

**आयकर अपीलिय अधिकरण "K" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI**

श्री शक्तिजीत डे, न्यायिक सदस्य एवं श्री एन के प्रधान, लेखा सदस्य के समक्ष ।

BEFORE SRI SAKTIJIT DEY, JM AND SRI NK PRADHAN, AM

**आयकर अपील सं./ ITA No. 2548/Mum/2011**

(निर्धारण वर्ष / Assessment Year 2002-03)

GlaxoSmithKline Pharmaceuticals Limited Dr. Annie Besant Road, Worli Mumbai-400 030	बनाम/ Vs.	The Dy. Commissioner of Income-tax, Range 6(3), Aayakar Bhavan, M.K. Marg, Mumbai-400 020
<b>(अपीलार्थी / Appellant)</b>		<b>(प्रत्यर्थी/ Respondent)</b>
<b>स्थायी लेखा सं./PAN No. AAACG4414B</b>		

**आयकर अपील सं./ ITA Nos. 3608 & 2261/Mum/2011**

(निर्धारण वर्ष / Assessment Years 2002-03)

The Dy. Commissioner of Income-tax, Range 6(3), Aayakar Bhavan, M.K. Marg, Mumbai-400 020	बनाम/ Vs.	GlaxoSmithKline Pharmaceuticals Limited Dr. Annie Besant Road, Worli Mumbai-400 030
<b>(अपीलार्थी / Appellant)</b>		<b>(प्रत्यर्थी/ Respondent)</b>

अपीलार्थी की ओर से / <b>Appellant by</b>	:	S/Shri Rajan R. Vora, Nikhil Tiwari, ARs
प्रत्यर्थी की ओर से / <b>Respondent by</b>	:	Shri Anand Mohan, CIT DR

सुनवाई की तारीख / <b>Date of hearing:</b>	26.11.2019
घोषणा की तारीख / <b>Date of pronouncement:</b>	21.02.2020

**आदेश / ORDER**

**शक्तिजीत डे, न्यायिक सदस्य/  
PER SAKTIJIT DEY, JM:**

This bunch consists of three appeals, one by the assessee and two by the Revenue, arising out of two separate orders of learned Commissioner of Income Tax (Appeals)-15 [in short Commissioner (Appeals)] pertaining to Assessment Year 2002-03.

**ITA No. 2548/Mum/2011 appeal by the assessee**

2. At the outset, Shri Rajan Vora, the learned authorized representative, on the instruction of the assessee, expressed his intention not to press ground Nos. 1, 3 and the additional ground. In view of the aforesaid submission of learned authorized representative, ground Nos. 1, 3 and the additional ground raised by the assessee are dismissed as not pressed.

3. In ground No.2, the assessee has challenged the decision of the Assessing Officer and learned Commissioner (Appeals) in including the amount of ₹97,57,000/- received from sale of scrap in the total turnover for computing the deduction under section 80HHC of the Act. Briefly, the facts are that assessee, a resident company, is engaged in the business of manufacturer of pharmaceuticals, bulk drugs and chemicals. For the assessment year under dispute assessee filed its return of income on 31<sup>st</sup> October, 2002 declaring total income of ₹102,48,80,810/-. In course of assessment proceedings, the



Assessing Officer while examining assessee's claim of deduction under section 80HHC of the Act noticed that the assessee has excluded the amount of ₹97.57 lacs which represent the amount received from the sale of scrap from the total turnover while computing the deduction under section 80HHC of the Act. Referring to clause (ba) of explanation below section 80HHC (4A), the Assessing Officer opined that amount received towards sale of scrap is not one of the items which can be excluded from the total turnover while computing deduction under section 80HHC of the Act. Thus, ultimately rejecting explanation of the assessee, the Assessing Officer included the amount of ₹97.57 lacs received from sale of scrap in the total turnover for computing the deduction under section 80HHC of the Act. Though, the assessee contested the aforesaid action of the Assessing Officer before learned Commissioner (Appeals), however, learned Commissioner (Appeals) also upheld the action of the Assessing Officer.

4. The learned authorized representative submitted, now the issue is settled in favour of the assessee by virtue of the decision of the Hon'ble Supreme Court in the case of CIT vs. Punjab Stainless Steel Industry (2014) 364 ITR 144 (SC), wherein, it has been held that income from the sale of scrap cannot be included in total turnover. He submitted, though, while deciding identical issue in assessee's own case in Assessment Years 1998-99 to 2000-01, the Tribunal has held that the income received from the sale of scrap is to be included in the total turnover for computing deduction under section



80HHC of the Act, however, at the relevant point of time the Tribunal did not have the benefit of Hon'ble Supreme Court's decision in the case of CIT vs. Punjab Stainless Steel Industry (supra). Further, he submitted, deciding identical issue in assessee's own case in Assessment Year 2001-02, the Tribunal has restored the issue to the Assessing Officer for adjudicating afresh keeping in view the aforesaid decision of the Hon'ble Supreme Court. Thus, he submitted, in line with the direction of the Tribunal in the Assessment Year 2001-02, the issue may be restored back to the Assessing Officer for fresh adjudication.

5. The learned Departmental Representative did not have any objection for restoration of the issue to the Assessing Officer.

6. We have considered rival submissions and perused the materials on record. The short issue arising for consideration is, whether the income received from sale of scrap can form part of the total turnover for computing deduction under section 80HHC of the Act. Though, while deciding identical issue in assessee's own case for Assessment Years 1998-99 to 2000-01, the Tribunal has held that the income received from sale of scrap has to be included in the total turnover for computing the deduction under section 80HHC of the Act, however, subsequently the Hon'ble Supreme Court in case of CIT vs. Punjab Stainless Steel Industry (supra) has held that the income from sale of scrap cannot be included in total turnover. Keeping in view the ratio laid down by the Hon'ble Supreme Court in the aforesaid decision, the Tribunal while deciding



identical issue in assessee's own case for Assessment Year 2001-02 in ITA No. 3266/Mum/2005 dated 04.05.2018 has restored the issue to the Assessing Officer for considering afresh keeping in view the ratio laid down by the Hon'ble Supreme Court in the decision referred to above. Facts being identical, respectfully following the decision of the Tribunal in assessment year 2001-02, as referred to above, we restore the issue to the Assessing Officer for fresh adjudication with similar direction. Needless to mention, the Assessing Officer must afford reasonable opportunity of being heard to the assessee before deciding the issue.

7. In ground No. 4, assessee has challenged the decision of the Revenue authorities in holding certain income as not derived from the profits of business, hence, not eligible for deduction under section 80HHC of the Act.

8. Briefly, the facts are, during the assessment proceedings the Assessing Officer noticed that while computing the deduction under section 80HHC of the Act, the assessee has included certain items of income in the profits of business and claimed deduction under section 80HHC of the Act thereon. The details of such income are as under: -

<b><i>Nature of income</i></b>	<b><i>Rs.(lacs)</i></b>
<i>i) Recoveries/ Claims</i>	19.24
<i>ii) Accommodation Recovery from employees</i>	2.47
<i>iii) recovery-staff buses</i>	7.15
<i>iv) Manufacturing charges</i>	502.12

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<i>v) Amount received from cross charging of associate companies</i>	<i>309.18</i>
<i>vi) cash discounts received</i>	<i>39.94</i>
<i>vii) unclaimed credit balances</i>	<i>9.50</i>
<i>viii) Amount received for R &amp; D work</i>	<i>140.88</i>
<i>ix) Miscellaneous income</i>	<i>3.47</i>

9. Being of the view that aforesaid items of income do not have direct nexus with the business of the assessee, the Assessing Officer reduced 90% thereof while computing profits of business for the purpose of deduction under section 80HHC of the Act. The assessee challenged this decision of the Assessing Officer before learned Commissioner (Appeals) without any success.

10. The learned Authorized Representative (AR) submitted, while deciding identical issue in assessee's own case in Assessment Years 1998-99, 1999-00, 2000-01 and 2001-02, the Tribunal has restored the issue to the Assessing Officer for considering assessee's claim. He submitted, while giving effect to the direction of the Tribunal in these assessment years, the Assessing Officer has accepted the assessee's claim on all items of income except miscellaneous income as no breakup could be provided for the same. He submitted, in the latest order passed by the Tribunal in assessee's own case for Assessment Year 2001-02 the issue has been restored back to the Assessing Officer for considering assessee's claim in the light of the direction given by the Tribunal in earlier assessment years. Thus, he submitted, the issue may be restored back to the



Assessing Officer to consider assessee's claim regarding all items of income except miscellaneous income, which, the learned authorized representative submitted, the assessee does not want to contest.

11. The learned Departmental Representative, though, relied upon the decision of learned Commissioner (Appeals), however, he submitted, keeping in view the orders passed by the Tribunal in the preceding assessment years, the issue may be restored back to the Assessing Officer.

12. We have considered rival submissions and perused the material on record. Undisputedly, the issue raised in this ground is a recurring issue between the assessee and Revenue since the preceding assessment years. While deciding identical issue in Assessment Years 1998-99 to 2000-01, the Tribunal restored the issue to the Assessing Officer for examining assessee's claim. It is the contention of the learned AR that while giving effect to the direction of the Tribunal in these assessment years, the Assessing Officer has actually allowed assessee's claim in respect of other income except miscellaneous income. We have also noticed, while deciding identical issue in assessee's own case for Assessment Year 2001-02 in ITA No 3266/Mum/2006 dated 04.05.2018, the Tribunal following its earlier decision has restored the issue to the Assessing Officer for fresh adjudication. Facts being identical, keeping in view the decision of the Tribunal in assessee's own case in preceding assessment years, we restore the issue to the Assessing Officer for fresh adjudication with similar direction, except the miscellaneous

income of ₹3.47 lacs, which the assessee has conceded before us. If as stated by the assessee, assessee's claim has been accepted in preceding assessment years, there would be no valid reason for not accepting assessee's claim in the impugned assessment year in respect of other items of income. Ground is allowed for statistical purposes.

13. In the result, the appeal is partly allowed for statistical purposes.

**ITA No. 2261/Mum/2011 appeal by the Revenue**

14. In ground No. 1, the Revenue has challenged the deletion of disallowance made under section 14A of the Act.

15. In course of assessment proceeding, the Assessing Officer noticed that during the year under consideration, the assessee has received dividend income of ₹1,97,77,000/- which has been claimed as exempt under section 10(33) of the Act. After calling for necessary details and examining them, he observed that assessee has taken the gross income from dividend and not the net income. Accordingly, he disallowed an amount of ₹19,22,281/- towards proportionate interest attributable to dividend income and further, an amount of ₹9,58,850/- being 5% of the dividend income towards administrative expenses. Thus, in total, the Assessing Officer made a disallowance of ₹28,81,131/-. The assessee contested the aforesaid disallowance before learned Commissioner (Appeals).

16. After considering the submissions of the assessee, learned Commissioner (Appeals) held that firstly, Rule 8D is not applicable to the impugned assessment year. Further, he found that major part of the investments on which the assessee has earned exempt income was made earlier. He observed, if at all, the assessee might have incurred some administrative expenditure. To take care of that, learned Commissioner (Appeals) ultimately restricted the disallowance to ₹2 lacs.

17. We have considered rival submissions and perused the materials on record. As could be seen from the materials placed on record, the investments on which the assessee has received dividend income were made long time back and not in the current year. Further, in the year under consideration, the assessee had sufficient interest free funds available with it. Therefore, no disallowance of interest expenditure can be made. It is further noticed, while deciding identical issue in assessee's own case in Assessment Year 2001-02 (supra), the Tribunal after examining the availability of fund and all other aspects has deleted disallowance of interest expenditure and further, has restricted the disallowance of administrative expenditure to 1% of the exempt income earned. Keeping in view the facts of the present case as well as the decision of the Tribunal in Assessment Year 2001-02, we hold that learned Commissioner (Appeals) was justified in restricting the disallowance to ₹ 2 lacs. Accordingly, the decision of learned Commissioner (Appeals) on the issue is upheld by dismissing the ground raised.



18. In ground No. 2, the Revenue has challenged the deletion of disallowance of depreciation on share issue expenses incurred and capitalized in earlier assessment years.

19. Briefly, the facts are, in the Assessment Year 1984-85, the assessee had claimed share issue expenses amounting to ₹62,55,639/-. Out of which the assessee has capitalized in Assessment Year 1984-85 a sum of ₹22,67,281/- and in Assessment Year 1986-87 a sum of ₹16,42,617/- and claimed depreciation thereon. In identical manner, the assessee had also claimed depreciation in the impugned assessment year. However, like in the past assessment years, the Assessing Officer disallowed assessee's claim of depreciation. When the issue came up for consideration before learned First Appellate Authority, he found that while deciding identical issue in the preceding assessment year, i.e. Assessment Year 1984-85, the Tribunal in ITA No. 3700/Bom/1989 dated 10.03.2006 has held that so much of expenditure as has been incurred by the assessee for issuing share capital attributable to acquisition of capital assets is eligible for depreciation and accordingly allowed assessee's claim of depreciation. He also noticed that while deciding the same issue in Assessment Years 1986-87 till Assessment Year 2000-01, the Tribunal has allowed assessee's claim of depreciation. Following the same, learned Commissioner (Appeals) allowed assessee's claim of depreciation.

20. We have considered rival submissions and perused the materials on record. Undisputedly, the Assessing Officer



following the orders passed by him in the preceding assessment years has disallowed assessee's claim of depreciation, however, assessee's claim of depreciation in Assessment Year 1984-85 till Assessment Year 2000-01 has been allowed by the Tribunal. Further, in the latest order passed for the Assessment Year 2001-02 in ITA No. 3266/Mum/2006 dated 04.05.2018, the Tribunal has allowed assessee's claim of depreciation. It is also relevantly observe, while deciding the appeals filed by the Revenue against the decision of the Tribunal in Assessment Years 1984-85 to 2000-01, the Hon'ble jurisdictional High Court has also upheld the decision of the Tribunal allowing assessee's claim of depreciation. In view of the aforesaid factual and legal position, we do not find any reason to interfere with the decision of learned Commissioner (Appeals) on the issue. The ground raised is dismissed.

21. In ground No.3, the Revenue has challenged the deletion of disallowance of bad debt amounting to ₹1,21,48,000/-.

22. Briefly, the facts are, during the assessment proceeding, the Assessing Officer noticing that the assessee has debited an amount of ₹8,76,89,000/- to the profit and loss account towards bad debts written off called upon the assessee to furnish the supporting details. After verifying the same, he was of the view that an amount of ₹1,21,48,000/- was not actually written off in the books of account in the year under consideration. Therefore, he disallowed the amount of ₹1,21,48,000/- out of the claim of bad debts written off. The assessee challenged the aforesaid disallowance before learned



Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record as well as the decision taken by the First Appellate Authority in assessee's own case in Assessment Years 2001-01 and 2001-02, learned Commissioner (Appeals) deleted the disallowance made by the Assessing Officer.

23. We have considered rival submissions and perused the materials on record. As could be seen from record, the assessee follows calendar year as the accounting period. In respect of bad debts pertaining to the months of January to March 2002, the decision to write off bad debts was taken after end of March 2002 and correspondent entries were passed in the books of account post March 2002. However, it is the claim of the assessee that bad debts written off pertained to previous year ending on 31<sup>st</sup> March 2002. This fact has not been disputed by the Assessing Officer. Only because the bad debts were not actually written off during the current year but were written off after March 2002, the Assessing Officer disallowed the same. Notably, while deciding identical issue in assessee's own case in Assessment Years 2000-01 and 2001-02 (supra), the Tribunal following the decision of the Hon'ble Calcutta High Court in the case of Turner Morrison And Co. Ltd. vs. CIT (2000) 245 ITR 724 (Cal) has allowed assessee's claim of bad debt. In this context, we may refer to the observations of the Tribunal in paragraphs 71 and 72 of ITA No.3266/Mum/2005 dated 04.05.20018. Facts being identical, respectfully following the decision of the Tribunal in assessee's own case as referred to



above, we uphold the decision of learned Commissioner (Appeals) on the issue. Ground raised is dismissed.

24. In ground No. 4, the Revenue has challenged the decision of learned Commissioner (Appeals) in directing the Assessing Officer to compute depreciation after reducing estimated Written Down Value (WDV) of block of assets transferred in Assessment Year 1995-96.

25. Briefly, the facts are, the assessee had sold its Family Product Undertaking (FPU) on a slump sale basis in Assessment Year 1995-96. In the course of assessment proceedings, on a query raised by the Assessing Officer, assessee submitted that since no consideration was assigned to specific value of assets, no reduction from WDV of block of assets was made while computing depreciation. The Assessing Officer, however, did not agree with the submissions of the assessee. He held that WDV of assets of FPU has to be reduced from the block of assets for computing depreciation. Accordingly, he proceeded to compute the depreciation after reducing the WDV of assets of the transferred unit. When the issue came up for consideration before learned Commissioner (Appeals), relying upon the decision of Tribunal in assessee's own case for Assessment Year 1995-96, he directed the Assessing Officer to compute depreciation after reducing WDV of assets of FPU transferred during the assessment year 1995-96.

26. We have considered rival submissions and perused the materials on record. As could be seen from the material on



record, in the Assessment Year 1995-96, assessee transferred its FPU on a slump sale basis. The Assessing Officer disallowed assessee's claim of depreciation on the assets relating to FPU. While deciding the issue in Assessment Year 1995-96, the Tribunal directed the Assessing Officer to reduce the WDV of FPU assets from the block of assets and allow depreciation on the balance written down value. The aforesaid decision was followed by the Tribunal in the subsequent assessment years upto Assessment Year 2001-02. On a perusal of the latest order of the Tribunal in ITA No.3266/Mum/2005 dated 04.05.2018 for Assessment Year 2001-02, it is noticed that the Tribunal after following its earlier decision has directed the Assessing Officer to allow depreciation after reducing the WDV of FPU assets from the block of assets. Facts being identical, respectfully following the decisions of the Tribunal in the preceding assessment years, we uphold the order of learned Commissioner (Appeals) on this issue. Ground raised dismissed.

27. In ground No. 5, the Revenue has challenged deletion of disallowance made on account of closing stock of diesel, oil and coal.

28. Briefly, the facts are, during the course of assessment proceedings, vide letter dated 2.12.2004 assessee claimed deduction for an amount of ₹57,32,853/- representing the value of stock of coal and diesel, oil, which was disallowed in Assessment Year 2001-02. The Assessing Officer observed, assessee's claim is not acceptable as the aforesaid items have been consumed in this year. Nevertheless, while allowing the



amount of ₹57,32,853/-, the Assessing Officer disallowed the closing stock of coal and diesel as on 31.3.2002 amounting to ₹58,25,237/-. Resultantly, he made a net disallowance of ₹92,384/-. The assessee challenged the aforesaid disallowance before learned Commissioner (Appeals). After considering the submissions of assessee, learned Commissioner (Appeals) following the decision of the Tribunal in assessee's own case deleted the disallowance made by the Assessing Officer.

29. We have considered rival submissions and perused the materials on record. As could be seen from the facts on record, since Assessment Year 1986-87 assessee changed its method of accounting for coal and diesel and started claiming expenditure on account of coal and diesel on purchase basis as against consumption basis due to difficulty in maintaining inventories of these items. The Assessing Officer, however, did not accept the change in accounting method and disallowed the value of stock claimed by the assessee. However, while deciding the issue in the preceding assessment years beginning from Assessment Year 1986-87 onwards, the Tribunal accepted the change in method of accounting of closing stock of diesel, oil and coal from consumption basis to purchase basis and allowed assessee's claim. In fact, learned Commissioner (Appeals), following the decision of Tribunal in Assessment Year 1995-96 has allowed assessee's claim with regard to consumable items. It is further relevant to observe, the Hon'ble Jurisdictional High Court has also upheld the decision of the Tribunal in the preceding assessment years while deciding Revenue's appeal.

In fact, in the latest order passed in Assessment Year 2001-02 (supra), the Tribunal has deleted similar disallowance made by the Assessing Officer. Therefore, respectfully following the consistent view of the Hon'ble Jurisdictional High Court as well as the coordinate bench, we uphold the decision of learned Commissioner (Appeals) on this issue by dismissing the ground raised.

30. In ground No.6, the Revenue has challenged the decision of learned Commissioner (Appeals) in allowing assessee's claim of deduction under section 80IB of the Act for New Iodex Plant (NIP), Bangalore.

31. Briefly, the facts are, during the year ended 31.03.2001, Smithkline Beecham Pharmaceuticals (India) Ltd. (SBPI) amalgamated with Glaxo (India) Ltd. to form the present company. The appointed date for amalgamation was 01.02.2001. The process for amalgamation was completed after approval of the Hon'ble High court only in October, 2001. As a part of amalgamation, the assessee acquired NIP located at Bangalore which was eligible for deduction under section 80IB of the Act. In the year under consideration, the assessee claimed an amount of ₹2,29,31,050/- towards deduction under section 80IB of the Act in respect of NIP. In course of assessment proceedings, it was submitted by the assessee that till October, 2001, the management operations of SBPI was at Bangalore and not that of assessee. Therefore, the head office general and administrative expenses for the period 01.04.2001 till October, 2001 cannot be allocated to the NIP. Rejecting the

aforesaid contention of the assessee, the Assessing Officer held that head office general and administrative expenses for the period 01.04.2001 to 31.03.2002 should be allocated to NIP Bangalore. Accordingly, he allowed deduction under section 80IB of the Act for an amount of ₹79,44,813/-. The assessee contested part disallowance of deduction claimed under section 80IB of the Act before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) accepted assessee's working of deduction under section 80IB of the Act at ₹2,21,62,000/- and directed the Assessing Officer not to allocate any further administrative cost to the NIP.

32. We have considered rival submissions and perused materials on record. Notably, while deciding an identical issue in assessee's own case for Assessment Year 2001-02, the Tribunal in ITA No. 3001/Mum/2005 dated 04.05.2018 has held that till the date of approval of amalgamation in October, 2001, the NIP at Bangalore was functioning independently without intervention of the assessee. Therefore, head office expenses of the assessee cannot be allocated to the Bangalore unit. The Tribunal has also observed that appropriate head office expenses of SBPI had already been allocated to the Bangalore Unit. Accordingly, the Tribunal upheld the order of learned Commissioner (Appeals) on this issue. Facts being identical, the aforesaid decision of co-ordinate bench squarely applies to the case. Therefore, we do not find any infirmity in the order of learned Commissioner (Appeals). Ground raised is dismissed.

33. In ground No.7, Revenue has challenged the decision of learned Commissioner (Appeals) holding that interest liability on account of Drug Price Equalization Account (DPEA) has to be allowed on year to year basis.

34. Briefly, the facts are, in the course of assessment proceedings, the assessee vide letter dated 02.12.2004 submitted that the Central Government vide letter dated 29.10.1996 has demanded an amount of ₹189.45 crores comprising of ₹71.79 crores pertaining to earlier years and interest thereon amounting to ₹117.66 crores for the period 12.05.1981 to 17.10.1996. It was submitted, the Central Government has made an application before the Hon'ble Delhi High Court for directing the assessee to deposit 50% of the aggregate amount of ₹189.45 crores and the Hon'ble High Court after hearing the parties did not pass any order for deposit of the amount claimed. Further, it was stated that the DPEA demand of ₹71.79 crores was on account of upward revision of bulk drug prices. Thus, it was claimed by the assessee, if ultimately it is held that the assessee is liable to pay interest, part of the interest which is attributable to the period 01.04.2001 to 31.03.2002 should be allowed while computing the income for the impugned assessment year.

35. The Assessing Officer observed, the application filed before the Hon'ble Delhi High Court is still pending and the recovery of demand is stayed. The assessee has also not debited any amount to the profit and loss account towards the interest paid or payable to the government. Thus, ultimately the Assessing



Officer disallowed assessee's claim. The assessee contested the aforesaid decision before learned Commissioner (Appeals). After considering the submissions of the assessee and following the decision of the Tribunal in assessee's own case in Assessment Years 1986-87 to 1995-96, learned Commissioner (Appeals) allowed deduction of interest on DPEA liability for the period 01.04.2001 to 31.03.2002.

36. We have considered rival contentions and perused the materials on record. Undisputedly, following the decision of the Tribunal in assessee's own case in Assessment Years 1986-87 to 1995-96, learned Commissioner (Appeals) has allowed assessee's claim with regard to interest on DPEA liability for the period 01.04.2001 to 31.03.2002. The aforesaid factual position remains uncontroverted. Even, in the latest order passed by the Tribunal for Assessment Year 2001-02 in ITA No. 3266/Mum/2005 dated 04.05.2018, it has been held that interest on DPEA liability is allowable. We have also noticed that the orders passed by the Tribunal on the disputed issue in preceding assessment years was also subject matter of appeal before the Hon'ble Jurisdictional High Court and the Hon'ble Jurisdictional High Court has upheld the decision of Tribunal. In this context, we may refer to the order dated 26.04.2016 of Hon'ble Jurisdictional High Court in ITA No. 2424/2013 pertaining to Assessment Year 2000-01. It is worth mentioning, the issue relating to DPEA has already attained finality as the Hon'ble Supreme Court vide order dated 30.03.2011 has confirmed the DPEA demand raised by the Central Government

while dismissing the petitions filed by the assessee. Thus, in effect, the DPEA demand has also crystallised. That being the case, the decision of learned Commissioner (Appeals) on the issue deserves to be upheld. Ground raised is dismissed.

37. In ground No. 8, Revenue has challenged the decision of learned Commissioner (Appeals) in directing the Assessing Officer to include closing balance of advance licence benefit amounting to ₹9,62,76,385/- in the profits of the business and to allow the benefit under section 80HHC of the Act.

38. Briefly, the facts are in the course of assessment proceedings, the Assessing Officer noticed that while the assessee has credited an amount of ₹9,36,66,000/- to the profit & loss account, being advance license benefit for exports made during the year, however, it has excluded a sum of ₹9,62,76,385/- being closing balance of advance licence as on 31.03.2002 on the plea that it has not accrued during the year. Relying upon the assessment order passed for Assessment Year 1997-98 and subsequent assessment orders, the Assessing Officer held that all export benefit arising to assessee out of exports made during the year have to be included in the profit and loss account. Accordingly, he added the differential amount of ₹1,43,57,307/- to the income of the assessee. Assessee challenged the aforesaid addition before learned Commissioner (Appeals). After considering the submissions of the assessee, learned Commissioner (Appeals) held that since actual import was not made by the assessee, only estimated benefit from import was accounted. Hence, same cannot be treated as



income. Further, learned Commissioner (Appeals) also allowed deduction under section 80HHC of the Act in respect of advance license benefit by treating it as profit of business.

39. We have considered rival submissions and perused the materials on record. As could be seen, while deciding identical issue in assessee's own case in Assessment Year 2001-02 in ITA No. 3266/Mum/2005 dated 04.05.2018, the Tribunal has restored the issue to the Assessing Officer for deciding afresh keeping in view the decision of Hon'ble Supreme Court in the case of CIT vs Excel Industries Ltd., (2013) 358 ITR 295 (SC). Insofar as the issue of deduction under section 80HHC of the Act relating to advance license benefit, it has also been restored back to the Assessing Officer for deciding afresh. It has been submitted before us by the learned AR that while giving effect to the order of the Tribunal in Assessment Years 1998-99 to 2000-01, the Assessing Officer has allowed assessee's claim. Be that as it may, since in the preceding assessment years the issue has been restored back to the Assessing Officer for afresh adjudication and there is no difference in the factual aspects, respectfully following the decision of Tribunal in Assessment Year 2001-02 as well as earlier assessment years, we restore the issue to the Assessing Officer for afresh adjudication keeping in view the directions of the Tribunal in the earlier assessment years. Suffice to say, assessee's claim of deduction under section 80HHC of the Act has to be allowed only on actual amount of advance licence benefit utilized and offered to tax. Accordingly, we restore the issue to the Assessing Officer for

deciding afresh after due opportunity of being heard to the assessee. This ground is allowed for statistical purpose.

40. In ground No. 9, Revenue has challenged the decision of learned Commissioner (Appeals) with regard to transfer pricing adjustment made by the Transfer Pricing Officer.

41. Briefly, the facts are, during the year under consideration assessee has provided certain global procurement services to its overseas Associated Enterprises (AEs). For this purpose, assessee deployed 8 employees out of 30 employees employed in the Procurement Department and stated to have recovered the full salary of employees amounting to ₹44,25,498/- from the AEs. The Transfer Pricing Officer after examining the issue observed that the assessee was sourcing materials even prior to January, 2002 and accordingly computed additional staff cost at ₹35 lacs. Further, the Transfer Pricing Officer added, on adhoc basis, 25% towards recovery of indirect cost such as corporate head office expenses. On the total cost, the Transfer Pricing Officer applied additional mark-up of 25% and proposed an adjustment of ₹69,67,405/-. The assessee contested the aforesaid adjustment before learned Commissioner (Appeals).

42. After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) held that assessee provided global procurement services with effect from 1<sup>st</sup> January, 2002 and not from May/ June, 2001, as held by the Transfer Pricing Officer. Further, he observed, the additional staff cost for the period 1<sup>st</sup> May, 2001

to 31<sup>st</sup> December, 2001 could not have been recovered by the assessee as no global procurement services was provided during that period. He observed, post 1<sup>st</sup> January, 2001, assessee's employees had dual responsibilities and accordingly, only 60% of the total time of 8 employees was spent on global procurement activity, whereas, the assessee has recovered full salary of such employees from AEs, thereby the assessee has earned a mark-up of 67% from the provision of global procurement services. Thus, he ultimately held that further estimation of mark-up at 15% is not necessary. Accordingly, he deleted the adjustment of ₹69,67,405/-.

43. We have considered rival submissions and perused the materials on record. As could be seen from the ground raised by the Revenue, only the decision of learned Commissioner (Appeals), vis-à-vis the mark-up of 15% has been challenged. whereas, the Revenue has not challenged either the allocation of manpower or earning of mark-up from provision of global procurement services at 66.67%, as has been worked out by the learned Commissioner (Appeals). Further, the factual finding of learned Commissioner (Appeals) with regard to mark-up of 66.15% on indirect cost has not been challenged. Further, from the material available on record it is noticed that the employees of the Procurement Department were exclusively engaged in managing procurement activities of the assessee till 31<sup>st</sup> December, 2001. Provision of global procurement services to AEs started only with effect from 1<sup>st</sup> January, 2002. The aforesaid factual position has not been controverted by the

Revenue through any supporting evidence brought on record. Further, the observation of learned Commissioner (Appeals) that the average time spent for global Sourcing support services by the eight employees was about 60% appears to be on the basis of evidences furnished by the assessee and has not been controverted through any cogent evidence brought on record by the department. It is also a fact on record that the mark-up of 15% applied by the Transfer Pricing Officer is purely on estimate and has no basis at all. On the contrary, the finding of learned Commissioner (Appeals) that the assessee has already earned mark-up of about 66% is on sound basis. In view of the aforesaid, we do not find any reason to interfere with the decision of learned Commissioner (Appeals) on this issue. Ground raised is dismissed.

44. In the result, appeal is partly allowed for statistical purposes.

**ITA No. 3608/Mum/2011 appeal by the Revenue**

45. This appeal arises out of a proceeding initiated under section 154 of the Act.

46. At the very outset, the learned Counsels appearing for the parties have fairly submitted that the tax effect on the amount disputed in the present appeal is below the monetary limit of ₹50 lacs as per CBDT Circular No. 17/2019 vide F.No. 279/Misc.142/2007-ITJ(Pt.) dated 8<sup>th</sup> August, 2019. It is also being submitted that the appeal is not protected by any of the exceptions provided under these circulars. Considering the

submission of the parties, we dismiss the present appeal of the Revenue as it is covered under the CBDT Circular No. 17/2019, hence, had to be withdrawn.

47. In the Result, the appeal is dismissed.

**48. To sum up, the appeals, in ITA No. 2548 & 2261/Mum/2011 by assessee & Revenue respectively are partly allowed for statistical purposes and in ITA No. 3608/Mum/2011 by Revenue is dismissed.**

Order pronounced in the open court on 21.02.2020.

Sd/-

(एन के प्रधान / NK PRADHAN)  
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(शक्तिजीत डे / SAKTIJIT DEY)  
(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 21.02.2020

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)  
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