and office equipments, indexation to cost of acquisition was not applied, that the business as a going concern is a capital asset, that if it was transferred as such, same was liable for capital gains tax. He referred to the case of Syndicate Bank Ltd.(155ITR681); Evans Frazer & Co.Ltd.(137ITR 493) and referred to provisions of section 50B of the Act. He held that the said section had been introduced w.e.f. 1.4.2000, that the principles incorporated in the section was based on judge made law, that they were applicable for the year under consideration also, that sale of

petro-chemical division at Vapi would fall under the category of slump sale of a going concern, that the transaction constituted a sale of capital asset. The FAA referred to principle of networth of undertaking/division of a going concern and held that networth was to be considered as cost of acquisition of a going concern for the purpose of section 48 and 49 of the Act. He further held that concept of networth was in existence in earlier years and was approved by the Courts, that if the theory of networth was applied for the purpose of cost of acquisition to work out capital gains that would not mean that the provisions of section 50 B had been applied, that without invoking the said provisions the concept of net worth could be used for working out the taxable capital gain, that the undertaking in question fell within the definition of long term capital asset, that it was a case of slump sale, that capital gains chargeable as the undertaking was an long term capital asset. He directed the AO to obtain the working of networth and to treat the same as cost of acquisition for working out LTCG. He further directed that no indexation was to be allowed for any asset on individual basis. In short, the AO was directed to re-calculate the LTCG after considering net worth as cost of acquisition.

**2.2.** Before us, the AR stated that the FAA had held that net-worth was to be considered the cost of acquisition, that he had applied section 50B of the Act for all practical purposes, that the provisions of section 50B were not applicable to the facts of the case, that the amendment to the section were introduced from the AY.2000-01, that cost of acquisition was not determinable, that no LTCG had arisen. He relied upon the cases of PNB Finance (307ITR75), Bharat Bijalee (10 taxmann.com.253). The DR supported the order of the FAA.

**2.3.** We have heard the rival submissions and perused the material before us. We find that the assessee had sold its Petro division at Vapi during the year under consideration as a going concern, that the plant, machinery, building, plot of land leased land along with the intangibles were sold for Rs. 26.20 crores, that as per the condition of the agreement the minimum net worth of the assessee had to be at Rs. 2.59 crores as on the date of transfer, that the net value was Rs. (-)5.29 crores, that the final sale consideration was Rs. 20.34 crores, that the assessee claimed that value of leased land and other tangibles were not ascertainable, that for the other assets it had adopted WDV on indexation basis, that the AO did not agree with the claim made by the assessee, that he held that the assessee was to be taxed on long-term capital gain of Rs. 7.12 crores as against the loss of Rs. 26.39 crores, that the FAA held that assessee had sold the unit as a going concern, that the provisions of section 50 B were applicable from the

next assessment year, that theory of networth was applicable for the purpose of determining the cost of acquisition and to work out capital gains, that the sold undertaking within the definition of long term capital asset, that he directed the AO to obtain the working of net worth and to treat the same as cost of acquisition for working out LTCG, that he further directed the AO not to be allow indexation for any asset on individual basis.

No authority is required to state that provisions of section 50B of the Act are applicable from the AY.2000-01 and that it is a charging section. As per the established principles of taxation jurisprudence any charging section is not retrospective until and unless there is a specific mention in the Act. Generally, the legislature would not tax the assessee from an earlier date. There is nothing in the explanatory notes or the memorandum to prove that the provisions of section 50B were to be applied for the year under consideration or the earlier years. The FAA had practically applied that section, even though he held that the transaction in question was slump sale. Once the undertaking was sold as a going concern in the AY.1999-2000, there was no justification on part of the departmental authorities to tax it under section 50B of the Act. It is also a fact that assets like leased land along with the intangible assets were not assigned any value by the assessee and the AO and the FAA had admitted that their value was not ascertainable. It is also to be remembered that the assessee had computed the capital gains as an alternative only- the first claim of the assessee was that the transaction being a slump sale was out of taxation provisions. The FAA and the AO had calculated the alleged capital gain in a particular manner. The assessee had given alternative computation of capital loss to be carried forward to the extent of Rs. <sup>20.51</sup> crores. The FAA has not dealt with the issue.

Here we would like to refer to the case of PNB Finances Ltd. (supra). Facts of the case were that The Punjab National Bank Ltd., set up in 1895, was nationalized under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. During the AY.1970-71, it received a compensation of Rs. 10.20 crores. This was calculated on the basis of capitalisation of the last 5 years' profits. The assessee had to compute the capital gains under section 48 of the Act, by deducting from the sale consideration the cost of acquisition and increased by the cost of improvement and expenses incurred in connection with the transfer. Under section 55 (2)(i), as it then stood, the assessee could index the cost of acquisition by applying the cost inflation index which became the indexed cost of acquisition. The assessee submitted that it could not exercise its option under section 55(2)(i), as the cost of acquisition was not computable and in the alternative submitted that the fair market value of the undertaking as on 1.04.1954, had to be taken. It contended that it had suffered a capital loss of Rs. 7.02 crores.

The AO computed the capital gains at Rs.1,65,34,709 on the basis of capitalisation of the last five years' profits. The FAA, on appeal, held that the capital gains could not be computed as it was not possible to determine the cost of acquisition and the cost of improvement u/s.48. The Appellate Tribunal, however, restored the figure of capital gains as arrived at by the AO, since the assessee had exercised its option for substitution of the fair market value of the undertaking as on 1.04.1954. On a reference, the High Court upheld the decision of the Appellate Tribunal. Reversing the decision of the High Court, the Hon'ble Supreme Court held as under:

*..... that this was a case where the computation provisions could not apply. The banking undertaking, inter alia, included intangible assets like goodwill, tenancy rights, man power and value of banking licence. It was not possible to earmark the compensation received by the assessee item wise. Therefore, it was not possible to compute the capital gains and the sum of Rs.10.20 crores was not taxable under section 45 of the Act."*

*"17. As regards applicability of section 45 is concerned, three tests are required to be applied. In this case, section 45 applies. There is no dispute on that point. The first test is that the charging section and the computation provisions are inextricably linked. The charging section and the computation provisions together constituted an integrated code. Therefore, where the computation provisions cannot apply, it is evident that such a case was not intended to fall within the charging section, which, in the present case, is section 45. That section contemplates that any surplus accruing on transfer of capital assets is chargeable to tax in the previous year in which transfer took place. In this case, transfer took place on July 18, 1969. The second test which needs to be applied is the test of allocation/attribution. This test is spelt out in the judgment of this court in Mugneeram Bangur and Co. (Land Department) [1965] 57 ITR 299. This test applies to a slump transaction. The object behind this test is to find out whether the slump price was capable of being attributable to individual assets, which is also known as item-wise earmarking. The third test is that there is a conceptual difference between an undertaking and its components. Plant, machinery and dead stock are individual items of an undertaking. A business undertaking can consist of not only tangible items but also intangible items like, goodwill, man power, tenancy rights and value of banking licence. However, the cost of such items (intangibles) is not determinable. In the case of CIT v. B. C. Srinivasa Setty reported in [1981] 128 ITR 294, this court held that section 45 charges the profits or gains arising from the transfer of a capital asset to Income-tax. In other words, it charges surplus which arises on the transfer of a capital asset in terms of appreciation of capital value of that asset. In the said judgment, this court held that the "asset" must be one which falls within the contemplation of section 45. It is further held that, the charging section and the computation provisions together constitute an integrated code and when in a case the computation provisions cannot apply, such a case would not fall within section 45. In the present case, the banking undertaking, inter alia, included intangible assets like, goodwill, tenancy rights, man power and value of banking licence. On the facts, we find that item-wise earmarking was not possible. On the facts, we find that the compensation (sale consideration) of Rs. 10.20 crores was not allocable item-wise as was the case in Artex Manufacturing Co. [1997] 227 ITR 260.*

*18. For the aforesaid reasons, we hold that on the facts and circumstances of this case, which concerns the assessment year 1970-71, it was not possible to compute capital gains and, therefore, the said amount of Rs.10.20 crores was not taxable under section 45 of the 1961 Act. Accordingly, the impugned judgment is set aside.*

*19. Before concluding, we may state that in this case, section 55(2)(i) did not operationalize. Under section 55(2), the fair market value as on January 1, 1954, could have substituted the*

*figure of cost of acquisition provided the figures of both " cost of acquisition" and " fair market value as on January 1, 1954" were ascertainable. The letter dated September 30, 1970, does not indicate the choice. Even the working done by the Assessing Officer based on capitalization of the last 5 years' profits would give the enterprise value of the undertaking and not the cost of acquisition. Hence, section 55(2) was not applicable.*

Considering the above, we decide ground.1.b.in favour of the assessee.

**3.**Ground Nos.2 and 3 are with regard to contribution to provident fund/ESIC.During the course of assessment proceedings,the AO found that contribution to PF were delayed on several occasions from the due date prescribed. Accordingly he made a disallowance of Rs. 7.76 lakhs on the ground that payments were not made within the due date, invoking the provisions of section 43B r.w.s 36(1)(iv) of the Act.

**3.1.**Before the FAA,during the Appellate proceedings, it was stated that payments were made within the grace period permitted and/or during the relevant previous year. After considering the submission of the assessee, the FAA held that amounts of Rs.59,140/- and Rs.81,383/- were beyond the grace period, that the AO was justified in disallowing the same.He directed the AO to allow the balance amounts.Similarly, he held that contribution/payment to ESIC, were made after the due date, that there was no provision for grace period for making contribution to ESIC, he upheld the order of the AO.

**3.2.**Before us, the AR relied upon the cases of Ghatge Patil Transports Ltd. (368 ITR 749) and Hindustan Organics Chemicals Ltd.(366 ITR 1). The DR left issue to the discretion of the Bench.

We find that assessee had made payment of provident fund within the grace period and payment on account of contribution to ESIC was made before the due date of filing of return of income.We find that in the above referred two judgments,the Hon'ble Bombay High Court has held that payments made towards PF/ESIC before the due date of filing of returns as per section 139(1) has to be treated as payment made within the time. Therefore, we decide both the grounds of appeal in favour of the assessee.

**4.**Fourth Ground of appeal is about disallowance of professional charges of Rs.3.46 lakhs. During the assessment proceedings,the AO found that the assessee had debited Rs.3,46,500/- to the P&L A/c.under the head professional charges,that the expenses pertained to sale of Vapi Unit.He held that same was not an allowable expenditure and the item was to be considered for computation of capital gains.

**4.1.** Before the FAA, the assessee argued that it had paid professional fees, that the expenditure was incurred for business as a whole and was an allowable deduction. After considering available material the FAA held that expenditure in question was incurred for slump sale, that the AO had rightly held it to be attributable to transfer of capital asset in the nature of business undertaking that was transferred as a going concern, that it was a capital expenditure incurred for transfer of a capital asset. Alternatively, he held that expenditure was also disallowable u/s. 14A of the Act, if capital gains were held as exempt.

**4.2.** Before us, the assessee made the same submission that were advanced before FAA and referred to pg. 1-7 of the PB in that regard. He placed reliance on Bombay Dyeing & Mfg. Co. Ltd. (219 ITR 521). The DR supported the order of the FAA.

We find that the assessee had paid professional fee with regard to slump sale of the Vapi unit. In our opinion expenditure incurred as professional fee for sale of going concern has to be allowed as business expenditure. We would like to rely upon the judgment of Bombay Dyeing & Mfg. Co. Ltd. (supra). In that matter a company was amalgamated with the assessee. In that connection certain expenses were incurred by it towards professional charges paid to a firm of solicitors. In the assessment proceedings, deduction of the said amount was claimed as revenue expenditure. The AO and the FAA rejected the claim, but the Tribunal allowed the claim made by the assessee. Matter travelled up to the Hon'ble Apex court and dismissing the appeal filed by the department, it held that the expenditure incurred towards professional charges of the solicitors' firm for the services rendered in connection with the amalgamation was in the course of carrying on of the assessee's business and, therefore, deductible as a revenue expenditure. In the case under consideration expenses were incurred for selling the unit as going concern. The payment is not in doubt and expenditure is relatable to business of the assessee. Therefore, respectfully following the above judgment of the Apex Court, we allow fourth Ground of appeal.

**5.** Next Ground of appeal is disallowance of miscellaneous expenditure of Rs. 5.24 lakhs being 5% of the total expenditure of Rs. 104.92 lakhs. During the assessment proceedings, the AO held that miscellaneous expenses of Rs. 1.04 crores were not fully verifiable on an estimate basis, he disallowed (5%) of the claim i.e. Rs. 5,24,600/-. The FAA, in the appellate proceedings, upheld the order of the AO.

**5.1.** Before us, the AR stated that in the earlier AY i.e. 1998-99 the then FAA, had deleted the identical disallowance, that the Tribunal had upheld the order of the FAA. We are reproducing the order of the Tribunal (1893/Ahd/2011-AY.98-99, dt. 24.4.2006) and it reads as follows:-

*“ We have heard the parties and perused the material on record..... The AO, if dissatisfied as to same or requiring any further clarification or evidence in support ought to have required the assessee to do so. Instead, he draws a summary inference again, based on presumptions. We, therefore, see no reason for any interference with the impugned order and uphold the same on this ground.”*

Respectfully, following the order of the Tribunal in the earlier AY, we decide Ground No.5 in favour of the assessee .

**6.** Last Ground of appeal is about deduction u/s. 80HHC of the Act. During the assessment proceedings, the AO found that the assessee had claimed deduction of Rs. 84.96 lakhs u/s. 80HHC, that for the purpose of the said claim the profit of business had been reduced by 90% of the lease rental (Rs. 1.60 crores), that the income shown under the head other income in Schedule-13 contained items such as brokerage, interest on advances, deposit with banks, dividend, miscellaneous receipts, sales tax set off and excess provision written off. He held that the nature of such receipts indicated that all these fell within the ambit of clause (baa) of the Explanation, that 90% of the total income of Rs. 364.90 lakhs had to be reduced from profit of business. He also observed that for the purpose of deduction u/s. 80HHC assessee had taken total turnover of Rs. 63.58 crores and that it did not include sales tax collected by it, amounting to Rs. 45.39 lakhs. He held that sales tax collected was part of total turnover and the deduction had to be recomputed accordingly.

The AO further observed that the assessee had credited export benefit of Rs. 30.25 lakhs to the profit and loss account, that for the purpose of deduction u/s. 80HHC 90% of the said receipt had to be reduced from the profit of the business, that 90% of the receipt in the ratio of export turnover to total turnover was to be allowed.

**6.1.** During the appellate proceedings, before the FAA, the assessee argued that the AO had wrongly reduced 90% of Rs. 364.90 lakhs as against the Rs. 160.50 lakhs, as determined by the assessee, that items such as sales tax set off, dividends, miscellaneous receipts, excessive provision written off would form part of business profit for claiming deduction u/s. 80HHC of the Act, that such receipts were not in the nature of commission, interest, rent, charges or any other receipt of similar nature, that the assessee had received a sum of Rs. 129.36 lakhs by way of interest on loans and advances, deposits with bank, that the assessee had incurred an

expenditure of Rs.441.09 lakhs by way of interest,that the net expenditure stood at Rs. 319.73 lakhs under the head interest.

After considering the submission of the assessee and the assessment order,the FAA held that interest on loan and advances,deposits with bank was not income from business, that same was income from other sources,that the AO had rightly reduced 90% of the interest of Rs. 129.36 lakhs from the profits of assessee for the purpose of working out deduction u/s. 80HHC,that no netting off could be allowed, that the source of debit and credit of interest was not same, that there was difference of opinion about netting off, that the gross interest received by the assessee had to be considered for its rejection to the extent of 90% of the amount from the profit of business to work out the deduction u/s.80HHC.About the lease rentals,the FAA held that the assessee itself had reduced 90% of it from the profit of the business, that no further reduction was required to be made by the AO so far as the amount of Rs. 160.50 lakhs was concerned. With regard to trade investment of Rs. 0.26 lakhs,the FAA held that the income was to be assessed under the head income from other sources, that it had rightly been reduced by the AO from the profit of business of the assessee to the extent of 90% of the amount in question for working out the deduction u/s.80HHC.

Discussing the issue of sales tax set off of Rs. 39.53 lakhs,he held that the amount was received by the assessee as a result of rebate in sales tax that had already been paid by it on purchases of raw materials stores and spares, that sales tax refund was received by the assessee from the sales tax Department for which payment had been already made by the assessee while purchasing the goods from the sellers, that it was an income from business as per the provisions of section 41(1), that same was the part of profit of business and had to be included in the profit of business and 90% thereof is not to be excluded from the profit of the business for working out deduction u/s.80HHC.Dealing with the issue of excess provision written back,amounting to Rs. 19.98 lakhs, the FAA held that same was income as per the provisions of section 41(1) of the Act,that it was part and parcel of business profit and was not to be excluded from the profit of business in working out the deduction u/s.80HHC.

**6.2.**Before us,the AR stated that there was no mistake in the computation made by the assessee for claiming deduction u/s.80HHC of the Act,that the AO had FAA had wrongly excluded or included certain items for deduction purposes.He relied upon the cases of ACG

Associated Capsules Pvt. Ltd.(343 ITR 89)and Punjab Stainless steel Industries Ltd.(364 ITR 144).The DR supported the order of the FAA.

**6.3.**We have heard the rival submissions and perused the material before us.We find that there are three issues in the appeal filed by the assessee i.e.netting of interest income, treatment to be given to dividend income and sale of scrap.In our opinion,the issue of netting of interest stands resolved by the Hon'ble Apex Court in the case of ACG Associated Capsules Pvt. Ltd.(supra)wherein the court has held as under :

*“Under clause (1) of Explanation (baa) to section 80HHC of the Act, ninety per cent. of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in any such profits are to be deducted from the profits of the business as computed under the head “Profits and gains of business or profession”. The expression “included any such profits” would mean only such receipts by way of brokerage, commission, interest, rent, charges or any other receipt which are included in the profits of the business as computed under the head “Profits and gains of business or profession”. Therefore, if any quantum of the receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature is allowed as expenses under sections 30 to 44D of the Act and is not included in the profits of business as computed under the head “Profits and gains of business or profession”, ninety per cent. of such quantum of receipts cannot be reduced under clause (1) of Explanation (baa) from the profits of the business. In other words, only ninety per cent. of the net amount of any receipt of the nature mentioned in clause (1) which is actually included in the profits of the assessee is to be deducted from the profits of the assessee for determining “profits of the business” of the assessee under Explanation (baa) to section 80HHC .*

*Explanation (baa) has to be construed on its own language and as per the plain natural meaning of the words used in it, the words “receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits” will not only refer to the nature of receipts but also the quantum of receipts included in the profits of the business as computed under the head “Profits and gains of business or profession” referred to in the first part of Explanation (baa). Accordingly, if any quantum of any receipt of the nature mentioned in clause (1) of Explanation (baa) has not been included in the profits of business of an assessee as computed under the head “Profits and gains of business or profession”, ninety per cent. of such quantum of the receipt cannot be deducted under Explanation (baa) to section 80HHC .*

*..... that ninety per cent. of not the gross rent or gross interest but only the net interest or net rent, which had been included in the profits of business of the assessee as computed under the head “Profits and gains of business or profession”, was to be deducted under clause (1) of Explanation (baa) to section 80HHC for determining the profits of the business.*

With regard to sale of scrape for the purpose of total turnover,we would like to refer to the case of Punjab Stainless steel Industries Ltd.(supra)and it reads as follow :

*“Normally, the term “turnover” would show the sales effected by a business unit. In the course of the business, in addition to the normal sales, the business unit may also sell some other things. In ordinary accounting parlance, as approved by all accountants and auditors, the term “sales”, when reflected in the profit and loss account, would indicate sale proceeds from sale of the articles or things in which the business unit is dealing. When other things like old furniture or a capital asset, in which the business unit is not dealing are sold, the sale proceeds therefrom would not be included in “sales” but would be shown separately. Sale proceeds from scrap may either be shown separately in the profit and loss account or may be deducted from the amount spent by the manufacturing unit on the raw material from which goods are*

*manufactured. The raw material, which is not capable of being used for manufacturing the goods will have to be either sold as scrap or might have to be re-cycled or disposed of to someone who would re-cycle the scrap. When such scrap is sold, the sale proceeds of the scrap cannot be included in the term "turnover". Therefore, the proceeds of sale of such scrap would not be included in "sales" in the profit and loss account of the assessee.*

*The situation would be different in the case of the buyer, who purchases scrap from the assessee and sells it to someone else. The sale proceeds for such a buyer would be treated as "turnover" for the simple reason that the buyer of the scrap is a person who is primarily dealing in scrap.*

*When a recognised body of accountants, such as the Institute of Chartered Accountants of India, after due deliberation and consideration publishes certain material for its members, one can rely upon it. The meaning given by the Institute clearly denotes that in normal accounting parlance the word "turnover" would mean "total sales". The sales would definitely not include scrap which is either to be deducted from the cost of raw material or is to be shown separately under a different head. There is no reason not to accept the meaning of the term "turnover" given by a body of accountants, having statutory recognition.*

*If all accountants, auditors, businessmen, manufacturers normally interpret the term "turnover" as sale proceeds of the commodity in which the business unit is dealing, there is no reason to take a different view.*

*The intention behind the enactment of section 80HHC of the Income-tax Act, 1961, was to encourage businessmen, traders and manufacturers to increase exports so as to bring more foreign exchange in our country. Once the Government decides to give some benefit to someone who helps the nation in bringing foreign exchange, the Department should also make all possible efforts to encourage such traders or manufacturers by giving such business units more benefits as contemplated under the provisions of law.*

*..... as the assessee was not primarily dealing in scrap but was a manufacturer of stainless steel utensils, only the sale proceeds from sale of utensils would be treated as its "turnover". The view expressed by the High Court was in conformity with the normal accounting practice followed by traders, including the assessee and it was justified in coming to the conclusion that the proceeds generated from the sale of scrap would not be included in the "total turnover".*

As far as dividend income is concerned, we would like to mention that the assessee not shown the income in question under the head income from business or profession. So, there was no justification for considering the same for deduction u/s. 80HHC of the Act. Considering the above, sixth ground is decided in favour of the assessee.

#### **ITA/8372/Mum/2004:**

7. First ground of appeal, raised by the AO, is about deleting the disallowance of Rs. 6.35 lakhs under the head provident fund contribution. While dealing with the second and third ground of appeal, filed by the assessee, we have narrated the facts. The AO had rejected the claim made by the assessee, as he was of the opinion that contribution to PF was made after due date.

7.1. We find that the FAA has given a categorical finding of fact that contribution was paid before the due date of filing of returns under section 139 (1) of the Act. Respectfully following the judgments of the honorable jurisdictional High Court in the cases of Ghatge

Patil Transports Ltd. (supra) and Hindustan Organics Chemicals Ltd.(supra), we dismiss the first ground of appeal.

8.Next ground pertains to exclusion of sales tax, amounting to Rs. 45.38 lakhs from the total turnover for the purpose of calculating deduction under section 80HHC of the Act. While dealing with the ground number six of the assessee,we had narrated the facts regarding to computation of deduction under section 80 HHC.We find that the issue stands covered by the judgment of the Hon'ble Bombay High Court in the case of Sudarshan Chemicals and Industries Ltd.(245ITR 769).We would like to reproduce the relevant portion of the judgment and it reads as under:

*“Under section 80HHC(1) of the Income-tax Act, 1961, it is, inter alia, provided that where an assessee is engaged in the business of export of any goods, there shall be allowed in computing the total income of the assessee, a deduction of the profits derived by the assessee from the export of such goods. In other words, in computing the total income of such an assessee, profits derived by the assessee from the exports are deductible. The above expression, namely, "profits derived from exports" also finds place in section 80HHC(3)(a) . It says that where the export is of goods, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business. In fact, the earlier section 80HHC(3) consisted of two parts, namely, where the assessee carried on a business as 100 per cent. exporter and secondly where the assessee carried on a composite business. In the latter case, it was provided that the profits derived from exports shall be the amount which bears to the profits of the business as computed under the head "Profits and gains of business", the same proportion as the export turnover bears to the total turnover. The emphasis is on the words "profits derived from the exports". Therefore, weightage must be given to such profits. Such profits cannot be reduced artificially by including statutory levies in the denominator, namely, total turnover. Therefore, the turnover should be restricted to such receipts which have an element of profit in it. It is only the actual sale price which is relevant. Anything charged by the assessee by way of excise duty and sales tax cannot be taken into account as they do not have any element of profit. Even, according to accounting principles, such levies do not form part of the profit and loss account. In fact, they are shown as liability in the balance-sheet. In the circumstances, the above two items cannot be included in the total turnover. Section 80HHC is a separate code by itself. Hence, the general definition of the word turnover or the case law dealing with the said definition under the Sales Tax Act which is a State levy, cannot be imported into section 80HHC of the Act.”*

Respectfully following the above judgment, we hold that the order of the FAA does not need any interference from our side. Ground number two is decided against the AO.

9.Ground No.3 is general in nature.The AO has not mentioned as to which were the receipts from the other sources that were directed to be excluded /included for working out deduction u/s.80HHC.Hence we dismiss the third ground.

**ITA/6905/Mum/2006**

**10.**The effective Ground of appeal, filed by the assessee is about levy of penalty u/s.271(1)(c) of the Act. While computing the assessment, the AO issued a notice as to why penalty for inaccurate particulars and concealing the income should not be levied. After considering the submission of the assessee, the AO, vide his order dated 28.9.2006 levied a penalty of Rs. 11.39 lakhs. In his penalty order, the AO mentioned that the submission of the assessee was not acceptable with regard to professional charges (Rs.3.46 lakhs) and 80HHC deduction specially regarding the interest income (Rs.29.07 lakhs), that the professional charges were relatable to capital receipt, that same were claimed as revenue expenditure, that the assessee had failed to justify the claim regarding lease rent for computing deduction u/s. 80 HHC. Finally, he levied the penalty of Rs. 11.39 lakhs, as stated earlier.

**10.1.** Aggrieved by the order of AO, the assessee preferred an appeal before the FAA. Before him it was argued that the assessee had paid professional fee of Rs.3.46 lakhs for its business purposes, that the expenditure pertained to sale of Vapi Unit. It relied upon the case of Bombay Dyeing & Manufacturing Co.Ltd. (219ITR521). With regard to reduction in claim of deduction, the assessee argued that addition was result of difference of opinion. It relied upon the cases of Ajaib Singh (253ITR630); Premdas (248ITR234). The FAA held that the then FAA had confirmed the additions in quantum appeal, that there was no debatable issue, that the FAA was justified in levying the penalty.

**10.2.** Before us, the AR argued that all the details were made available to AO during the assessment proceedings, that the FAA had confirmed the penalty order because the same were upheld by the then FAA, that both the additions were legal in nature and were allowable, that making a claim would not amount to furnishing inaccurate particulars/concealing the income. The DR stated that matter could be decided on merits.

**10.3.** We have heard the rival submissions and perused the material on record. We find that penalty was levied for two additions made during the assessment proceedings that were confirmed by the FAA. As per the settled principles of tax jurisprudence penalty for concealment cannot be levied in a routine manner or just because certain additions are made during the quantum proceedings. Penalty proceedings are totally different from assessment proceedings. Claims made by the assesseees may be disallowed, but it would and should not result in concealment penalty. In the case under consideration, all the facts were available on record. There was difference of opinion between AO and the assessee with regard to the treatment to be given to the disputed additions. The assessee had treated the legal expenditure

as revenue expenditure, whereas the AO had termed it as capital expenditure. In the earlier part of our order, we have deliberated upon the deduction to be allowed u/s. 80HHC. We have held that the computation made by the assessee under various sub sections/proviso to section 80HHC were as per law. We have upheld the order of the FAA where he has reversed the order of the AO. The addition sustained by the FAA have also been deleted by us. Considering the above and relying upon the case of Reliance Petroproducts Pvt.Ltd.(322 ITR 158), we decide the effective Ground of appeal in favour of the assessee.

As a result, appeal filed by the AO is dismissed. Quantum appeal (ITA/7825/Mum/2004) of the assessee is partly allowed and the Penalty appeal stands allowed.

फलतः निर्धारिती अधिकारी की अपील नामंजूर की जाती है. निर्धारिती की मुख्य अपील (ITA/7825/Mum/2004) अंशतः मंजूर की जाती है और जुर्माने की अपील मंजूर की जाती है.

Order pronounced in the open court on 10<sup>th</sup> March, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 10 मार्च, 2017 को की गई।

Sd/-

Sd/-

(सी. एन. प्रसाद / C.N.Prasad )

(राजेन्द्र / Rajendra)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक/Dated : 10.03.2017.

Jv.Sr.PS.

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

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त,
- 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR "A " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया.मुंबई
- 6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.